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A Treatise

ON THE LAW OF

BANKS AND BANKING

By the Editorial Staff of The Michie Company

UNDER THE SUPERVISION OF

THOMAS JOHNSON MICHIE

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BANKS AND BANKING

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§ 140 (1h) Check as Transfer or Assignment of Funds in Bank.
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§ 140 (1hbd) Check Containing Words of Assignment or Transfer.
§ 140 (1hbe) Payee of Check Deposited for Collection.
§ 140 (1hbf) Check Payable in Exchange.
§ 140 (1hbg) Check against Deposit of Drafts Not Yet Paid.
§ 140 (1hbh) Deposit Levied on by Execution against Drawer.
§ 140 (1hbi) Deposit of Drawer Garnished.
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§ 140 (1ja) As to Assignment of Deposit.
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C. DEPOSITS.[1]

§ 119. Relation between Bank and Depositor Generally—§ 119 (1) General Rule.[2]—Ordinarily the relation between a bank and its depositor is that of debtor and creditor,[3] and not that of agent and prin-

1. Civil liability of officers for receiving deposits after insolvency, see ante, "Civil Liability on Insolvency," § 82.

Criminal responsibility of officers for procuring or receiving after insolvency, see ante, "Criminal Responsibility on Insolvency," § 83.

Deposits for collection, see post, "Collections," §§ 156-175.

Deposits in national banks, see post, "Deposits in General," § 263; "Certificates of Deposit," § 265; "Special Deposits," § 266; and "Deposits of Public Money," § 267.

Deposits in savings banks, see post, "Deposits," § 298; and "Repayment of Deposits," § 305.

Preferred claims on insolvency, see ante, "Presentation and Payment of Claims," § 80.

Representation of bank by officers and agents, see ante, "Deposits," § 106.

Rights of persons making deposits after insolvency, see ante, "Rights of Persons Making Deposits after Insolvency," § 75.

With trust companies, see post, "Deposits," § 315 (3).

Bank depositors' guaranty law, see ante, "Constitutional and Statutory Provisions," § 4.

Bankers' checks, see post, "Issue and Payment of Drafts," § 189.

Certificates of deposit, see post, "Certificates of Deposit," § 152.

Repayment on transfer of assets of one bank to another, see ante, "Reorganization," § 65.

Usage as to Deposit of Money.—See ante, "Character and Effect," § 89 (2).

2. Relation between bank and depositor of check or draft, see post, "Interest and Dividends on Deposits," § 303; "Control and Regulation in General," § 310.

3. Debtor and creditor relationship.—*United States.*—First Nat. Bank *v.* Lanier, 11 Wall. 369, 20 L. Ed. 172; Thompson *v.* Riggs, 5 Wall. 663, 678, 18 L. Ed. 704; Planters' Bank *v.* Union Bank, 16 Wall. 483, 21 L. Ed. 473; Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 66, 26 L. Ed. 693; Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 106, 29 L. Ed. 811, 6 S. Ct. 657; Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 40, 30 L. Ed. 573, 7 S. Ct. 460; Florence Min. Co. *v.* Brown, 124 U. S. 385, 31 L. Ed. 424, 8

S. Ct. 531; United States *v.* Wardwell, 172 U. S. 48, 54, 43 L. Ed. 360, 19 S. Ct. 86, 34 S. Ct. 535; Auten *v.* United States Nat. Bank, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628; New York County Nat. Bank *v.* Massey, 192 U. S. 138, 48 L. Ed. 380, 24 S. Ct. 199; Burton *v.* United States, 196 U. S. 283, 49 L. Ed. 482, 25 S. Ct. 243; Ballew *v.* United States, 160 U. S. 187, 40 L. Ed. 388, 16 S. Ct. 263; Union Stock Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 422, 34 L. Ed. 724, 11 S. Ct. 118.

That the relation of a bank and its depositor is that of debtor and creditor and nothing more, has been the settled doctrine of the supreme court, as it is believed to be of all others, since the case of the Marine Bank *v.* Fulton Bank, 2 Wall. 252, 17 L. Ed. 785. In that case, it was said that it would be a waste of time to prove that a general deposit created a debtor and creditor relation. This proposition has been reaffirmed in Thompson *v.* Riggs, 5 Wall. 663, 18 L. Ed. 704; Bank *v.* Millard, 10 Wall. 152, 19 L. Ed. 897; Oulton *v.* Savings Inst. (U. S.), 17 Wall. 109, 21 L. Ed. 618; Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483; and Newcomb *v.* Wood, 97 U. S. 581, 24 L. Ed. 1085; Phœnix Bank *v.* Risley, 111 U. S. 125, 28 L. Ed. 374, 4 S. Ct. 324.

In Re Madison Bank, Fed. Cas. No. 890, 5 Biss. 515; Balbach *v.* Frelinghuysen, 15 Fed. 675; St. Louis *v.* Johnson, Fed. Cas. No. 12,235, 5 Dill. 241.

Alabama.—Southern Hardware, etc., Co. *v.* Lester, 166 Ala. 86, 52 So. 328.

Arkansas.—Covey *v.* Cannon (Ark.), 149 S. W. 514.

Where money is deposited in a bank, the bank becomes the debtor of the depositor to the amount of his general deposit, and bound by implied contract to repay the same on his demand or order. Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902.

District of Columbia.—Thompson *v.* Riggs, 6 D. C. 99.

Florida.—Camp *v.* First Nat. Bank, 44 Fla. 497, 33 So. 244, 103 Am. St. Rep. 173; Miami *v.* Shutts, 59 Fla. 462, 51 So. 929.

General deposits in a commercial bank on account of the depositor, without being complicated by any other transaction than that of the depositing and withdrawing of the moneys, transfers the ownership of the money to the bank; and the relationship with reference thereto, as between the bank and the depositor, is simply that of debtor and creditor. Collins *v.* State, 33 Fla. 429, 15 So. 214.

Georgia.—McGregor *v.* Battle, 128 Ga. 577, 58 S. E. 28; Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96; Davenport *v.* State Banking Co., 126 Ga. 136, 54 S. E. 977.

Idaho.—Crab *v.* Citizens' State Bank (Idaho), 126 Pac. 520.

Illinois.—Lanterman *v.* Travous. 73 Ill. App. 670; Brahm *v.* Adkins, 77 Ill. 263; American Exch. Nat. Bank *v.* Loretta Gold, etc., Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233.

Indiana.—Hamilton *v.* Toner, 17 Ind. App. 389, 46 N. E. 921; McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911; Harrison *v.* Wright, 100 Ind. 515, 58 Am. Rep. 805; Union Sav. Bank, etc., Co. *v.* Indianapolis Lounge Co., 20 Ind. App. 325, 47 N. E. 846.

Iowa.—State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500.

Kentucky. — Williams *v.* Rogers (Ky.), 14 Bush 776.

Louisiana.—Matthews *v.* Creditors, 10 La. Ann. 344.

The depositor becomes the ordinary creditor of the bank, unless he makes a deposit in kind, as defined by Civ. Code, arts. 2940, 2943-2945, 2963, 3522. In re Louisiana Sav. Bank, etc., Co., 40 La. Ann. 514, 4 So. 301.

Massachusetts. — National Bank *v.* Eliot Bank, 5 Am. L. Reg. 711, 20 L. Rep. 138.

Michigan. — Perley *v.* Muskegon County, 32 Mich. 132, 20 Am. Rep. 637; Neely *v.* Rood, 54 Mich. 134, 19 N. W. 920, 52 Am. Rep. 802.

A depositor's contract with his banker is not materially different from any other contract by which one person becomes bound to take charge of and repay another's funds. Davis *v.* Lenawee County Sav. Bank, 53 Mich. 163, 18 N. W. 629.

Missouri.—Knecht *v.* United States Sav. Inst., 2 Mo. App. 563; Lieber *v.* Fourth Nat. Bank, 117 S. W. 672; Padgett *v.* Bank, 125 S. W. 219; In re Purl's Estate, 125 S. W. 849; Butcher *v.* Butler, 114 S. W. 564, 134 Mo. App. 61; Utley *v.* Hill, 155 Mo. 232, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569; Union Nat. Bank *v.* Hill, 155 Mo. 279, 55 S. W. 1133; Haas *v.* Garnett, 155 Mo. 568, 55 S. W. 1132; Boatmens' Bank *v.* Garnett, 155 Mo. 569, 55 S. W. 1132; McKeen *v.* Boatmens' Bank, 74 Mo. App. 281; Quattrochi Bros. *v.* Farmers', etc., Bank, 89 Mo. App. 500; Kenneth Inv. Co. *v.* National Bank, 96 Mo. App. 125, 70 S. W. 173; Arnold *v.* Sedalia Nat. Bank, 100 Mo. App. 474, 74 S. W. 1038.

A transaction between a bank and a depositor arising from a check on the

cipal,[4] bailor and bailee,[5] or trustee and cestui que trust,[6] unless the

deposit is a debit and credit account, the depositor being creditor, and the bank debtor. Lieber *v.* Fourth Nat. Bank (Mo.), 117 S. W. 672.

North Carolina.—Rayden *v.* Bank, 65 N. C. 13.

New Jersey.—Perth Amboy Gaslight Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704; Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120.

New York.—Parks *v.* Knickerbocker Trust Co., 137 App. Div. 719, 122 N. Y. S. 521.

Ohio.—Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 O. St. 60, 42 N. E. 700, affirming 8 O. Dec. 585, 27 W. L. Bull. 105, 11 O. Dec. Rep. 469; Bank *v.* Windischmuhlhauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660; Covert *v.* Rhodes, 48 O. St. 66, 27 N. E. 294; Treasurer *v.* Bank, 47 O. St. 503, 25 N. E. 697, 10 L. R. A. 196; Shaw *v.* Bauman, 34 O. St. 25; Collett *v.* Springfield Sav. Soc., 13 O. C. C. 131, 7 O. C. D. 146.

Pennsylvania. — In re Prudential Trust Co.'s Assignment, 223 Pa. 409, 72 Atl. 798; Bank *v.* Jones, 42 Pa. 536.

Rhode Island.—The ordinary relation of banker and depositor on a general deposit is that of debtor and creditor. State *v.* Grills (R. I.), 85 Atl. 281.

South Carolina.—Dabney, etc., Co. *v.* Bank, 3 S. C. 124.

Tennessee.—Banks are debtors to general depositors for the amount of their deposits. Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940; Klepper *v.* Cox, 97 Tenn. 534, 37 S. W. 284, 34 L. R. A. 536, 56 Am. St. Rep. 823; Pease, etc., Co. *v.* State Nat. Bank, 114 Tenn. 693, 88 S. W. 172; Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669.

Texas.—A general deposit with a banker creates, as between the bank and the depositor, simply the relation of debtor and creditor. Baker *v.* Kennedy, 53 Tex. 200, citing Duncan *v.* Magette, 25 Tex. 245; Van Winkle Gin, etc., Co. *v.* Citizens' Bank, 89 Tex. 147, 33 S. W. 862; First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334. See, also, Harris County *v.* Campbell, 68 Tex. 22, 3 S. W. 243; House *v.* Kountze, 17 Tex. Civ. App. 402, 43 S. W. 561; Engelke *v.* Schlender, 75 Tex. 559, 12 S. W. 999.

When one makes a general deposit in a bank, it is not contemplated that the identical money shall be returned, but the relation of debtor and creditor arises between the parties. Templeman *v.* Hutchings, 24 Tex. Civ. App. 1, 3, 57 S. W. 868, citing Van Winkle Gin, etc., Co. *v.* Citizens' Bank, 89 Tex. 147, 33 S. W. 862. See, also, Hoskins *v.* Velasco Nat. Bank, 48 Tex. Civ. App. 246, 107 S. W. 598.

Vermont.—State *v.* Clement Nat. Bank, 78 Atl. 944.

Virginia.—Robinson *v.* Gardiner, 59 Va. (18 Gratt.) 509; Pendleton *v.* Commonwealth, 110 Va. 229, 65 S. E. 536; Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804; Wood *v.* American Nat. Bank, 100 Va. 306, 40 S. E. 931.

A bank is the debtor of the depositor and must keep careful and faithful accounts with the depositor. Brown *v.* Lynchburg Nat. Bank, 109 Va. 530, 64 S. E. 950.

Wisconsin.—Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

4. McGregor *v.* Loomis, 1 Disn. 247, 12 O. Dec. 602.

5. Bailment.—A deposit of money in a bank does not create a bailment. Arnold *v.* Sedalia Nat. Bank, 100 Mo. App. 474, 74 S. W. 1038.

The relation between an ordinary depositor of cash and a bank of deposit being that of debtor and creditor, and not one of bailment, it can not be claimed, in a suit by the bank's receiver against the directors for losses caused by their alleged negligence, that the bank was a mere gratuitous bailee, and only bound to use the lowest degree of diligence in the care of the deposits. Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120.

A general deposit in a bank though called a deposit, is not a bailment. Pendleton *v.* Commonwealth, 110 Va. 229, 65 S. E. 536; Robinson *v.* Gardiner, 59 Va. (18 Gratt.) 509.

6. *United States.*—Leather Mfg'rs Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 32 L. Ed. 342, 9 S. Ct. 3; Bank *v.* Millard, 10 Wall. 152, 19 L. Ed. 897; New York County Nat. Bank *v.* Massey, 192 U. S. 138, 48 L. Ed. 380, 24 S. Ct. 199.

No trust is created by the deposit of funds of the state in a bank for the purpose of paying claims against the state, in favor of such claimants. The money remains under the state's con-

moneys deposited are public funds[7] or funds held by the depositor in a fiduciary capacity, knowingly accepted by the bank.[8] This is equally true of deposits in private banks,[9] deposits in savings banks,[10] and deposits arising from collections made for a correspondent bank.[11]

When Relation Arises.—Immediately upon making the deposit by a depositor the relation of debtor and creditor attaches,[12] whether it is an ordinary or time deposit,[13] or whether the deposit was made by the depositor himself or to his credit by an agent, where he ratified such act of the agent.[14]

Relation between Depositor and Directors of Bank.—There is noth-

trol. Manhattan Co. *v.* Blake, 148 U. S. 412, 37 L. Ed. 504, 13 S. Ct. 640.

Arkansas. — Himstedt *v.* German Bank, 46 Ark. 537.

Illinois.—American Exch. Nat. Bank *v.* Loretta Gold, etc., Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233; Brahm *v.* Adkins, 77 Ill. 263.

New Jersey.—Perth Amboy Gaslight Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704.

Missouri.—A banker is guilty of no breach of trust or impropriety in using funds coming into his custody from general depositors, his relation to them being in no sense that of trustee and cestui que trust. Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564.

New York.—When moneys are deposited from time to time in the course of a banking business, subject to checks at sight, the relation is not that of trustee and cestui que trust, but of debtor and creditor. Buchanan Farm Oil Co. *v.* Woodman (N. Y.), 1 Hun 639, 4 Thomp. & C. 193.

Ohio.—McGregor *v.* Loomis, 1 Disn. 247, 12 O. Dec. 602; Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 O. St. 60, 42 N. E. 700, affirming 8 O. Dec. 585, 27 W. L. Bull. 105, 11 O. Dec. 469; Bank *v.* Windischmuhlhauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660; Covert *v.* Rhodes, 48 O. St. 66, 27 N. E. 94; Treasurer *v.* Bank, 47 O. St. 503, 25 N. E. 697, 10 L. R. A. 196; Shaw *v.* Bauman, 34 O. St. 25; Collett *v.* Springfield Sav. Soc., 13 O. C. C. 131, 7 O. C. D. 146.

Pennsylvania.—Bank *v.* Jones, 42 Pa. 536.

South Carolina.—Dabney, etc., Co. *v.* Bank, 3 S. C. 124.

Virginia.—Robinson *v.* Gardiner, 59 Va. (18 Gratt.) 509.

Wisconsin.—There is no trust relation between the creditors of a banking corporation and such corporation or its officers. Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

7. See post, "Public Funds," § 130.

8. See post, "Notice of Trust Character of Fund," § 130 (1c).

9. In re Purl's Estate (Mo.), 125 S. W. 849.

Death of banker.—The depositors in a private bank, the sole owner of whose assets died, were general creditors of the bank, and had no special lien on the funds thereof. In re Purl's Estate (Mo.), 125 S. W. 849.

10. Savings bank.—Oulton *v.* Savings Inst. (U. S.), 17 Wall. 109, 21 L. Ed. 618; Society *v.* Coite (U. S.), 6 Wall. 594, 18 L. Ed. 897; Provident Inst. *v.* Massachusetts (U. S.), 6 Wall. 611, 18 L. Ed. 907.

11. Collections for correspondent bank.—Phœnix Bank *v.* Risley, 111 U. S. 125, 28 L. Ed. 374, 4 S. Ct. 322.

12. When relation arises.—Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96; Davenport *v.* State Banking Co., 126 Ga. 136, 54 S. E. 977; Baker *v.* Orme, 6 O. C. C., N. S., 289, 17-27 O. C. D. 465, affirmed in 74 O. St. 337.

13. Time or ordinary deposits.—The relation of debtor and creditor established by a deposit between the bank and the depositor is the same, whether it is an ordinary or time deposit. Williams *v.* Rogers (Ky.), 14 Bush 776.

14. Where the president of a bank, employed as the agent of a third person to collect notes due him, collected notes and deposited the proceeds in the bank to the third person's credit, and notified the third person thereof, and the third person replied that he would let it remain in the bank until it could be lent out, the relation of debtor and creditor existed between the bank and the third person. Dixon *v.* Jackson Exch. Bank (Mo.), 129 S. W. 481.

ing of either contract or trust, in all ordinary cases, to create any relation between a depositor, the creditor, and the directors of a bank.[15]

§ 119 (2) Definitions, Classification and Characteristics—§ 119 (2a) Depositor.—A "depositor" is one who delivers to or leaves with a bank money subject to his order, either upon time deposit or subject to check.[16]

§ 119 (2b) Deposits Defined and Classification.—Deposits made with bankers may be divided into two general classes: Those in which the banker becomes the bailee of the depositor, the title to the thing deposited remaining with the latter; and those where money is the thing deposited in accordance with a custom peculiar to the banking business, where the depositor, for his own convenience, parts with the title to the money and loans it to the banker, and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand.[17] A general deposit is where a sum of money is left with a banker for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum, whether it bears interest or not.[18] In other words, a general deposit in

15. Relation to directors.—Utley *v.* Hill, 155 Mo. 232, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569; Union Nat. Bank *v.* Hill, 155 Mo. 279, 55 S. W. 1133; Haas *v.* Garnett, 155 Mo. 568, 55 S. W. 1132; Boatmen's Bank *v.* Garnett, 155 Mo. 569, 55 S. W. 1132.

16. "Depositor."—State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500.

17. What constitutes and classification.—Marine Bank *v.* Fulton Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785; Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483; Phœnix Bank *v.* Risley, 111 U. S. 125, 28 L. Ed. 374, 4 S. Ct. 322. See post, "Special Deposits," § 153.

Florida.—Deposits in a bank are of two classes, special when the identical or other thing deposited is to be restored or is given for some specified purpose or is received by the bank as a collecting agent, such collection to be remitted, the property in the deposit in such case remaining in the depositor, the bank being the bailee or agent; and general special deposits which comprise all moneys simply deposited in the bank on account of the depositor to be withdrawn from time to time by him, such a deposit transferring the ownership of the money to the bank, and creating the relation of debtor and creditor between the bank and depositor. Miami *v.* Shutts, 59 Fla. 462, 51 So. 929.

Georgia.—Nashville Produce Co. *v.* Sewell, 121 Ga. 278, 48 S. E. 945.

Indiana.—Shopert *v.* Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515.

18. State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500.

A deposit is defined as money lodged in a bank for safe-keeping. A deposit, strictly speaking, signifies only bonds or bills, or bullion deposited with a bank at interest, and not capable of being withdrawn except after certain specified notice, and refers to a deposit account as money deposited with a banker at interest for some certain specified time. It is opposed to a current account, which can be added to or drawn upon at any time without notice to the banker. Ramsay *v.* Whitbeck, 81 Ill. App. 210, reversed in 183 Ill. 550, 56 N. E. 322.

An ordinary bank deposit is where a voluntary credit is taken with a bank; and for which no bank note, bill, or similar evidence of debt is given; and for which there exists a right to draw unconditionally. In every such case a special trust and confidence is reposed in the bank. Catlin *v.* Savings Bank, 7 Conn. 487.

Deposit distinguished from other contracts.—Where a party confides a sum of money to another, who is to return to him, upon demand, a like sum, and not the identical money, the transaction is a simple deposit. If any

a bank is so much money to the depositor's credit; it is a debt to him from the bank, payable on demand to his order,[19] not property capable of identifi-

other terms or conditions enter into the contract, it does not assume the character of a deposit. If the sum can not be withdrawn, at the pleasure of the creditor, but is to remain for a certain period in the hands of the debtor, it becomes a gratuitous loan. If it is to be repaid with interest, it becomes a loan upon interest. State *v.* Buttles, 10 West. L. J. 309, 1 O. Dec. 520.

Certificate of deposit of tickets.—A certificate by the agent of an unincorporated banking company, that "M. had deposited with him $430, in tickets on deposit, subject to him only on the return of the certificate," imports on its face no liability of the company. Lake *v.* Munford (Miss.), 4 Smedes & M. 312.

Interest bearing loan.—Money deposited in a bank on an open account, subject to check, and not received as a special deposit, the bank agreeing to pay interest on the money, though called a "deposit," is a loan. State *v.* Bartley, 39 Neb. 353, 58 N. W. 172, 23 L. R. A. 67, following State *v.* Keim, 8 Neb. 63.

Deposit of straight time certificate.—A., an employee of a national bank, wrote to a savings bank, stating that he had $5,000 he would like to deposit for six months at 6 per cent, and asked if they could use it. Through its cashier, the savings bank replied that it would use it on a straight-time certificate for one year at six per cent. Thereupon A. sent a draft for $5,000 payable to the savings bank, with a request for the certificate, and received an ordinary time certificate of deposit payable to himself, which he indorsed to the national bank. Held, that the transaction was a deposit. State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500.

Loan of stock to president of bank—Ordinary creditor.—Plaintiff loaned certain stock to the president of a bank to be used to raise money for the bank, after which the bank failed. The money raised had been credited on the deposit pledged in the name of the president. Held, that plaintiff's relation to the bank was that of an ordinary creditor, and not a depositor. In re Appeal of Parkesburg Bank (Pa.), 6 Wkly. Notes Cas. 394.

Creditor by reason of bank's commission of bills.—On the 13th of January, 1824, A., a citizen of New York, offered, at the counter of the Eagle Bank, in New Haven, a certain amount of the bills of that bank, and demanded payment thereof in specie. The officers of the bank offered to redeem these bills by giving a draft for the amount on a bank in the city of New York, which was refused. The bills were then left with the officers of the Eagle Bank, to be counted and paid. Two days afterwards the president of the Eagle Bank forwarded a draft to an agent in New York, with directions to tender the amount of the bills, in specie, to A. the next morning. This was accordingly done, and the money was refused, on the ground that two days' interest was then due. Within a day or two afterwards, A. again demanded payment of the bills at the Eagle Bank, which was refused, on the ground of an alleged payment in New York; and then he demanded the bills themselves, which were also refused, and were purposely mingled with the redeemed circulation of the bank. In March, 1824, A. sued the Eagle Bank in an action for money had and received, and ultimately (in 1827) recovered judgment for the amount of the bills and interest. On the 31st of August, 1825, the affairs of the Eagle Bank being desperate, the funds provided in New York for the payment of the bills were withdrawn, and an entry thereof was made on the books of the bank. On the 19th of September, 1825, the bank failed. On the 21st, the president assigned a quantity of iron to trustees, first, to secure, to a certain amount, an indorser of the post notes of the bank; and then, after paying the savings bank the amount of its deposits, "to pay all other persons, who had ordinary or special deposits with the Eagle Bank, the full amount of such deposits, respectively." On a bill in chancery, brought by A. to obtain the benefit of the assignment as a creditor of the Eagle Bank, by reason of an ordinary or special deposit of money with such bank, it was held that the plaintiff did not sustain that character, and was therefore not entitled to the relief sought. Catlin *v.* Savings Bank, 7 Conn. 487.

19. Florence Min. Co. *v.* Brown, 124 U. S. 385, 31 L. Ed. 424, 8 S. Ct. 531; Manhattan Co. *v.* Blake, 148 U. S. 412, 37 L. Ed. 504, 13 S. Ct. 640; Burton *v.*

cation and specific appropriation.[20]

Money Deposited in Course of Business.—Money placed in a bank on deposit in the usual course of business is a general deposit.[21]

A deposit is presumed to be general, unless it otherwise appear.[22]

§ 119 (2c) Nature and Characteristics—§ 119 (2ca) A Loan.—A general deposit of money in a bank is nothing but a loan of money by the depositor to the bank,[23] payable on demand,[24] except under special cir-

United States, 196 U. S. 283, 49 L. Ed. 482, 25 S. Ct. 243.

The act incorporating the Bank of Kentucky provides that the bank shall receive money on deposit without being required to give a sealed obligation to repay it. This enactment creates a liability to the depositor by the act of depositing—an assumpsit in law implied from an act in pais. Bank *v.* Wister (U. S.), 2 Pet. 318, 324, 7 L. Ed. 437.

A bank on receiving a deposit becomes debtor for its repayment, or any part thereof, to the depositor on demand. Himstedt *v.* German Bank, 46 Ark. 537.

Georgia.—"If parties contract for the sale of cotton, the seller receiving a check on a bank for the full purchase price, and delivers up the check and has the amount placed in a pass book by the officers of the bank, and takes possession of the pass book as his, the contract of sale is complete, and the relation of debtor and creditor exists between the seller and the bank—the seller becoming a depositor and the bank his debtor for the amount charged in the pass book." Rawls *v.* Saulsbury, etc., Co., 66 Ga. 394.

Missouri.—A general deposit is where the bank is given custody of the money deposited with the intention expressed or implied that the bank is not required to return the identical money, but only its equivalent. Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564.

Texas.—"In the third volume of Encyclopedia of United States Supreme Court Reports, at page 9, this language is found: 'A general deposit in a bank is so much money to the depositor's credit; it is a debt to him from the bank, payable on demand to his order, not property capable of identification and specific appropriation'—citing Florence Min. Co. *v.* Brown, 124 U. S. 385, 31 L. Ed. 424, 8 S. Ct. 531; Manhattan Co. *v.* Blake, 148 U. S. 412, 37 L. Ed. 504, 13 S. Ct. 640." Fleming *v.* State, 62 Tex. Cr. App. 653, 139 S. W. 598.

20. Florence Min. Co. *v.* Brown, 124 U. S. 385, 31 L. Ed. 424, 8 S. Ct. 531; Manhattan Co. *v.* Blake, 148 U. S. 412, 37 L. Ed. 504, 13 S. Ct. 640; Burton *v.* United States, 196 U. S. 283, 49 L. Ed. 482, 25 S. Ct. 243.

21. Money deposited in course of business.—Ruffin *v.* Orange County, 69 N. C. 498; Lily *v.* Cumberland, 69 N. C. 300.

22. Bank *v.* Windischmuhlhauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660.

"Deposits are general or special, and are legally general deposits, unless otherwise agreed between the parties." Fleming *v.* State, 62 Tex. Cr. App. 653, 139 S. W. 598.

23. A loan.—*United States.*—First Nat. Bank *v.* Lanier (U. S.), 11 Wall. 369, 20 L. Ed. 172; Davis *v.* Elmira Sav. Bank, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502; Marine Bank *v.* Fulton Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785; Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483; New York County Nat. Bank *v.* Massey, 192 U. S. 138, 48 L. Ed. 380, 24 S. Ct. 199.

Georgia.—Ricks *v.* Broyles, 78 Ga. 610, 3 S. E. 772; Georgia Seed Co. *v.* Talmadge & Co., 96 Ga. 254, 22 S. E. 1001; Davenport *v.* State Banking Co., 126 Ga. 136, 54 S. E. 977.

Iowa.—State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500.

Kentucky.—All deposits are loans. Williams *v.* Rogers (Ky.), 14 Bush 776.

Louisiana.—Where moneys are deposited to be mixed with and used indifferently by the bank with the other cash assets, subject to withdrawal, but not in the identical funds, the bank

24. Debt payable on demand.—It is unquestionably true that under the authorities a deposit of money on general deposit in a bank is a loan to the bank by the depositor, and is not distinguishable by any clear mark from an ordinary loan of money by one man to another, payable on demand. Spain *v.* Beach & Son, 52 Ga. 494. See post, "Repayment in General," § 133.

cumstances, or where there is a statute to the contrary.[25] In Arkansas[26] and Iowa,[27] an ordinary deposit of money in a bank is not a loan of the money to the bank.

§ 119 (2cd) Property of Bank—§ 119 (2cba) In General.—A bank, whether it is a corporation, a firm, or simply that of a private banker,[28] in the absence of a special agreement imparting a different character to the transaction,[29] becomes the absolute owner of money deposited with it to the general credit of the depositor, as soon as it is received. The legal title to the money passes to the bank,[30] which has a right to mix it with

takes title to the moneys as loanee, and the relation is that of debtor and creditor. Schmidt *v.* Barker, 17 La. Ann. 261, 87 Am. Dec. 527.

New York.—"A general deposit in a bank, in its exact legal result, is a loan of money (Chapman *v.* White, 6 N. Y. 412, 57 Am. Dec. 464)." Curtis *v.* Leavitt, 15 N. Y. App. 9, 52, 1 Smith 667.

North Carolina.—Boyden *v.* Bank, 65 N. C. 13.

Texas.—"A deposit of money in a bank is nothing more nor less than a loan to the bank." Fleming *v.* State, 62 Tex. Cr. App. 653, 139 S. W. 598, 605.

Virginia. — Pendleton *v.* Commonwealth, 110 Va. 229, 65 S. E. 536; Robinson *v.* Gardiner, 59 Va. (18 Gratt.) 509.

25. New York County Nat. Bank *v.* Massey, 192 U. S. 138, 48 L. Ed. 380, 24 S. Ct. 199.

26. A general deposit of funds in a bank is not a loan to the bank, as when a loan is made the money is borrowed for a fixed time on a promise to pay at that date, but a general deposit is payable upon demand, and the money deposited is under the control of the depositor at all times subject to his check. Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896.

27. Elliott *v.* Capital City State Bank, 103 N. W. 777, 128 Iowa 275, 1 L. R. A., N. S., 1130, 111 Am. St. Rep. 198, overruling Mereness *v.* First Nat. Bank, 112 Iowa 11, 83 N. W. 711, 51 L. R. A. 440, 84 Am. St. Rep. 318; Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365; Hunt *v.* Hopley, 120 Iowa 695, 95 N. W. 205, overruling Lowry *v.* Polk, 51 Iowa 50, 47 N. W. 1049, 33 Am. Rep. 114, and Long *v.* Emsley, 57 Iowa 11, 10 N. W. 280.

28. Ex parte Rickey, 31 Nev. 82, 100 P. 134.

29. Camp *v.* First Nat. Bank, 33 So. 241, 44 Fla. 497, 103 Am. St. Rep. 173; Miami *v.* Shutts, 59 Fla. 462, 51 So. 929; McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911; State *v.* Clement Nat. Bank (Vt.), 78 Atl. 944.

30. **Property passes to bank.**—*United States.*—Marine Bank *v.* Fulton Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785; Thompson *v.* Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704; Bank *v.* Wister (U. S.), 2 Pet. 318, 7 L. Ed. 437; Society *v.* Coite (U. S.), 6 Wall. 594, 18 L. Ed. 897; Provident Inst. *v.* Massachusetts (U. S.), 6 Wall. 611, 18 L. Ed. 907; Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897; Planters' Bank *v.* Union Bank (U. S.), 16 Wall. 483, 21 L. Ed. 473; Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483; Manhattan Co. *v.* Blake, 148 U. S. 412, 37 L. Ed. 504, 13 S. Ct. 640; Bulbach *v.* Frekingheyse, 15 Fed. 675.

Arkansas. — Himstedt *v.* German Bank, 46 Ark. 537.

Florida.—Camp *v.* First Nat. Bank, 44 Fla. 497, 103 Am. St. Rep. 173, 33 So. 241; Miami *v.* Shutts, 59 Fla. 462, 51 So. 929.

Georgia.—The moment the deposit is made, the credit of the banker is substituted for the money. McGregor *v.* Battle, 128 Ga. 577, 58 S. E. 28; Davenport *v.* State Banking Co., 126 Ga. 136, 54 S. E. 977.

Indiana.—Shopert *v.* Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515; McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911.

Michigan.—Perley *v.* Muskegon, 32 Mich. 132, 20 Am. Rep. 637; Neely *v.* Rood, 54 Mich. 134, 19 N. W. 920, 52 Am. Rep. 802.

Missouri.—Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564.

Ohio.—Title to funds in bank on general deposit vests in the bank, and such funds become part of its assets. Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 O. St. 60, 42 N. E. 700; Bank *v.* Windischmuhlauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am.

its other funds,[31] and invest and use it as it pleases,[32] for its own benefit in its usual financial operations.[33] The depositor has no longer any claim on that money; his claim is on the bank for a like amount of money.[34]

§ 119 (2cbb) Not Capital Stock or Investment.—A deposit is not capital stock in any point of view, or even an investment under the tax exemption laws.[35]

§ 119 (2cbc) Chose in Action and Property Right of Depositor.—A general deposit of money in a bank transforms the funds from ready money into a chose in action.[36]

Property Right of Depositors.—Where money is deposited in a bank, the bank's promise and the availability of the funds deposited are property rights which ought not to be any more liable to another's debts than the money would have been if the depositor had retained it.[37]

§ 119 (3) What Law Governs.—The relation between a bank and a depositor is determined by the lex loci contractus.[38]

St. Rep. 660; Shaw *v.* Bauman, 34 O. St. 25; Ellis *v.* Linck, 3 O. St. 66.

Pennsylvania.—Bank *v.* Jones, 42 Pa. 536.

South Carolina.—Dabney, etc., Co. *v.* Bank, 3 S. C. 124.

Tennessee.—"Money deposited in the ordinary course of business is at once blended with the general fund of, and becomes the property of, the bank." Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273.

Vermont.—State *v.* Clement Nat. Bank, 78 Atl. 944.

Virginia.—Robinson *v.* Gardiner, 59 Va. (18 Gratt.) 509.

31. Where money is placed in a bank in the usual way, the relation of debtor and creditor is established; and the bank has a right to mix the money with its other funds, and use it in its own business. Covey *v.* Cannon (Ark.), 149 S. W. 514.

32. Leather Mfg'rs Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 34, 32 L. Ed. 342, 9 S. Ct. 3; New York County Nat. Bank *v.* Massey, 192 U. S. 138, 48 L. Ed. 380, 24 S. Ct. 199.

The right of a banker to use, in his business, money left with him on general deposit, is a part of the contract between the depositor and the banker. Matthews *v.* Creditors, 10 La. Ann. 344.

Missouri.—Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564.

Tennessee.—Money deposited becomes the property of the banks to be used subject to those rules of law or custom which limits the amount used so that a sufficient fund may always be on hand to meet the check of the depositors. Cannon *v.* Apperson, 82 Tenn. (14 Lea) 553.

33. *North Carolina.*—Boyden *v.* Bank, 65 N. C. 13.

34. McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911.

35. Not capital stock or investment.—Society *v.* Coite (U. S.), 6 Wall. 549, 609, 18 L. Ed. 897; Provident Inst. *v.* Massachusetts (U. S.), 6 Wall. 611, 18 L. Ed. 907.

36. Chose in action.—Ricks *v.* Broyles, 78 Ga. 610, 3 S. E. 772; Georgia Seed Co. *v.* Talmadge & Co., 96 Ga. 254, 22 S. E. 1001; Davenport *v.* State Banking Co., 126 Ga. 136, 54 S. E. 977

A balance in bank to the credit of a depositor is, strictly speaking, a chose in action. It is often treated, however, as ready money, and whether it is to be treated as one or the other depends upon the circumstances of the particular case. Koss *v.* Kastleberg, 98 Va. 278, 36 S. E. 377.

37. Property rights of depositor.—Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

38. What law governs.—Where plaintiff, a citizen and resident of New York, deposited her money, subject to check, in the private bank of defendant's firm in that state, defendant being then a resident of New York, and interest was agreed to be paid on the deposits in New York, the nature and character of the transaction should be determined by the laws of New York. Schinotti *v.* Whitney, 130 Fed. 780.

§ 119 (4) Right to Examine Bank's Books.—A bank is bound to exhibit its books to a depositor, on proper occasions, and the officers having charge of them are, quoad hoc, the agents of both parties.[39]

§ 119 (5) Rules of Clearing House Association.—The rights of a depositor in a bank which is a member of a clearing house association are not affected by the rules of the association.[40]

§ 119 (6) Particular Deposits—§ 119 (6a) Deposit of Bank Bills.—A deposit of bank bills with a banking company, unless special, creates a debt, not a bailment.[41]

§ 119 (6b) Deposits for Transmission.—Upon the deposit in a city bank of funds for transmission to the credit of a country bank, for the use of the depositor, the city bank becomes a trustee of the depositor; and, where the country bank, by reason of its failure before the deposit was made, becomes unable to receive the deposit, the city bank is liable to the depositor, in an action for money had and received, for the amount of the deposit.[42] The fact that the city bank deposited the money with another city bank, which was the correspondent of the country bank, does not exempt the former bank from such liability, where the depositor was unacquainted with the custom of the banks in making such deposit, and did not consent thereto.[43] Nor will the city bank with which the money was finally deposited be liable in the suit of the original depositor, when the money was left with it with instructions to credit it to the home bank generally, without any intimation that it was to be credited to that bank as the money of the original depositor.[44]

39. Right to examine bank books.—Union Bank *v.* Knapp (Mass.), 3 Pick. 96, 15 Am. Dec. 181.

40. Rules of clearing house association.—Citizens' Cent. Nat. Bank *v.* New Amsterdam Nat. Bank (Sup.), 109 N. Y. S. 872.

41. Deposit of bank bills.—Wray *v.* Tuskegee Ins. Co., 34 Ala. 58.

Where a deposit is made of the notes of another bank, which are received as cash, and carried to the general credit of the depositor as cash, the bank can not afterwards treat it as a special deposit. Corbit *v.* Bank (Del.), 2 Har. 235, 30 Am. Dec. 635.

42. Deposit to be forwarded for depositor's use.—Union Stock Yards Nat. Bank *v.* Dumond, 150 Ill. 501, 37 N. E. 864; Dumond *v.* Merchant's Nat. Bank, 150 Ill. 515, 37 N. E. 864, following Drovers' Nat. Bank *v.* O'Hare, 119 Ill. 646, 10 S. E. 360; Cutler *v.* American Exch. Nat. Bank, 113 N. Y. 593, 21 N. E. 710, 4 L. R. A. 328.

43. Union Stock Yards Nat. Bank *v.* Dumond, 150 Ill. 501, 37 N. E. 863; Dumond *v.* Merchants' Nat. Bank, 150 Ill. 515, 37 N. E. 864, following Drovers' Nat. Bank *v.* O'Hare, 119 Ill. 646, 10 N. E. 360.

44. Union Stock Yards Nat. Bank *v.* Dumond, 150 Ill. 501, 37 N. E. 863; Dumond *v.* Merchants' Nat. Bank, 150 Ill. 515, 37 N. E. 864; Drovers' Nat. Bank *v.* O'Hare, 119 Ill. 646, 10 N. E. 360.

A city bank, upon receiving a deposit for transmission to a country bank for the use of the depositor, transferred the same to the city correspondent of the country bank for account of the latter, but without stating that the same was to be credited to that bank for the use of the depositor. On the day of the deposit the country bank failed, and notified its city correspondent thereof. Held, that there was no privity of contract between the depositor and the city bank to which the deposit was transferred, which would allow a recovery by the former against the latter. Drovers' Nat. Bank *v.* O'Hare, 119 Ill. 646, 10 N. E. 360;

Remittance to Other Bank to Pay Specified Debt of Depositor.—The relation between a banker and his customer, as respects a specific sum of money remitted by the banker at the request of the customer to another bank to pay a specified debt of the customer, is that of principal and agent.[45]

§ 119 (6c) Deposits by One to Credit of Another.—A deposit of money by one person to the credit of another creates the relation of depositor and depositee between the bank and such other person where the deposit is made with the consent of the latter,[46] or where he ratifies the transaction;[47] but the mere leaving of the money with the bank does not make the depositor a customer.[48] If a country bank, having an account with a city bank, permits a customer to deposit money in the city bank to its credit, but solely for the customer's accommodation, the country bank having no power to withdraw the deposit except at the customer's request, the country bank is not liable to the customer if he loses his deposit by the failure of the city bank.[49]

§ 119 (6d) Deposit by Debtor for Creditor.—A sum of money placed in a bank by a debtor for his creditor becomes a deposit if the latter elect so to treat it.[50]

§ 119 (6e) Deposit by Agent to Credit of Principal.—Where an agent tenders money to a bank to be deposited to the credit of his principal and the bank accepts the same, the relation of bank and depositor

Union Stock Yards Nat. Bank *v.* Dumond, 150 Ill. 501, 37 N. E. 863; Dumond *v.* Merchants' Nat. Bank, 150 Ill. 515, 37 N. E. 864.

45. St. Louis *v.* Johnson, Fed. Cas. No. 12,235, 5 Dill. 241.

46. Hill *v.* Arnold & Co., 116 Ga. 45, 42 S. E. 475; Dustin *v.* Hodgen, 38 Ill. 352.

47. First Nat. Bank *v.* Pickens, 7 Indian T. 725, 104 S. W. 947.

48. Where money is left at a bank for the purpose of paying the bill of one not a regular customer, the bank is not bound to apply the money to the payment, unless it assented to receive the deposit. The mere leaving the money with the paying teller of the bank does not make the depositor a customer of the bank. Thatcher *v.* Bank, 7 N. Y. Super. Ct. 121.

49. Dustin *v.* Hodgen, 38 Ill. 352.

50. Deposit of money by debtor to account of creditor.—A deposit by a debtor in a bank to the account of his creditor of a sum of money due the latter will not constitute payment to the creditor, unless he consents to the deposit. When such a deposit is made without the creditor's consent, the bank is merely the agent of the debtor to pay the money to the creditor. Hill *v.* Arnold & Co., 116 Ga. 45, 42 S. E. 475.

D., who was indebted to A., applied to a bank for credit for the amount, promising to deposit to balance the credit in a few days. The credit was given by the bank, and D. took a deposit slip in the name of A. for the amount, and also a pass book in A.'s name, and delivered the same to A. in payment of the debt. Held, that the transaction amounted to a loan by the bank to D., and a deposit of the amount by A., and that D.'s failure to fulfill the promise on which the credit was extended could not affect the legal rights of A. Andrews *v.* State Bank, 9 N. Dak. 325, 83 N. W. 235.

Note.—Where a note held by a bank as collateral was paid to the bank after the loan secured thereby had been repaid, the money so received became a deposit for the use and benefit of the owner, if he should elect to so treat it. First Nat. Bank *v.* Pickens, 7 Indian T. 725, 104 S. W. 947.

Deposit for transmission to another bank to pay specified debt.—See ante, "Deposits for Transmission," § 119 (6b).

arises as between the bank and the principal.[51]

§ 119 (6f) Deposit Payable to Third Person on Contingency.—The fact that a deposit in a bank is not made for the sole benefit of the depositor, but may in a certain contingency become payable to a third person, for whose security the deposit is made, does not deprive it of the character of a deposit.[52]

§ 119 (6g) Savings Deposits.—See post, "Deposits," §§ 298, 301. All the moneys received by a savings bank, whether for safe-keeping or for investment, are deposits within the meaning of their by-laws, and within the very words of their charter.[53] Where the corporation is by the charter but a trustee for the stockholders in its management, the fact that it bears the name of a savings bank will not, in the absence of proof that its depositors were thereby deceived, render its deposits in trust, so that the property therein will remain their own.[54]

Effect of By-Laws.—A by-law which does not declare that investments of savings deposits are made for the benefit of the depositors, does not render the same trust property.[55]

Withdrawal without Reference to Investment.—A by-law authorizing a savings deposit to be withdrawn after giving a certain notice, without regard to the condition of the investment at the time, indicates that the depositor has no trust in the investment; otherwise he would have to await the maturity of the note on which the money was loaned.[56]

51. Where, at the time money was handed by plaintiff's correspondent to the cashier of a bank, the latter was informed that the deposit was made for plaintiff's benefit, and was requested to telegraph plaintiff accordingly, which was done, the relation between plaintiff and the bank became that of depositor and banker; the bank becoming plaintiff's debtor for the amount of the deposit, its liability to be discharged only by payment. Heath *v.* New Bedford, etc., Trust Co., 184 Mass. 481, 69 N. E. 215.

52. Bushnell *v.* Chautauqua County Nat. Bank, 74 N. Y. 290.

53. Bank *v.* Collector, 3 Wall. 495, 513, 18 L. Ed. 207.

54. Ward *v.* Johnson, 95 Ill. 215.

55. **Effect of by-laws.**—A by-law: "All savings deposited in this bank, over and above such sums as it may be expedient to reserve for immediate use, * * * shall be invested in the stocks and obligations of the United States or the state of Illinois," etc.—not declaring the investments to be made for the benefit of the depositors—does not render the same trust property. The bank could sell, assign, pledge, or mortgage them, in good faith, to secure other loans or deposits. Ward *v.* Johnson, 95 Ill. 215.

A by-law providing that "all savings deposited in this bank * * * shall be invested in the stocks and obligations of the United States or the state of Illinois," etc., even if considered as an express contract, merely pledges the corporation to invest the savings deposited in certain specified securities. Unaided by something aliunde, it does not fix the character of the funds deposited as trust funds, or create the relation of trustee and cestui. Johnson *v.* Ward, 2 Ill. App. 261.

56. **Withdrawal without reference to investment.**—Ward *v.* Johnson, 95 Ill. 215.

A by-law provided that a specified rate of interest should be paid on savings deposits, and the bank became obligated for its payment, without regard to whether the same was realized from the investment of the money by the bank. The depositor might withdraw his deposit without reference to the condition of the investment at the time. Held that, had the securities been lost without the fault of the bank, it would still have been liable to the depositors for the amount of their de-

Promise to Use Securities for Benefit of Depositor.—A pledge for trust is not created by a promise of the officers of a bank to its savings depositors to keep and use the securities taken on by the loans by way of investment for their benefit.[57]

§ 119 (6h) Money Held in Trust by Bank.—The fact that a bank holds money in trust for the owner thereof does not create the relation of bank and depositor between them.[58]

§ 119 (6i) Deposit as Indemnity.—A sum placed with a bank as an indemnity against advances to the indemnator is not a deposit, and does not create the relationship of banker and depositor between them.[59]

§ 120. Power and Duty to Receive Deposits.—Making, receipt and entry of deposits, see post, "Making, Receipt and Entry," § 121.

§ 120 (1) Authority.—Receiving and handling deposits is a part of legitimate banking business.[60]

Corporations.—In the absence of statutory authority, corporations can not engage in the business of receiving and handling deposits, any more than they can engage in any other business not authorized by their char-

posits, and might have been compelled to pay them. Johnson *v.* Ward, 2 Ill. App. 261.

A circular was issued under the heading "Depositors' Co-operative Association," signed by one as "Manager," inviting deposits, on which interest would be paid semiannually. Plaintiff made a deposit with the manager, taking a certificate reciting that the money should remain one year, and bear interest at six per cent, but might be sooner drawn on notice, and, in case drawn before six months, no interest would be paid. Held, that the relations created by the deposit were those of debtor and creditor, and that no trust was created, but the money became at once the property of the association or manager. Leaphart *v.* Commercial Bank, 45 S. C. 563, 23 S. E. 939, 33 L. R. A. 700, 55 Am. St. Rep. 800.

57. Promise to use securities for benefit of depositor.—Ward *v.* Johnson, 95 Ill. 215.

58. Plaintiffs, being owners of a majority of the stock of a bank, agreed to sell the same to the defendants, who owned the balance, at a price equal to its just value, if the bank was closed and its affairs settled on that day, leaving defendants to carry on the business at their discretion. The bank's assets were thereupon ascertained and agreed on. Subsequently defendant collected sums previously due the bank, not included in the statement of assets, which were placed to plaintiff's credit, but no certificates of deposit were ever issued to plaintiff, nor any notice given them of their collection. Held, that the bank held these sums as trustee for plaintiff, and that the relation of bank and depositor did not exist, and hence the bank was liable for interest thereon from the date the money was received. Parsons *v.* Treadwell, 50 N. H. 356.

59. Indemnity against advances.—Where a dealer in corn made an arrangement with a bank to cash the checks of his agent given for the purchase of corn, the bank to be repaid the amount so advanced from time to time on drafts on the dealer, and at the time of making such arrangement he deposited a small sum in the nature of indemnity against its advancements, such deposit did not create the relationship of banker and depositor between them. Armour *v.* Greene County State Bank, 50 C. C. A. 339, 112 Fed. 631.

60. State *v.* Bank, 64 Tenn. (5 Baxt.) 1; State *v.* Sneed, 68 Tenn. (9 Baxt.) 472. See, also, Forest, etc., Bldg. Ass'n *v.* Gallagher, 25 O. St. 208.

Receiving deposit subject to check is a part of the business of a banking institution. Cannon *v.* Apperson, 82 Tenn. (14 Lea) 553.

ters, either expressly or by implication.[61] Such is the law under the banking acts of Missouri[62] and Ohio.[63]

Security.—The banking laws of a state may require a banking corporation to deposit securities with the auditor as a condition precedent to receiving deposits.[64]

Specific Deposit.—The acceptance of a specific deposit by a bank officer, and an agreement to pay the same on the happening of a contingency,

61. Crow *v.* Lincoln Trust Co., 144 Mo. 562, 46 S. W. 593; Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371; Exchange Bank *v.* Hines, 3 O. St. 1; Corwin *v.* Urbana, etc., Ins. Co., 14 O. 7.

62. *Missouri.*—It seems clear that no corporation other than a bank organized according to the laws of Missouri has the power to receive moneys on general deposit and pay them out on demand, on check, or otherwise. Crow *v.* Lincoln Trust Co., 144 Mo. 562, 46 S. W. 593.

63. *Ohio.*—Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371; Exchange Bank *v.* Hines, 3 O. St. 1; Corwin *v.* Urbana, etc., Ins. Co., 14 O. 7. See, also, Pickaway County Bank *v.* Prather, 12 O. St. 497.

No express authority is essential, however, as in the absence of statutory restriction, the power to receive deposits would result by implication from the usual powers conferred upon corporations to contract, and to acquire, hold and dispose of property. Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371; Corwin *v.* Urbana, etc., Ins. Co., 14 O. 7.

Charter restrictions against engaging in the "business of banking" will not prevent the corporation from receiving deposits. Corwin *v.* Urbana, etc., Ins. Co., 14 O. 7.

The express authority thus required, however, seems unnecessary except in order to legalize the receipt of deposits for the purpose of engaging in or in connection with a banking business thereon. See Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371; Pickaway County Bank *v.* Prather, 12 O. St. 497. Compare Medill *v.* Collier, 16 O. St. 599. And see ante, "In General," II, A, 2, a.

Under the act to incorporate the State Bank of Ohio and other banking companies, passed February 24, 1845, banks organized thereunder were expressly authorized to "receive deposits." Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371.

"It would seem, from a review of this act, in connection with the general banking law," under which authorized incorporated banks are expressly given the power to receive deposits, "that it was the policy and purpose of the framers of these acts, in their effort to restrain unauthorized banking, to require that a corporation, before it could be permitted to engage in the business of banking upon deposits, should have the authority of a law of this state as clear and express as would be required to authorize a corporation to do a like business upon notes of its own creation and issue." Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371.

Where a corporation, without other authority than that granted by "an act in relation to incorporated religious societies," passed March 5, 1836, engages in the business of banking, for the purpose of receiving on deposit, keeping and circulating the money of others, such business comes within the prohibition of the first section of "an act to prohibit unauthorized banking," etc., passed March 12, 1845. Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371.

Under the Free Banking Act, passed March 21, 1851, banks incorporated thereunder were expressly authorized to receive deposits. Medill *v.* Collier, 16 O. St. 599; Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371.

Building and loan associations.—The power granted to building and loan associations to receive deposits from and make loans to their members is not within art. 13, § 7, of the constitution of Ohio. Bates *v.* People's Sav., etc., Ass'n, 42 O. St. 655; Dearborn *v.* Northwestern Sav. Bank, 42 O. St. 617, 51 Am. Rep. 851; Forest, etc., Bldg. Ass'n *v.* Gallagher, 25 O. St. 208.

64. **Security.**—By virtue of the forty-fourth section of the Free Banking Act, however, a bank organized thereunder could not receive deposits until it had deposited with the auditor the securities mentioned in the seventh section. Medill *v.* Collier, 16 O. St. 599.

are within the powers of a bank, and it is immaterial that the money is not credited on the books of the bank.[65]

Insolvency of Bank.—See post, "Insolvency of Bank of Deposit," § 127 (5).

§ 120 (2) Duty to Receive Deposits.—A bank is not bound to receive, on deposit, the funds of every man who offers them. It has a right to select its dealers, and the cashier is the proper officer to make the selection.[66]

§ 121. Making, Receipt and Entry.—Entry of deposits other than money, see post, "Entry to Credit of Depositor," § 126. Character of deposit as question for jury, see post, "Actions by Depositors or Others for Deposits," § 154. Variance as to character of deposit in action by depositors, see post, "Actions by Depositors or Others for Deposits," § 154. Deposits for collection, see post, "Making, Receipt and Entry of Deposit for Collection," § 158. Pass book and account, see post, "Depositors' Pass Books and Accounts," § 151. Power and duty to receive deposits, see ante, "Power and Duty to Receive Deposits," § 120.

§ 121 (1) In General.—All that is necessary to constitute a legal deposit of money in a bank is for the persons wishing to make the deposit to hand what he wishes to deposit to the party in the bank ostensibly clothed with authority to receive the same, at the place in the bank where deposits are usually received, and to request that the same be placed to his credit; and that the thing deposited should be received upon these terms. When so received the bank is responsible for its return.[67]

§ 121 (2) Mutuality, Proposal and Acceptance, and Persons Who May Be Depositors—§ 121 (2a) Necessity.—The relation of banker and depositor can not be created without a meeting of minds, one to propose and the other to accept. The assent of both parties is essential to an ordinary deposit.[68] There must be privity of contract between the bank and the depositor;[69] hence, the relation of banker and depositor can not be created without the consent of the owner of the funds deposited.[70]

65. Specific deposit.—American Nat. Bank *v.* Presnall, 58 Kan. 69, 48 Pac. 556.

The discounting of commercial paper, and the receipt of the proceeds on deposit to disburse to a certain person when a certain service is performed, are within the powers of a bank, and such power may be exercised by the cashier or managing officer. Kansas Nat. Bank *v.* Quinton, 57 Kan. 750, 48 Pac. 20.

66. Duty to Receive Deposits.—Thatcher *v.* Bank, 7 N. Y. Super. Ct. 121.

67. Jackson Ins. Co. *v.* Cross, 56 Tenn. (9 Heisk.) 283.

68. Mutuality.—Catlin *v.* Savings Bank, 7 Conn. 487; Miller *v.* Western Nat. Bank, 172 Pa. 197, 33 Atl. 684.

69. Drovers' Nat. Bank *v.* O'Hare, 119 Ill. 646, 10 N. E. 360; Union Stock Yards Nat. Bank *v.* Dumond, 150 Ill. 501, 37 N. E. 863; Dumond *v.* Merchants' Nat. Bank, 150 Ill. 515, 37 N. E. 864. See ante, "Deposits for Transmission," § 119 (6b).

70. Winslow *v.* Harriman Iron Co. (Tenn.), 42 S. W. 698.

Title to money does not pass from the legal owner thereof to the bank, and the relation of creditor and debtor does not arise between them as to money deposited without his knowledge or consent.[71] No one can create this relation between the owner of money and the bank without authority from the owner. In such case the person who holds the depositor's money, and who deposits it without authority is guilty of a conversion of the fund, and the bank receiving it is likewise guilty of conversion, at all events, if it is so related to the payee making the deposit as to effect it with notice. The legal relation then existing between the bank and the person whose money is put into it without authority is not that of a technical depositor, but merely the relation that exists between persons when one gets possession of the property of the other without authority of law, or wrongfully asserts dominion over it, falling distinctly within the definition of the conversion.[72] And the rule is the same, even though the bank had no notice or knowledge at the time the deposit was made that it was the money of another.[73]

§ 121 (2b) Acts Constituting an Acceptance.—Where at the time money was handed by plaintiff's correspondent to the cashier of a bank, the latter was informed that the deposit was made for plaintiff's benefit, and was requested to telegraph plaintiff accordingly, which was done, the relation between plaintiff and the bank became that of depositor and banker; the bank becoming plaintiff's debtor for the amount of deposit, its liability to be discharged only by payment.[74]

§ 121 (2c) Denial of Receipt of Money.—Where a bank retains money offered for deposit and refuses to acknowledge the receipt of it, the relation is not created.[75]

§ 121 (2d) Estoppel of Depositor or Waiver of Deposit.—Where there was first a valid contract of deposit between plaintiff and defendant bank acting through its cashier who without plaintiff's knowledge or con-

71. Patek *v.* Patek, 166 Mich. 446, 131 N. W. 1101; Burtnett *v.* First Nat. Bank, 38 Mich. 630; Cady *v.* South Omaha Nat. Bank, 46 Neb. 756, 65 N. W. 906.

72. Winslow *v.* Harriman Iron Co. (Tenn.), 42 S. W. 698; Roach & Co. *v.* Turk, 56 Tenn. (9 Heisk.) 708. See also, Jackson Ins. Co. *v.* Cross, 56 Tenn. (9 Heisk.) 283; Branner *v.* Branner, 69 Tenn. (1 Lea) 101; Merchants' Nat. Bank *v.* Trenholm & Son, 59 Tenn. (12 Heisk.) 520; Brady *v.* Wasson, 53 Tenn. (6 Heisk.) 131.

Title to money in complainant's hands did not pass from him, where his wife deposited it, without his knowledge or consent, in a bank in which neither was a depositor. Patek *v.* Patek, 166 Mich. 446, 131 N. W. 1101.

73. Patek *v.* Patek, 166 Mich. 446, 131 N. W. 1101; Burtnett *v.* First Nat. Bank, 38 Mich. 630; Union Stock Yards Nat. Bank *v.* Campbell, 2 Neb. 72, 96 N. W. 608; Van Alen *v.* American Nat. Bank, 52 N. Y. 1.

74. **Acts constituting an acceptance.**—Health *v.* New Bedford, etc., Trust Co., 184 Mass. 481, 69 N. E. 215.

75. **Refusal to acknowledge receipt.**—Where one mails to a bank money and checks for deposit, but the bank refuses to acknowledge receipt thereof, and persistently denies such receipt, the relation of depositor and depositee is not created. Miller *v.* Western Nat. Bank, 172 Pa. 197, 33 Atl. 684.

sent substituted his personal check for what she believed was a certificate of deposit, plaintiff's retention of the check without knowledge of its real character for several months did not constitute a waiver of the deposit.[76] Nor does her failure to examine the instrument estop her to assert that the contract was one of deposit and not a loan to the cashier.[77]

§ 121 (2e) Persons Who May Be Depositors.—Bank.—One bank may be a depositor in another bank.[78]

§ 121 (3) Authority of Officer to Receive Deposit—§ 121 (3a) In General.—When the bank is bound to receive a deposit, it must, to render the bank liable for its application, be made with its proper officer.[79] The president of a bank,[80] the cashier,[81] and receiving teller,[82] are proper persons for receiving a deposit. Such transaction is outside the ordinary scope of employment of the paying teller[83] and bank clerks,[84] who, in receiving deposits, act as agents of the depositors and do not bind the bank unless the money comes into its actual custody, except when they act in place of the receiving teller, etc., in his absence.[85]

76. Waiver of deposit.—Castello *v.* Citizens' State Bank, 140 Wis. 275, 122 N. W. 769.

77. Where money was deposited in a bank for plaintiff, a married woman of no business experience, she believing it to be a time deposit contract, while the cashier, instead of issuing a certificate of deposit, issued his personal check therefor, plaintiff's failure to examine the instrument from August 28, 1906, until January 19, 1907, and ascertain its character, did not estop her to claim that the contract was one of deposit, and not a loan to the cashier. Castello *v.* Citizens' State Bank, 140 Wis. 275, 122 N. W. 769.

78. Bank.—State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500.

79. Authority of officer to receive.—Thatcher *v.* Bank, 7 N. Y. Super. Ct. 121.

80. The president of a bank has general authority to receive a deposit. Hazleton *v.* Union Bank, 32 Wis. 34. See contra, Bickley *v.* Commercial Bank, 39 S. C. 281, 17 S. E. 977, 39 Am. St. Rep. 721. Jumper *v.* Commercial Bank, 39 S. C. 296, 17 S. E. 980; S. C., 48 S. C. 430, 26 S. E. 725.

81. Cashier.—The cashier of the State Bank is authorized to receive deposits, and his receipt for money received of an individual is evidence of a deposit by such individual in that bank. State Bank *v.* Kain (Ill.), Beecher's Breese 75.

82. Receiving teller.—Thatcher *v.* Bank, 7 N. Y. Super. Ct. 121.

83. Paying teller.—The receiving teller of a bank is the proper person for receiving a deposit; and therefore where a deposit is made with the paying teller, who assumes payment of the depositor's bill, the teller becomes the depositor's agent, as such transaction is outside the ordinary scope of his employment. Thatcher *v.* Bank, 7 N. Y. Super. Ct. 121.

Money to pay overdraft.—Plaintiff, to the knowledge of defendant, a customer, employed in its bank a paying and a receiving teller, the general duty of the latter being to receive moneys paid or deposited. In his absence other officers or clerks acted in his place. Defendant, having overdrawn his account by mistake, received a letter from the paying teller requesting him to call. He went to the bank, and, at the request of the paying teller, paid him over the counter the amount required to rectify the error. This was not entered on the books of the bank. It did not appear that the receiving teller was in the bank. In an action to recover the amount overdrawn, held, that the bank was bound by the payment. East River Nat. Bank *v.* Gove, 57 N. Y. 597.

84. Clerk.—See post, "Where Money Comes into Custody of Bank," § 121 (3cb).

85. East River Nat. Bank *v.* Gove, 57 N. Y. 597.

§ 121 (3b) Where Officer Represents Bank—§ 121 (3ba) In General.—Where the officers of a bank have been in the practice of receiving money and other things to be deposited in its vault for safe-keeping, the corporation, and not the officers, will be considered as the depositary.[86] The depositor by subsequently treating such officer as his debtor waives his right to hold the bank,[87] but he is not estopped by failure to ask the bank for a statement of his account.[88]

§ 121 (3bb) Certificates Issued before Organization of Bank.—A bank is not liable, even to an innocent holder for value, on a certificate of deposit issued before its organization or incorporation, and signed, as cashier, by the person who afterwards became such, there being nothing to show that the bank ever received any consideration therefor.[88a]

§ 121 (3c) Money Intrusted to Employee Not Authorized to Receive It—§ 121 (3ca) In General.—Where a customer of a bank intrusts money to be deposited to an agent or employee of the bank, who was not authorized to receive it, such person is the agent of the customer, and such customer is answerable for any deficit in the deposit, resulting from the fraud of such agent, in the same manner as if he himself were guilty of the fraud.[89]

86. Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

87. Plaintiff handed money over for deposit to one who was the manager of a bank, and who also did an individual banking business, supposing he was dealing with the bank, but the manager used the deposits himself, and thereafter failed, and then plaintiff discovered that he had been deceived. Held that, by subsequently treating the manager as his debtor, and negotiating with him for payment, he waived his right to elect to hold the bank. Rich *v.* Niagara County Sav. Bank (N. Y.), 5 Thomp. & C. 589, 3 Hun 481.

88. Plaintiff employed the president of a bank to collect notes due him. The president made collections, and deposited the proceeds in the bank to the credit of plaintiff. Subsequently plaintiff visited the bank during the time the president was using the money for his own purposes, but he did not ask the bank for a statement of account. Plaintiff had no pass book, and had never received at any time a stated account in which he had acquiesced. Held not to estop him from suing the bank for the amount deposited to his credit. Dixon *v.* Jackson Exch. Bank (Mo.), 129 S. W. 481.

88a. Long *v.* Citizens' Bank, 8 Utah 104, 29 Pac. 878.

89. **Intrusting money to agent not authorized to receive it.**—A customer intrusted funds to the bank's bookkeeper to be carried to the bank and deposited. The bookkeeper entered the amounts on the ledger to the customer's credit, but did not pay the money to the receiving teller, nor was the amount entered in the teller's cash book. When the customer's bank book was balanced the amount of the supposed deposit was entered therein, and checks against it were paid. Subsequently the bookkeeper absconded, and the bank claimed that he had never deposited the money, but had embezzled it and made a false entry in the ledger; and it thereupon brought suit for money paid on overdrafts. The customer claimed that the bank had been negligent in discovering the fraud, and this question was left to the jury. Held, that the question whether due diligence was used by the bank to detect the fraud is a question of law, and, as it did not appear that other than the usual and customary mode to detect the frauds or mistakes of its clerks was pursued, it must be held to have been sufficiently diligent. Manhattan Co. *v.* Lydig (N. Y.), 4 Johns. 377, 4 Am. Dec. 280.

§ 121 (3cb) Where Money Comes into Custody of Bank.—If money received by a clerk as a special deposit comes to the banker's hands, it is the same as if he received it.[90]

§ 121 (3d) Fraud or Dishonesty of Bank Official—§ 121 (3da) In General.—A bank is responsible for the safe-keeping of the money of a depositor, and can not set up the fraud of its own officers as an answer to a demand for repayment; public policy forbids such defense.[91] The bank will be held liable when such officer converts the deposit to his own use, or embezzles it.[92]

§ 121 (3db) Certificate of Deposit with Third Person or Bank.—Where a bank issues a certificate of deposit acknowledging a deposit made with a third person or an officer of the bank,[93] or with another

90. Dougherty *v.* Vanderpool, 35 Miss. 165.

91. Steckel *v.* First Nat. Bank, 93 Penn. 376, 39 Am. Rep. 758.

92. Long *v.* Citizens' Bank, 8 Utah 104, 79 Pac. 878.

Plaintiff drew a draft in favor of defendant bank, and delivered it to the bank's teller for collection, and directed the teller to deposit the proceeds to plaintiff's own credit or to the account of the teller as trustee. The teller deposited the proceeds to his own personal account, and immediately checked out the entire amount, and converted it to his own use. Plaintiff sued the bank for the proceeds. Held that, when the bank received the draft through the teller for collection, the teller acted for the bank. Ihl *v.* Bank, 26 Mo. App. 129.

Treasurer of a saving institution also cashier of a bank.—The treasurer of a savings institute was also the cashier of a bank, both corporations doing business in the same office and over the same counter, the only separation being in the books of account. Under the arrangement, the institute was to receive no money. All its funds were to be deposited in the bank, and credits therefor given to the institute, the latter having no cash drawer. Under this arrangement, money was received for deposit with the institute, the treasurer giving his receipt therefor. A check was also deposited payable to said treasurer, who indorsed it as said treasurer and also as cashier, neither of which was credited to the institute, but was embezzled by him. Held that, under such arrangement, the deposits immediately became the property of the bank, for which the institute was entitled to credit, and that, therefore, it was embezzled from the bank. Fishkill Sav. Inst. *v.* Bostwick, 92 N. Y. 564.

93. Certificate in name of bank officer.—A national bank which, with the knowledge of its officers, was in the habit of receiving money on deposit and of issuing certificates therefor, sometimes in its own name and sometimes to the credit of V., its president, held to be liable to a depositor who took a certificate purporting to be issued by V. personally, and who honestly believed it to be the obligation of the bank, and would not have accepted it had he known it to have been merely the certificate of V. West *v.* First Nat. Bank (N. Y.), 20 Hun 408.

F., who had been in the habit of dealing with a banking firm consisting of three members, including M., the managing partner, entered its ordinary place of business, handed over the counter to M. $50, and received therefor, upon a printed blank in the name of the bank, a certificate of deposit signed by M., with no words affixed to his name. No intimation was given of any other than, as F. intended, a transaction with the firm. Held, that the certificate was binding upon the firm, although M. took the money as a loan to himself, and did not pass it to the credit of the firm on the books, and although the blank form was not the one generally used by the bank after the formation of the partnership. Lemon *v.* Fox, 21 Kan. 152.

In an action against an incorporated bank to recover money deposited therein it appeared that plaintiff paid the money to I., defendant's president, who had previously been manager of a private bank, and received from him a certificate of deposit signed by "I., Manager," which certified that plaintiff had "deposited with I., manager," the

bank,[94] representing it to be the certificate of the bank, upon which assurance the depositor accepts it, the bank is liable for the amount of the deposit. Where the depositor could not have been misled by the representation of the bank officers and did not honestly believe the certificate to be the obligation of the bank, he has no claim upon the bank.[95]

§ 121 (3e) Ultra Vires Collateral Agreements.—Where a bank cashier acts within the scope of his duties in receiving a deposit, the bank is liable for the money, although he enters into an ultra vires agreement to lend it for the depositor's use.[96]

sum claimed by plaintiff. The certificate in no way referred to any bank. Held that, where the defense is that the money was deposited to the credit of "I., Manager," and not to the credit of plaintiff, it is error to charge that if it was handed to I. to be deposited in defendant bank, and was so deposited, the bank is liable, though it was not one of the president's duties to receive deposits, without qualifying the charge to the effect that it would be liable only in case the money went into its custody and control as the money of plaintiff. Bickley *v.* Commercial Bank, 39 S. C. 281, 17 S. E. 977, 39 Am. St. Rep. 721; Jumper *v.* Commercial Bank, 39 S. C. 296, 17 S. E. 980; S. C., 48 S. C. 430, 26 S. E. 725.

The president of an incorporated bank had, prior to incorporation, conducted a banking business, signing his name, "C. J. Iredell, Manager." After incorporation of the "Commercial Bank," of which he became president, he issued the certificate of deposit sued on in this action, signing his name as above. Held, that there is nothing on the face of such certificate to show that the Commercial Bank is responsible. Bickley *v.* Commercial Bank, 39 S. C. 281, 17 S. E. 977, 39 Am. St. Rep. 721; Jumper *v.* Commercial Bank, 39 S. C. 296, 17 S. E. 980; S. C., 48 S. C. 430, 26 S. E. 725.

Plaintiff handed a sum of money over the counter of a bank to its teller, stating that he desired to leave it on deposit with the bank. The teller gave him a certificate, which was in form an acknowledgment that he had deposited the money with a third person, and contained a personal obligation on the part of the latter to repay the amount. The latter was the president of the bank, and the certificate was signed by him, but not in his official capacity, nor was the bank in any way named therein. Plaintiff did not read the certificate when he received it. In an action against the bank to recover the amount of the deposit, held, that plaintiff was not precluded by the certificate; that the doctrine of constructive notice of its contents, from the fact of possession thereof, did not apply; and that it was a question of fact whether the deposit was with the defendant or its president individually. Coleman *v.* First Nat. Bank, 53 N. Y. 388.

94. Plaintiff, a depositor in a national bank, requested a certificate of deposit, drawing interest, for a portion of his deposit. The teller gave him a certificate purporting to be issued by B. & Co., a private banking firm, and informed him, in presence of the cashier of the bank, that this was the bank's certificate, upon which assurance the plaintiff accepted it. The members of the firm were the managing officers of the bank, but had a separate place of business in the same town. Held, that the bank was liable to the plaintiff for the amount of his deposit. Steckel *v.* First Nat. Bank, 93 Pa. 376, 39 Am. Rep. 758.

95. A., a business man, accustomed to financial transactions, inquired of a bank president whether the bank paid interest on deposits. The president replied that it did not, but that he would give him a certificate that would. He thereupon gave A., for his money, an interest-bearing certificate of deposit with a banking firm of which the president was a member. A. noticed that the certificate was not that of the bank, and the president replied that it was all the same thing; that the firm owned the bank, and that A. could get his money at the bank at any time. The firm, in fact, owned 1,500 of 2,500 shares of the bank stock. The firm became insolvent. Held, that A. had no claim upon the bank. First Nat. Bank *v.* Williams, 100 Pa. 123, 45 Am. Rep. 365.

96. Plaintiff deposited a sum of money with defendant bank, taking

§ 121 (3f) Personal Loan to Officer of Bank.—Where a contract is a loan to an officer of the bank personally, the loanor can not, upon the insolvency of the loanee, disaffirm his contract and recover the amount from the bank.[97]

§ 121 (4) Receipt of Money and Entry—§ 121 (4a) Necessity for Actual Receipt and Promise to Pay.—In order to create the relation of bank and depositor, the money must be received by the bank to use of the depositor.[98]

Promise to Pay.—In an absence of a promise on part of the bank to pay the depositors, or facts from which such promise can be inferred, a bank can not be held liable, in the absence of negligence, for money which it did not receive, as, for instance, money stolen from the mails.[99]

§ 121 (4b) Mode of Receipt and Entry—§ 121 (4ba) In General.—A deposit goes into the hands of the receiving teller, thence into the hands of a journal clerk, thence to the individual bookkeeper, or such other officials as perform the functions of these officers. When it reaches the hands of the bookkeeper, who makes the final entry, which stands as

from the cashier a certificate of deposit, on the bottom of which was a memorandum signed by the cashier that the money was to be paid to a creditor of plaintiff, or, if he would not receive it, it was to be loaned for plaintiff's use. The money was mingled with the general funds of the bank, but was not placed on the books to the credit of any one. The cashier defaulted for a much larger sum than plaintiff's deposit, and the bank resisted payment on the ground that the transaction was with the cashier as an individual, and that his undertaking was ultra vires. Held, that the cashier acted within the scope of his duties in receiving the deposit, and, whether the agreement to lend it for plaintiff's use was ultra vires or not, the bank was liable for the money. First Nat. Bank *v.* Brooks, 22 Ill. App. 238.

97. **Personal loan to officer of bank.**—M., the managing officer of a savings bank, carried on a banking business in his own name in the same room with the bank, receiving deposits, etc. Plaintiff deposited moneys with M., receiving certificates of deposit in the name of M. therefor. M. failed, and went into bankruptcy. Plaintiff proved his demand on the certificates against M.'s estate, and received a dividend thereupon. Held, that plaintiff could not disaffirm his contract with M., and recover the amount of deposit of the bank. Shields *v.* Niagara Sav. Bank (N. Y.), 3 Hun 477, 5 Thomp. & C. 585.

Loan of stock to bank president for use of bank.—See ante, "Deposits Defined and Classification," § 119 (2b).

98. Simpson *v.* Pemigewassett Nat. Bank, 68 N. H. 289, 38 Atl. 1005; Gettysburg Nat. Bank *v.* Kuhns, 62 Pa. 88, and see Jackson Ins. Co. *v.* Cross, 56 Tenn. (9 Heisk.) 283.

A bank can not be held liable, for the amount of a check transmitted to it by order of the plaintiff, merely on evidence that the check was drawn in favor of the cashier, and the money received by him. The plaintiff must show that the money was received to his use, and it is not incumbent upon the defendants to prove that they gave value for the check. Gettysburg Nat. Bank *v.* Kuhns, 62 Pa. 88.

99. **Money stolen from the mail.**—Depositors sent currency to the bank by registered mail. It arrived at the postoffice one day, but the bank had no notice of its arrival until 5 p. m. the next day, when it refused to receive the letter, because the bank did not receive money at that hour. That night the registered package was stolen from the postoffice. Held, that since it could not be inferred that the bank promised to pay the depositors for the money, in the absence of negligence on the bank's part, the depositors could not recover from it. Simpson *v.* Pemigewassett Nat. Bank, 68 N. H. 289, 38 Atl. 1005.

the true statement between the bank and depositor, it has gone through the hands of a dozen parties, perhaps; and the last party only records what comes to him through so many hands, and knows nothing, it may be, of the actual transaction.[1]

Deposits by agents should be made in the name of the principal or in the name of the agent for the principal.[2]

§ 121 (4bb) Rules of Bank.—Though an incorporated bank be authorized to make by-laws, rules, and regulations, etc., such by-laws and rules can not affect the rights or interests of third persons. A by-law or rule, therefore, of a bank, that all payments made and received must be examined at the time, does not prevent a party dealing with the bank from showing afterwards that there was a mistake in his account of deposits and receipts.[2a]

Regulations as to Deposit of Confederate Currency.—Special regulations introduced by a bank in one of the seceded states with reference to deposits in Confederate currency can not affect the rights of one who was previously a customer, in respect to subsequent deposits, unless he had notice of the change.[3]

Nonobservance by the officer of a bank of its rules and customs with regard to receiving deposits will not absolve it from liability.[4]

§ 121 (4bc) Place of Delivery to Bank Official.—A person delivering money for deposit to a bank officer in a place other than the bank building, where money is usually received, does not necessarily assume the risk of the money reaching the bank to his credit, since the bank may acquiesce in or ratify such action of the officer.[5]

§ 121 (4bd) Accepting Credit with Correspondent.—Neither a bank nor its receiver can deny the receipt of money deposited with the bank as a trust fund on the ground that no money was actually deposited, where it received and accepted credit for the amount with a correspondent, and received the money thereon in due course of business.[6]

1. **Method of receipt and entry.**—Continental Nat. Bank *v.* First Nat. Bank, 108 Tenn. 374, 68 S. W. 497.

2. **Deposit by agent.**—Hale *v.* Wall, 63 Va. (22 Gratt.) 424.

2a. Farmers', etc., Bank *v.* Smith, 19 Johns. 115. See, also, Godin *v.* Bank, (N. Y.), 6 Duer 76; Gallatin *v.* Bradford (Ky.), 1 Bibb 209; Schneider *v.* Irving Bank (N. Y.), 30 How. Prac. 190, 1 Daly 500.

3. **Regulations as to confederate currency.**—Boyden *v.* Bank, 65 N. C. 13.

4. **Rules of bank with regard to receiving deposits.**—If a bank receives a deposit without a deposit ticket or pass book, or giving a certificate of deposit or other evidence of deposit, a failure of the depositor to observe the customs and rules requiring such deposit ticket or taking a certificate will not defeat his right to recover the amount, even though the bank has given the credit to the wrong person, and thereby lost the money. Jackson Ins. Co. *v.* Cross, 56 Tenn. (9 Heisk.) 283.

5. Jumper *v.* Commercial Bank, 48 S. C. 430, 26 S. E. 725.

6. **Accepting credit with correspondent.**—Merchants' Nat. Bank *v.* School Dist. No. 8, 94 Fed. 705, 36 C. C. A. 432.

§ 121 (4be) Depositor Having More than One Account.—A depositor can not recover from a bank because deposits intended for his individual account were credited by the bank to an account kept by him as chairman, which, however, belonged to him individually, and was paid out to him as such chairman.[7]

§ 121 (4c) Deposit Slips.—A deposit slip or deposit check constitutes an acknowledgment that the amount of money named therein has been received. It is a receipt, and nothing more. No promise is made to pay the sum named on return of the paper, nor is it expected either by the depositor or depositary that it will ever be presented to the bank again unless a dispute should arise as to the amount of the deposit, in which event it would become important as evidence, not that there is money in the bank to the credit of the depositor but that on a given date there was deposited the sum named. Usage has fixed its status in banking as a mere receipt. It is not proof of liability, and it will not support an action against the bank.[8]

Mistake of Name of Depositor on Deposit Slip.—A mistake in the name of a depositor on the deposit slip if made by the bank will not defeat an action made on the contract evidenced by the entry in the depositor's bank book;[9] aliter, if made by the depositor.[10]

§ 121 (4d) Entry in Deposit or Pass Book.—A bank depositor's pass book is not a written contract between the depositor and the bank,[11] but a memorandum.[12] The entry in a pass book of the deposit is an ad-

7. **Depositor having more than one account.**—Rennyson *v.* People's Nat. Bank, 4 Pa. Super. Ct. 640.

8. **Deposit slip.**—First Nat. Bank *v.* Clark, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580; Hotchkiss *v.* Mosher, 48 N. Y. 478.

9. **Mistake of name of depositor on deposit slip.**—Where a deposit slip containing a memorandum of checks constituting a deposit was made out erroneously to a person other than the depositor, but the bank's receiving teller credited the deposit in the bank book, the bank was liable to the depositor in an action on a contract evidenced by the depositor's bank book, though by reason of the mistake in the name on the deposit slip the bank had credited the deposit in its books to the person whose name appeared on such deposit slip. Schwartz *v.* State Bank, 63 Misc. Rep. 265, 116 N. Y. S. 701.

10. **Mistake by depositor.**—Plaintiff, a customer of a bank, having checks to deposit, presented them to its receiving teller, with his bank book, but with a deposit slip headed with the name of another customer of the bank. Such teller entered the aggregate of the checks in such bank book and handed it back to plaintiff. Later, from the deposit slip, the amount was entered in the ledger to the credit of the other customer. Held that, plaintiff's bank book not constituting the account between him and the bank, but being a series of receipts open to explanation, and the effect of handing in such deposit slip being a direction to credit the amount to the other customer, so that the relation of debtor and creditor was not created between plaintiff and the bank as to such deposit, and the first act of negligence leading to the error, if negligence be considered, having been that of plaintiff, he could not recover of the bank on account thereof. Judgment, 63 Misc. Rep. 265, 116 N. Y. S. 701, reversed in Schwartz *v.* State Bank, 135 App. Div. 42, 119 N. Y. S. 763.

11. **Entry in deposit book.**—Talcott *v.* First Nat. Bank, 53 Kan. 480, 36 Pac. 1066, 24 L. R. A. 737; Branch *v.* Dawson, 36 Minn. 193, 30 N. W. 545.

12. A deposit ticket is not an engagement in writing, nor on its face

mission that the bank is a debtor to the depositor,[13] it is in the nature of a receipt, and is prima facie evidence that the bank received the amounts entered therein at the dates set out—that is, it raises a presumption that the deposits were made.[14] It binds the bank as a receipt, and as such is open to explanation or contradictions by evidence aliunde, although parol.[15] The amount which has or has not been deposited on a certain day is a question for the jury.[16]

Entry of Credit on Books of Bank.—An entry on the books of a bank of a certain amount as a credit on a depositor's account is not conclusive of the bank's liability to the depositor for that amount, but is open to explanation.[17]

does it contain the contract of the parties deliberately agreed to. It is not a contract in terms, nor was it intended to be. It more nearly corresponds to the meaning of the word memorandum, "a record of something which it is desired to remember—a note to help the memory." Webster's Dictionary, "Memorandum." Weisinger *v.* Bank, 78 Tenn. (10 Lea), 330.

13. The entry in a pass book of a deposit is a contract to repay the money to the depositor or order, and is an admission that the bank is a debtor to the depositor. Second Nat. Bank *v.* Gibboney, 43 Ind. App. 492, 87 N. E. 1064.

14. Talcott *v.* First Nat. Bank, 53 Kan. 480, 36 Pac. 1066, 24 L. R. A. 737; Andrews *v.* State Bank, 9 N. Dak. 325, 83 N. W. 235.

The entry of a deposit in a pass book to the credit of the depositor is in the nature of a receipt, and is prima facie evidence that the bank has received the amount from the depositor and entered it to his credit. Quattrochi Bros. *v.* Farmers', etc., Bank, 89 Mo. App. 500.

Money was handed to a receiving teller with a deposit ticket, and the teller entered the amount, as shown by the ticket, to the depositor's credit in his pass book, after which he handed the money to an assistant to count, who found the amount short. In an action by the depositor against the bank to recover the amount which the bank claimed was not deposited, held, that the entry in the pass book was prima facie evidence of the amount deposited. Asher *v.* National Park Bank (N. Y.), 7 Alb. L. J. 43.

Construction of instruction.—A charge that a deposit ticket "is a strong fact" of the amount deposited in the bank, is not equivalent to stating that it was prima facie evidence of the fact. Weisinger *v.* Bank, 78 Tenn. (10 Lea) 330.

15. Talcott *v.* First Nat. Bank, 53 Kan. 480, 36 Pac. 1066, 24 L. R. A. 737; Branch *v.* Dawson, 36 Minn. 193, 30 N. W. 545; Andrews *v.* State Bank, 9 N. Dak. 325, 83 N. W. 235.

A deposit ticket given to a bank is not that character of instrument which parol evidence may not be introduced to contradict or vary its terms, but is rather a memorandum. Weisinger *v.* Bank, 78 Tenn. (10 Lea) 330.

Letter written by bank president.—Where the amount deposited on a certain day is the subject of controversy in an action by a bank to recover an overdraft of defendant's account, and the bank officials testify and introduce the books to show that the amount was $509.65 while the defendant testified that $1700 had been deposited, it was held that a new trial would not be granted because of the introduction in evidence of a letter to the bank president, written by the bookkeeper of the bank, who had been employed after the transaction had taken place, which tended to show that the books had not been correctly kept and that money had been deposited which had not been credited. Ellis *v.* Garvey, 76 Tex. 371, 13 S. W. 320.

16. Amount a question for jury.—Ellis *v.* Garvey, 76 Tex. 371, 13 S. W. 320.

17. Entry of credit on bank's books.—Anderson *v.* Walker, 93 Tex. 119, 53 S. W. 821.

Temporary extension of credit.—If the bank, relying on the representation of the treasurer that the county needed the money and would replace it next day, extended credit only till that time, and canceled it next day in accordance with the understanding, there would be no liability, it being immaterial in such case that the treasurer

In Louisiana.—An entry of a credit in a bank book made at the time of a deposit, by a clerk authorized to make the entry, is conclusive as against the bank, in the absence of proof of fraud or collusion between the clerk and the depositor.[18]

Time of Entry.—Though a deposit is not entered in the bank books until five days after it has been entered by the bank in the depositor's pass book, the deposit must be held to have been made at the date of the entry in the pass book.[19] If a dealer with the bank send his bank book with money to be deposited, and the clerk enter the amount to his credit, in the bank book, at the time the deposit is made, it is conclusive on the bank. Aliter, if the deposit is first made, and the entry is afterwards copied from the ledger into the dealer's bank book.[20]

Not Conclusive upon Depositor.—A depositor is not concluded by entries made by the bank in his deposit book, upon writing up his account, where it appeared that objection was made within a reasonable time afterwards.[21]

§ 122. Deposits Other than Money.—With trust company, see post, "Functions and Dealings," § 315.

When Title Regarded as Vesting in Bank—Effect of Crediting Sight Drafts as Cash.—See post, "Entry to Credit of Depositor," § 126.

§ 123. —— In General.—When the deposit with the bank is of something else than money, the relation of debtor and creditor can not arise from the mere fact of deposit as on an implied contract.[22]

could not bind the county. So long as the bank did not part with the title to its money it could withhold it, and the entry of the credit on such understanding created no greater right than grew out of the understanding. Anderson *v.* Walker, 92 Tex. 119, 53 S. W. 821, affirming 49 S. W. 937.

18. *Louisiana.*—Mechanics Bank *v.* Banks, 11 La. 261; Hepburn *v.* Citizens' Bank, 2 La. Ann. 1007, 46 Am. Dec. 564.

19. Time of entry.—Wasson *v.* Lamb, 120 Ind. 514, 22 N. E. 729, 6 L. R. A. 191, 16 Am. St. Rep. 342.

20. Manhattan Co. *v.* Lydig (N. Y.), 4 Johns. 377, 4 Am. Dec. 280.

21. Conclusiveness of entry.—Schneider *v.* Irving Bank (N. Y.), 1 Daly 500, 30 How. Prac. 190.

A depositor is not bound to examine his bank book to discover whether the officer receiving his deposit has blundered in counting the money deposited, for in such case any injury to the bank is the result of its own neglect, and can not operate as an estoppel on the depositor. Judgment, Kemble *v.* National Bank, 88 N. Y. S. 246, 94 App. Div. 544, affirmed in Kemble *v.* Rondout Nat. Bank, 183 N. Y. 545, 76 N. E. 1098.

An entry by a teller or clerk of a bank of the amount of a deposit in the bank book of a dealer with the bank, being the act only of the agent of the bank, and not of both parties, is not conclusive. If, therefore, the dealer can afterwards prove that there was a mistake in the entry, he may recover, in an action for money had and received, the sum not credited. Mechanics', etc., Bank *v.* Smith (N. Y.), 19 Johns. 115.

22. First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334.

Deposit of "commodity."—Where the thing deposited is not money, but a "commodity," the relation of debtor and creditor does not arise. Planters' Bank *v.* Union Bank (U. S.), 16 Wall. 483, 21 L. Ed. 473, distinguishing Marine Bank *v.* Fulton Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785.

It was so held where the thing deposited was "Confederate notes," and it was agreed that the collection should be made in like notes. The fact that

Deposit for Safe-Keeping or Collection—Gratuitous Bailment.—Where a deposit is made for safe-keeping without compensation to the bank, the arrangement is a gratuitous bailment.[23]

Questions for Jury.—The terms of the contract of bailment, where the evidence is conflicting, and whether it was made with the teller in his official capacity or personally, are questions for the jury.[24]

§ 123½. —— Checks and Drafts Generally.—Checks and drafts deposited in a bank whether for safe keeping or collection do not create the relation of debtor and creditor between the bank and the depositor.[25] Where one deposits in a bank a check or draft on a third party, it is a bailment, unless the understanding be that he may at once draw against the deposit, or, being indebted to the bank, that the deposit may be applied on such indebtedness.[26]

§ 124. —— Checks and Drafts on Depositor's Bank.—Credit to Payee.—Where the holder of a check presents it at the bank upon which

the collecting bank used the notes in its business does not alter the case. Planters' Bank *v.* Union Bank (U. S.), 16 Wall. 483, 21 L. Ed. 473, distinguishing Marine Bank *v.* Fulton Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785.

"This case differs very materially from Marine Bank *v.* Fulton Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785. There, it is true, the collecting bank received depreciated currency of the Illinois banks, and, it may be assumed, with the assent of its correspondent. But there were positive instructions to hold the avails of the collections subject to the order, of the bank which had sent the notes for collection; and the proceeds of the collections were an authorized lawful currency. The two banks, therefore, stood to each other in the relation of debtor and creditor, and the collecting bank acknowledged that relation immediately on the payment of the notes which had been sent to it for collection. Not so here. The collections were not made in money, and it was not the understanding of the parties that money should be paid." Planters' Bank *v.* Union Bank (U. S.), 16 Wall. 483, 21 L. Ed. 473.

23. Deposit for safe-keeping.—Plaintiff and her husband were both depositors in defendant bank, and the husband rented a safety deposit box in defendant's vault. The husband took a package of jewelry and coins belonging to plaintiff to the bank, to put in the deposit box, and, finding that the box would not hold the package, asked the cashier if it would be necessary to rent another box, or if he could put the package away. The cashier agreed to the latter arrangement, and placed it in the vault, from which it was stolen. Held, that the arrangement was a gratuitous bailment. Gerrish *v.* Muskegon Sav. Bank, 100 N. W. 1000, 138 Mich. 46.

24. Questions for jury.—In an action to recover the value of bonds stolen from defendant's bank, where they had been deposited by plaintiff for safe-keeping, the evidence was conflicting upon the question whether the teller who received the deposit told plaintiff it must be at his own risk, and whether the deposit was made with the teller in his official capacity or personally. Held, that the question was for the jury. Pattison *v.* Syracuse Nat. Bank (N. Y.), 1 Hun 606, 4 Thomp. & C. 96.

25. Checks and drafts.—Balbach *v.* Frelinghuysen, 15 Fed. 675; First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334.

"When negotiable paper is deposited for collection, the depositor remains the owner, as to the collecting bank, in the absence of special agreement. And the mere provisional credit as cash, with liberty to draw thereon, will not change the rule. St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390." Fleming *v.* State, 62 Tex. Cr. App. 653, 139 S. W. 598, quoting Ency. of U. S. Supreme Court Reports, vol. 3, p. 48.

26. Perth Amboy Gaslight Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704.

it was drawn and the bank places the amount to his credit, he becomes a creditor of the bank.[27] Such acceptance and credit is equivalent to a payment to the payee of the amount of the check,[28] and it is immaterial that the drawer did not have the amount of money necessary to pay the check deposited to his credit on the books of the bank at the time it was drawn.[29] The bank can not on failure of the drawer of the check to pay the same or make good the overdraft return the check to the payee and charge off the credit,[30] even where the overdraft was paid by mistake,[31] and on suit there-

27. Credit to payee.—Hubbard *v.* Pettey, 37 Tex. Civ. App. 453, 85 S. W. 509, affirmed in 101 Tex. 643, no op., citing Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103, affirmed in 95 Tex. 680, no op.

The acceptance by a bank of a check of a depositor, and charging him with the amount and placing the proceeds to the credit of the payee, creates between the bank and the payee the relation of debtor and creditor. Second Nat. Bank *v.* Gibboney, 43 Ind. App. 492, 87 N. E. 1064.

28. Bryan *v.* First Nat. Bank, 205 Pa. 7, 54 Atl. 480.

29. Check as overdraft.—It was so held where the bank owed the drawer the money and had the amount borrowed with which to pay the check, and had agreed to pay it before it was drawn. Hubbard *v.* Pettey, 37 Tex. Civ. App. 453, 85 S. W. 509, affirmed in 101 Tex. 643, no op., citing Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103, affirmed in 95 Tex. 680, no op.

30. Failure of drawer to make good overdraft.—First Nat. Bank *v.* Burkhardt, 100 U. S. 686, 25 L. Ed. 766; Oddie *v.* National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Byran *v.* First Nat. Bank, 205 Pa. 7, 54 Atl. 480.

"When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract." First Nat. Bank *v.* Burkhardt, 100 U. S. 686, 25 L. Ed. 766.

"If at the time the holder hands in the check he demands to have it placed to his credit, and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit, as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount, will be equally fixed and irrevocable." First Nat. Bank *v.* Burkhardt, 100 U. S. 686, 25 L. Ed. 766.

"If the bank proposed to hold the check on conditions, it was but fair and just to the other party to have said so when it was received, and thus have given him the option, after such notice, to do with it as he might think proper. The saving or loss of the amount to the payees might have depended on the promptitude and energy of their conduct. Delay until after bank hours might have determined the result inevitably against them. It would be contrary to plainest principles of reason and justice to permit a bank, under such circumstances, to shift the burden of the loss from itself to the shoulders of an innocent depositor." First Nat. Bank *v.* Burkhardt, 100 U. S. 686, 25 L. Ed. 766.

The plaintiffs delivered to the defendant bank, for deposit, a check upon the bank by another dealer with it, which was received, and the amount entered to the credit of the plaintiffs. The account of the drawer was largely overdrawn at the time, but the bank continued to certify other checks of his presented later. Before the close of banking hours it returned to plaintiffs the check deposited with them as not good. Held, that the presentation of the check for deposit was a demand of payment, and the bank, by giving the plaintiffs credit for the amount, closed the transaction and became the debtor of the depositors. Oddie *v.* National City Bank, 45 N. Y. 735, 6 Am. Rep. 160.

31. Overdrafts of insolvent paid by mistake.—Where a bank was not accustomed to receive checks for collection drawn on itself by its depositors, and a check was so drawn by one de-

for allege as a defense that the check had been given in a gambling transaction;[32] but where the depositor is guilty of a fraud in presenting the check,[33] and where there is an agreement that the credit may be charged off if the drawer of the check fails to pay the same,[34] the bank may charge the credit to the payee's account.

In California the bank may charge off the credit if the drawer has not sufficient funds to his credit to satisfy the check.[35]

Estoppel to Refuse Credit.—Where a bank, after receiving for deposit and refusing to credit a check drawn on a depositor of the bank whose account is overdrawn, cashed a small check drawn by him, it was not estopped thereby to refuse to give credit for the first check.[36]

positor in favor of another, presented by the latter, credited on his pass book as a deposit, and placed on the file of paid checks entered to his credit on the books of the bank, the check was paid, and the amount of it could not be withheld by the bank on discovering that it was an overdraft and the drawer was insolvent. City Nat. Bank *v.* Burns, 68 Ala. 267, 44 Am. Rep. 138.

32. Check given for gambling consideration.—Bryan *v.* First Nat. Bank, 205 Pa. 7, 57 Atl. 480.

33. Depositor guilty of fraud.—A check was deposited by the holder in the bank upon which it was drawn, with knowledge that the drawer had no funds there. The bank credited the holder with it, and charged it to the drawer's account. The next day the bank charged it back to the holder. Held, that he was guilty of fraud in presenting the check, and could not recover the amount of it from the bank. Peterson *v.* Union Nat. Bank, 52 Pa. 206, 91 Am. Dec. 146.

34. Agreement that credit may be charged off.—In an action to recover the amount of the check drawn on and deposited with defendant, and afterwards charged back to plaintiff's account, it appeared that plaintiff and defendant both knew when the check was offered for deposit that the drawer was insolvent. The maker then had an apparent credit with defendant exceeding the amount of the check, but afterwards an error was discovered which entirely absorbed the apparent credit. Defendant's clerk testified that he received the check under an agreement with plaintiff that, if there was any trouble about it, it should be charged back to plaintiff's account. Held, that a verdict for defendant would not be disturbed. Lumsdon *v.* Gilman, 81 Hun 526, 30 N. Y. S. 1124, 63 N. Y. St. Rep. 261.

35. *California.*—Where a customer of a bank hands the receiving teller a check drawn by another person upon the same bank and at the same time hands him her pass book, and the teller receives the check, stamps it "Paid," enters a credit for the amount in the pass book, and the check is entered to the credit of the depositor, and charged to the account of the drawer on the books of the bank, and nothing else is said or done, the bank may at the close of the business day, if the funds of the drawer are then insufficient to satisfy the check, charge back the amount to the depositor and return the check to her. Ocean Park Bank *v.* Rogers (Cal.), 92 Pac. 879.

Where a customer of a bank, in making a deposit, hands to the receiving teller of the bank, with his pass book, a check drawn by another person on the same bank, and the teller receives the check and notes it in the pass book, this alone, no entry being made on the books of the bank, does not raise a presumption that the check is received by the bank as cash or otherwise than for collection. The same rule obtains in regard to such a transaction as when checks on another bank are deposited, and a credit for them entered in the depositor's pass book. National Gold Bank, etc., Co. *v.* McDonald, 51 Cal. 64, 21 Am. Rep. 697.

If the drawer of a check received under such circumstances has no funds to his credit, the checks may be returned by the bank to the depositor, and the credit in his pass book be canceled. National Gold Bank, etc., Co. *v.* McDonald, 51 Cal. 64, 21 Am. Rep. 697.

36. Estoppel to refuse credit.—Ocean Park Bank *v.* Rogers (Cal.), 92 Pac. 879.

§ 125. —— Forged or Altered Paper.—Effect of Crediting Forged or Raised Paper.—Where a customer who is ignorant of the forgery deposited a forged check for which he had paid value, and the bank gave him credit therefor in his account, it was, in effect, payment of the check by the bank, and the bank sustains the loss. And the casual statement, in conversation with a clerk of the bank, by the depositor, that if the check is forged it is no deposit, made under misconception of his legal rights, is not an enforcible promise to refund.[37]

Raised Foreign Check.—Where a customer of a bank takes to the bank a foreign check with a good signature, but fraudulently raised in amount, to ascertain whether the check would be paid, and the customer at the request of the teller indorses the check, and the teller makes out a deposit slip, and credits the amount of the check to the customer's account, and thereafter the bank uses due diligence in ascertaining that the check had been paid, and notifying the customer thereof, the bank after the fraud had been detected, and after it had been compelled to pay back the money to the drawee, may recover the amount thus paid from the customer who presented the check.[38]

Payee's Indorsement Forged.—Recovery by one on a credit entered in his pass book by a bank on deposit of a check is not defeated by evidence that the payee's indorsement was forged, without evidence that the bank was thereby prejudiced or damaged.[39]

Indorsement of Forged Check by Agent.—An agent duly authorized to indorse checks in behalf of his principal for deposit, may bind the principal by such an indorsement to the bank of the check purporting to have been drawn by the principal to his own order, although such check was in fact forged by the agent himself. The liability of a payee who by himself

37. **Effect of crediting forged check.**—The entry of a forged check in the bank book of a customer as cash, is equivalent to payment. If the customer was ignorant of the forgery, the bank sustains the loss. Levy *v.* Bank (Pa.), 1 Bin. 27, 4 Dall. 234, 1 L. Ed. 814.

The entry in the bank book of a depositor as a deposit of cash, of the forged check of a customer, is tantamount to the actual payment in cash of such check, and can not be afterwards canceled or revoked by the bank on discovery of the forgery, the depositor having acted in good faith in the matter. Levy *v.* Bank (Pa.), 1 Bin. 27, 4 Dall. 234, 1 L. Ed. 814.

38. **Raised foreign check.**—Girad Trust Co. *v.* Boyd, 45 Pa. Super. Ct. 285.

A depositor brought to his bank a check which the cashier, simply from its amount, and not from any appearance of fraud, advised him not to take, as it might be raised, but said it could be deposited for collection, and, if it was not returned, they would suppose it all right. It was left and credited to the depositor, who, two days later, without making further inquiry, completed the sale in which it was offered in payment. The bank's correspondent credited it with the check, but about a month later it was returned by the bank on which it was drawn as being raised, and the correspondent charged it up to the depositor's bank, which charged it to the depositor. Held, that the depositor could not recover the amount of the bank because of the credit of his account. Rapp *v.* National Security Bank, 136 Pa. 426, 20 Atl. 508.

39. **Payee's indorsement forged.**—Stein *v.* Empire Trust Co. (Sup.), 130 N. Y. S. 168.

or an authorized agent indorses and deposits in a bank for credit a forged check, is not the usual contingent liability of an indorser, but that of a warrantor of the genuineness of the paper; and is absolute, requiring neither demand nor notice.[40]

§ 126. Entry to Credit of Depositor—§ 126 (1) In General.—In most jurisdictions when a bill, check, or draft is deposited in a bank in the usual course of business, and is received and credited to the account of the depositor as money, the relation of debtor and creditor subsists between the bank and the depositor, as upon a cash deposit,[41] and the depositor may sue the bank for its indebtedness to him in an action ex contractu.[42]

Practice Not a Binding Usage.—The practice which has grown up among banks to credit deposits of checks at once to the account of the depositor, and to allow him to draw against them before the collection, is a mere gratuitous privilege, which does not grow into a binding legal usage.[43]

Payment Deferred Till Sufficiency of Funds Ascertained.—Where

40. **Indorsement of forged check by agent.**—A paving company having its principal place of business in New York opened an account with a bank in Detroit, and transmitted to the bank a power of attorney authorizing the company's local agent in Detroit to indorse and sign checks and deposit money in its name and for its use. From time to time the agent indorsed and deposited checks drawn by the company to its own order on its New York bank, which were credited to its account as cash. The agent forged such a check, indorsed and deposited it in the usual manner, checked out the proceeds, and absconded. Held, that the bank was not bound to know the company's New York signature, and that, in the absence of circumstances amounting to notice that the signature was a forgery, the company was liable to it on the indorsement for the amount of the check. Warren-Scharf Asphalt Pav. Co. *v.* Commercial Nat. Bank, 38 C. C. A. 108, 97 Fed. 181.

Where a power of attorney given by a corporation, authorizing an agent to indorse and sign checks, provided that all checks drawn should "be in the name of this company," and a check is drawn on a blank furnished by the company to the agent, having the name of the company printed at its head, and signed only in the name of the agent, as "attorney and cashier," which was in the form of all previous checks drawn by the agent, the bank was not guilty of negligence, or a violation of the usual rules and customs of banking, in receiving and crediting the check as cash; and the paying out of such deposit prior to the collection of the check did not constitute an overdraft, as between the parties, but on such payment the bank became a bona fide holder of the check for value. Warren-Scharf Asphalt Pav. Co. *v.* Commercial Nat. Bank, 38 C. C. A. 108, 97 Fed. 181.

41. **Entry to credit of depositor.**—Wasson *v.* Lamb, 120 Ind. 514, 22 N. E. 729, 6 L. R. A. 191, 16 Am. St. Rep. 342; Walnut Hill Bank *v.* National Reserve Bank, 65 Misc. Rep. 315, 121 N. Y. S. 892; Walton *v.* Riverside Bank, 28 Misc. Rep. 449, 58 N. Y. S. 1008, affirmed in 29 Misc. Rep. 304, 60 N. Y. S. 519.

"When a check is taken to a bank, and the bank receives it and places the amount to the credit of a customer, the relation of creditor and debtor between them subsists * * *. This principle is held in Thompson *v.* Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704, and also in Marine Bank *v.* Fulton Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785. See, also, Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483; Davis *v.* Elmira Sav. Bank, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502." Burton *v.* United States, 196 U. S. 283, 49 L. Ed. 482, 25 S. Ct. 243. And see Planters' Bank *v.* Union Bank (U. S.), 16 Wall. 483, 21 L. Ed. 473.

42. Walton *v.* Riverside Bank, 28 Misc. Rep. 449, 58 N. Y. S. 1008, affirmed in 29 Misc. Rep. 304, 60 N. Y. S. 519.

43. **Usage not binding.**—Balbach *v.* Frelinghuysen, 15 Fed. 675.

a depositor presented a check for deposit, he and the bank could agree that payment should be deferred for a reasonable time until the bank ascertained whether there were sufficient funds of the drawer to pay it.[44]

§ 126 (2) Acts Which Constitute.—Where defendant bank received a draft drawn on it in favor of another correspondent, with directions to credit the same to the latter's account, and at once gave notice to the latter that the amount had been placed to its credit, such notice was not the equivalent of an actual credit, and defendant was not bound thereby, where the drawer had insufficient funds to cover the draft.[45] Such notice does not operate as an estoppel where it does not appear that the depositor had done anything or refrained from doing anything to his damage in reliance upon the notification.[46]

§ 126 (3) Person Entitled to Credit.—Unless otherwise directed the entry of credit for checks, etc., deposited in a bank should be to the account of the person making the deposit.[47]

Presumption Where Paper in Favor of Bank.—Drafts or checks, in favor of banks and held by them, are presumed, prima facie, to have been received on deposit as cash from customers, and not deposited for collection merely, unless some evidence of that fact is adduced.[48]

§ 126 (4) Credit Subject to Payment.—A plaintiff depositing a check, knowing of the custom of the bank to give credit subject to the right to charge off the amount thereof on want of funds to pay the check, is es-

44. **Payment deferred till sufficiency of funds ascertained.**—Pollock *v.* National Bank (Mo. App.), 151 S. W. 774.

45. **What constitutes.**—Walnut Hill Bank *v.* National Reserve Bank, 65 Misc. Rep. 315, 121 N. Y. S. 892, reversing Walnut Hill Bank *v.* National Reserve Bank, 141 App. Div. 475, 126 N. Y. S. 430, reversing 65 Misc. Rep. 315, 121 N. Y. S. 892.

46. Defendant bank received a draft upon it, drawn by a correspondent in favor of plaintiff, another correspondent, and it at once notified plaintiff thereof. No actual credit was made on defendant's books because the drawer had not sufficient funds to cover the draft. The first information which plaintiff had that the amount had not been credited was when it received a statement of its account with defendant, about three weeks later, and after the drawer had ceased doing business. It did not appear that plaintiff had done anything in reliance upon said notice, or refrained from doing anything to its damage by reason thereof. Held, that defendant was not estopped from claiming that it had not credited plaintiff with draft. Walnut Hill Bank *v.* National Reserve Bank, 141 App. Div. 475, 126 N. Y. S. 430.

47. **Person entitled to credit.**—A letter written by a depositor to a bank, inclosing a draft drawn by another customer in favor of himself, and indorsed to the writer of the letter, with instructions to the bank to "please collect and credit," is not uncertain as to who is to be given credit, and does not justify the bank in crediting the proceeds of the draft to the indorser. Long *v.* Bank, 18 Ky. L. Rep. 922, 38 S. W. 886.

48. **Presumption—Paper in favor of bank.**—Gettysburg Nat. Bank *v.* Kuhns, 62 Pa. 88.

A check drawn by a United States paymaster, in favor of the cashier of a bank, was received by the bank, and the money collected by the cashier. The check was for a soldier's bounty, and had been forwarded to a third person. Held, that the bank was not liable. Gettysburg Nat. Bank *v.* Kuhns, 62 Pa. 88.

topped from preventing the bank from charging his account with the amount of the check.[49] A clause on a postal card to a bank, acknowledging receipt of a draft drawn on the bank, and "all items sent to us are credited subject to payment," applies only to items drawn upon banks other than the one giving the notice.[50]

§ 127. —— Title and Right of Bank.—Lien of Bank on Deposit. —See post, "Lien of Bank on Deposits," § 136.

§ 127 (1) Commercial Paper Received as Money—§ 127 (1a) In General.—A deposit in a bank of a bill, check, draft or other evidence of debt in the ordinary course of business, whereby the depositor receives a credit against which he may draw, operates to transfer the title to the bank,[51] in the absence of a usage, custom,[52] or of any oral or other agree-

49. Credit subject to payment.—Pollock *v.* National Bank (Mo. App.), 151 S. W. 774.

50. Walnut Hill Bank *v.* National Reserve Bank, 65 Misc. Rep. 315, 121 N. Y. S. 892, reversed in 126 N. Y. S. 430.

51. Commercial paper.—Burton *v.* United States, 196 U. S. 283, 302, 49 L. Ed. 482, 25 S. Ct. 243.

Alabama.—Bank *v.* Webb, 108 Ala. 132, 19 So. 14.

Georgia.—A contract for the sale of cotton is complete, and the relation of debtor and creditor exists between the seller and the bank, where the seller receives a bank check for the full purchase price, and delivers it up to the bank, and has the amount placed in his pass book, of which he takes possession. Rawls *v.* Saulsbury, etc., Co., 66 Ga. 394.

Illinois.—Doppelt *v.* National Bank, 175 Ill. 432, 51 N. E. 753.

On a deposit being made by a customer in a bank, in the ordinary course of business, of drafts or checks received and credited as money, the title thereto is immediately vested in, and becomes the property of, the bank, and the depositor is entitled to draw checks against the credit. American Exch. Nat. Bank *v.* Gregg, 37 Ill. App. 425, reversed in 138 Ill. App. 596, 28 N. E. 839, 32 Am. St. Rep. 171.

When a customer, in the ordinary course of business, deposits in a bank a draft or check indorsed "for deposit," and such draft or check is received and credited to him as money, the title thereto vests in the bank. Lanterman *v.* Travous, 73 Ill. App. 670, affirmed in 174 Ill. 459, 51 N. E. 805.

Indiana.—Where checks, drafts, or other evidences of debt are received in good faith as deposits, if the bank credits them as so much money, the title to the checks or drafts is immediately transferred to the bank, and it becomes legally liable to the depositor as for so much money deposited. Wasson *v.* Lamb, 120 Ind. 514, 22 N. E. 729, 6 L. R. A. 191, 16 Am. St. Rep. 342.

Kansas.—Noble *v.* Doughten, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A., N. S., 1167.

Louisiana.—Where a bank discounts a note of a corporation, crediting the corporation's account with the proceeds, the contract is represented by the note, and the bank has no right of action upon any general banking account, unless the note was issued without authority, and hence where a bank takes a bill of exchange at a fixed valuation arrived at by deducting, from the amount called for on its face, the discount and exchange, and credits the depositor with the balance, the bill, with any collateral which may be attached, becomes the bank's property, and alone represents the contract between it and the depositor. Taylor *v.* Vossburg Mineral Springs Co., 128 La. 364, 54 So. 907.

Maryland.—Ditch *v.* Western Nat. Bank, 79 Md. 192, 29 Atl. 72, 138, 47 Am. St. Rep. 375.

Massachusetts. — Taft *v.* Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387.

Minnesota.—The title to checks and drafts passes to a bank on their deposit therein in the ordinary course of business, they being received and credited as money, and there being no different understanding. Security Bank *v.* North-

52. Taft *v.* Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387.

ment that the effect of the transaction shall be otherwise,[53] even though the

western Fuel Co., 58 Minn. 141, 59 N. W. 987.

Missouri.—Kavanaugh *v.* Farmer's Bank, 59 Mo. 540.

Nebraska.—Higgins *v.* Hayden, 53 Neb. 61, 73 N. W. 280.

New Jersey.—Hoffman *v.* First Nat. Bank, 46 N. J. L. 604.

New York.—On a deposit being made by a customer in a bank, in the ordinary course of business, of drafts or checks received as money, the title thereto is immediately vested in the bank. Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; King *v.* Bowling Green Trust Co., 145 App. Div. 398, 129 N. Y. S. 977; Metropolitan Nat. Bank *v.* Loyd (N. Y.), 25 Hun 101; Walton *v.* Riverside Bank, 28 Misc. Rep. 449, 58 N. Y. S. 1008, affirmed in 29 Misc. Rep. 304, 60 N. Y. S. 519; Stuyvesant Bank *v.* National Mechanics' Banking Ass'n (N. Y.), 7 Lans. 197; National Citizens' Bank *v.* Howard (N. Y.), 3 How. Prac., N. S., 511.

When a bank, on receiving checks, immediately charges itself with the amount thereof, credits the depositor's account accordingly, other deposits being made and charged and credited in like manner, and pays the check of the depositor out of the general balance to his credit, and delivers up to the depositor certain securities held for advances made by it to the depositor, the checks are deemed to have been received as so much money. Justh *v.* National Bank, 45 How. Prac. 492, 36 N. Y. Super. Ct. 273.

A. deposited a check, payable to himself and indorsed by him in blank, in a bank, and the bank credited him with the amount of the check in his bank book. Held, that the bank became the owner of the check, and could pass a good title to it. Metropolitan Nat. Bank *v.* Loyd (N. Y.), 90 N. Y. 530, affirming 25 Hun 101.

Ohio.—Where the depositor is credited with the paper as cash, the title thereto is transferred to the bank, in the absence of fraud on the part of the bank. Warner *v.* Armstrong, 21 Wkly. L. Bull. 124, 10 O. Dec. 426; Miles *v.* Reiniger, 39 O. St. 499.

R., the owner of a county order, on presenting it to the treasury for payment, was requested by M., the treasurer, to take it to his bank, which he did, and delivered it to the bank without indorsement, and took credit for the amount thereof as a deposit in his account, subject to his check in two or three days thereafter. On the next day, the bank presented the order to the treasurer for redemption, and the same was satisfied by giving credit to the bank upon its checks then held by the treasurer. On the second day thereafter, and before R. had checked on any portion of the order deposited, the bank failed. It was held that in the absence of the bad faith on the part of M., an action against him by R., for the wrongful conversion of the order, could not be maintained, the title to the orders having passed to the bank, which was therefore authorized to make the settlement with M. Miles *v.* Reiniger, 39 O. St. 499.

Texas.—"It is necessary in order to constitute a deposit, of a check, that the title of the property pass to the bank." Fleming *v.* State, 62 Tex. Cr. App. 653, 139 S. W. 598.

53. Burton *v.* United States, 196 U. S. 283, 49 L. Ed. 482, 25 S. Ct. 243; Taft *v.* Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387.

Where there was no oral or special agreement made between the depositor and the bank at the time when any one of the checks was deposited and credit given for the amount thereof, but the depositor had an account with the bank, took each check when it arrived, went to the bank, indorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. Burton *v.* United States, 196 U. S. 283, 297, 49 L. Ed. 482, 25 S. Ct. 243.

In the absence of any special agreement that the effect of the transaction shall be otherwise (and none can be asserted here), there is no doubt that its legal effect is a change of ownership of the paper, and that the subsequent action of the bank in taking steps to obtain payment for itself of the paper which it had purchased can in no sense be said to be the action of an agent for its principal, but the act of an owner in regard to its own property. Where the judge in his charge

cashier fraudulently makes out the deposit slip so as to show a deposit for collection.[54] In such case the bank is a purchaser and absolute owner of the paper[55] and not a mere agent to collect the same for the payee;[56] but it is not necessarily a bona fide purchaser for value and without notice.[57]

to the jury did not, indeed, deny the general truth of this proposition, but left it to the jury to determine whether there was not an agreement or understanding made or arrived at by the parties at the time the checks were taken by the defendant to the bank, which altered the legal effect of the transaction actually proved, of which there was not the slightest evidence, it was error to submit that question to the jury, in a prosecution of the depositor for an offense, when an important question was when the depositor actually received the money on the check deposited. Burton *v.* United States, 196 U. S. 283, 49 L. Ed. 482, 25 S. Ct. 243.

Absolute sale.—In the absence of a usage, custom, or agreement of any kind, a deposit of an indorsed check in a bank, for which it gives credit to the depositor as cash in a drawing account, is consistent with a finding of an absolute sale of the paper to the bank, especially where the checks of the depositor were honored by the bank at times several weeks subsequent to the date when the bank knew the check was lost in being forwarded to the drawee for collection, when the depositor's account would not have been enough to meet the checks if the amount of the missing check had been charged back, and where his pass book was afterwards written up without charging back the amount of said check. Taft *v.* Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387.

54. Where a bank cashier, in receiving from an illiterate person a draft sold to the bank, fraudulently makes out his deposit slip so as to show a deposit for collection, and the depositor subsequently, on discovering the fraud, repudiates the transaction as a deposit for collection, and, on an issue as to whether the transaction was a purchase or a deposit for collection, the bank admits that the slip was a receipt for the draft, and the depositor claims that it was one for the proceeds, it is proper to refuse to instruct for the bank that the retention of the slip by the depositor after repudiation, and using it as evidence of its demand against the bank, rendered it binding on him. Bank *v.* Webb, 108 Ala. 132, 19 So. 14.

Evidence.—Where a bank cashier, in receiving from an illiterate person a draft sold to the bank, fraudulently makes out his deposit slip for him so as to show a deposit for collection, it is error to admit evidence that the bank required the cashier to pay the draft on failure to collect it, on the issue as to whether the bank was liable as purchaser or as a receiver for collection only. Bank *v.* Webb, 108 Ala. 132, 19 So. 14.

Where a bank cashier, in receiving from an illiterate person a draft in his favor sold to the bank, fraudulently makes out his deposit slip for him so as to show that this draft was deposited for collection, statements subsequently made by the depositor to another officer of the bank on discovering the fraud though inadmissible to vary the written contract evidenced by the deposit slip, are admissible to show a repudiation of it by the depositor. Bank *v.* Webb, 108 Ala. 132, 19 So. 14.

55. Taft *v.* Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387.

56. Burton *v.* United States, 196 U. S. 283, 49 L. Ed. 482, 25 S. Ct. 243.

Where the payee of a check on another bank indorses and deposits the same with his bank, receives credit of the amount as cash in his general account, to be checked against, with nothing to qualify the effect of such acts, the bank becomes the owner of the check, and not a mere agent to collect the same for the payee. Aebi *v.* Bank, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925.

57. Bank as bona fide purchaser.—The mere credit of a check upon the books of a bank, which may be canceled at any time, does not make the bank a bona fide purchaser for value. If after such credit, and before payment for value, upon the faith thereof, the holder receives notice of the invalidity of the check, he can not become a bona fide holder by subsequent payment. Blake *v.* Hamilton, etc., Sav. Bank Co., 79 O. St. 189, 87 N. E. 73, affirming 9 O. C. C., N. S., 196, 12-29 O. C. D. 465.

"The mere discounting of paper and placing the amount thereof to the credit of a depositor, who already has a large balance to his credit, does not

The bank in such case can make any use or disposition of such paper as it chooses, without infringing upon any right of the depositor;[58] as, for instance, transfer it to a bona fide purchaser.[59]

Bank Having Right to Charge Back Dishonored Papers.—This is the rule although the bank has the right to charge dishonored paper to the depositor instead of proceeding against the maker,[60] but in Minnesota where the paper is taken under an agreement that it shall be charged back to the account of the depositor if returned unpaid, the bank is not the owner thereof, but an agent for collection.[61]

make the bank a purchaser for value so as to protect it against infirmities in the paper. Entering the amount of the discount to the credit of the depositor simply creates the relation between the bank and the depositor of debtor and creditor, and so long as that relation remains, and the deposit is not drawn out, the bank has simply promised to pay the depositor, has parted with no value, and is not entitled to the protection of a bona fide holder of paper." Blake *v.* Hamilton, etc., Sav. Bank Co., 79 O. St. 189, 87 N. E. 73, affirming 9 O. C. C., N. S., 196, 19-29 O. C. D. 465.

58. Burton *v.* United States, 196 U. S. 283, 49 L. Ed. 482, 25 S. Ct. 243; Kavanaugh *v.* Farmers' Bank, 59 Mo. App. 540.

59. A check indorsed in blank by the payee, and placed to his credit in his bank, becomes the legal property of the bank, and can be transferred to a bona fide creditor. Hoffman *v.* First Nat. Bank, 46 N. J. L. 604.

60. Charging back dishonored paper.—See post, "Right to Charge Back Dishonored Paper," § 127 (1c).

If the payee of a check drawn on a bank in a city other than that of his residence indorse it and deposit it in his home bank in the usual and ordinary manner, and without any agreement or understanding in reference to the transaction other than such as the law implies, the check becomes the property of the indorsee, although the bank may have the right to charge the check on the depositor's account if it is dishonored. Noble *v.* Doughten, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A., N. S., 1167.

Where a person deposits in a bank a check payable to his order, indorsed, "For deposit to the credit" of the payee, which is placed to his credit as cash, the title thereto is vested in the bank, though it has been its custom to charge dishonored checks to the depositor, instead of proceeding against the drawee. Ditch *v.* Western Nat. Bank, 79 Md. 192, 29 Atl. 72, 138, 47 Am. St. Rep. 375, 23 L. R. A. 164.

A depositor tendered to a bank a draft made by him payable to its order, saying that he had checks outstanding which would overdraw his account, and that he desired credit for the draft. The bank took the draft, agreeing to give him credit for it and to protect his checks, but said to him, if it should not be paid, he would "be overdrawn just the same." On that day the bank honored his checks for more than one-half the amount, and two days thereafter the bank, which was then insolvent, and so known by its officers to be, closed its doors. Held, that the draft became the property of the bank, and was not intrusted to it merely for collection. Higgins *v.* Hayden, 53 Neb. 61, 73 N. W. 280.

61. On the front leaf of petitioners' pass book was a statement that "this bank, in receiving checks or drafts on deposit or for collection, acts only as your agent." Petitioners for some time deposited with the bank commercial paper, which it would discount, and place the proceeds to petitioners' credit, against which they could draw if they chose. When any of the paper was returned unpaid, petitioners would either give their check for it, or have the bank charge it to their account. Held, that the bank took the paper as agent for collection. In re State Bank, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454.

A customer kept an account with a bank, which received his deposits, consisting of checks, under an agreement that the checks should be credited to his account, and, if not paid on presentation, should be charged back. Held, that the title to the checks passed to the bank, subject to the condition that credit should be rescinded if the checks were not paid on presentation, and that the failure of the bank after it had received certain checks,

§ 127 (1b) Sufficiency and Operation of Indorsement.—An unrestricted indorsement and an indorsement in blank of a check or draft vests title in the bank when the amount of such paper is passed to the credit of the depositor.[62] Indorsements in the following language have been construed to vest title in the bank: "for deposit,"[63] "for deposit to the credit of the [name of the depositor];"[64] "for deposit in the [name of the bank]

but before they were collected, did not devest its title. In re Receivership, 72 Minn. 283, 75 N. W. 228.

A draft was delivered by the drawer to his bank, and he received credit on his account. His pass book contained a notice that the bank, in receiving drafts on deposit or for collection, acts only as an agent, and assumes no responsibilities. The drawer had for years been in the habit of delivering drafts to the bank, and receiving credit for them on pass books containing such notice. It was the usual custom of the bank, when a draft deposited by a customer was not paid in the usual course of business by the drawee or acceptor, to charge it back to the customer, and the drawer knew of this custom. There was no evidence that the drawer, in making deposits of drafts, ever objected to the terms of the notice, or to the known custom of the bank. Held, that the title to the draft did not pass absolutely to the bank. South Park, etc., Mach. Co. *v.* Chicago, etc., R. Co., 75 Minn. 186, 77 N. W. 796.

62. Metropolitan Nat. Bank *v.* Loyd, 90 N. Y. 530.

The check was sent with an unrestricted indorsement; the complainant directed it to be placed to his credit; the bank treated it as credited, and so advised the complainant; it was immediately checked against by the complainant, and from these evidences of intention it was inferred that the check was deposited as cash. There is no proof to contradict the prima facie import of these facts, or tending to show that the check was deposited merely for collection, and, in the absence of any such proof, it must be held, that the deposit was as cash, and for immediate credit. Williams *v.* Cox, 97 Tenn. 555, 37 S. W. 282.

By the law merchant an indorsement of a check in blank for collection when passed to the credit of the drawee and drawn against by him amounts to a transfer of the legal title to the fund against which the check is drawn. Vaughn *v.* Farmers', etc., Nat. Bank (Tex.), 126 S. W. 690.

63. Where one has a deposit account at a bank, in which he is accustomed to deposit checks payable to himself, for entry on his pass book, and to be drawn against, an indorsement by him on a check of the words "For deposit" is a direction to deposit such a sum to his credit. National Commercial Bank *v.* Miller & Co., 77 Ala. 168, 54 Am. Rep. 50.

Where a customer makes a deposit in a bank, in the ordinary course of business, of a draft or check received and credited as money, and endorsed by the customer of the bank "for deposit" to be placed to his credit, the title to the draft or check vests in the bank, subject to the right on the part of the bank to charge it back to the depositor in case it is not paid on presentment. In such case there is an actual transfer of the title to the draft or check by endorsement upon the instrument itself. American Exch. Nat. Bank *v.* Loretta Gold. etc., Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233; American, etc., Sav. Bank *v.* Gueder, etc., Mfg. Co., 150 Ill. 336, 37 N. E. 227.

64. Where a regular customer of a bank deposits his draft payable to his own order, and indorsed, "For deposit to the credit of" the drawer, and the same is entered to his credit on the books of the bank, and forwarded by the bank to another bank for collection, the drawer, by the course of dealing, have the right to check against such deposit, and, in fact, checking against it, and his checks being honored, the title to the draft passes to the first bank. Fourth Nat. Bank *v.* Mayer, 89 Ga. 108, 14 S. E. 891, distinguishing Central R. Co. *v.* First Nat. Bank, 73 Ga. 383; Freeman *v.* Exchange Bank, 87 Ga. 45, 13 S. E. 160.

When collected, the proceeds of such draft are not subject to garnishment at the instance of a creditor of the drawer, such proceeds being the property, not of the drawer but of the first bank. This case is distinguishable from Central R. Co. *v.* First Nat. Bank, 73 Ga. 383; Freeman *v.* Exchange Bank, 87 Ga. 45, 13 S. E. 160; Fourth Nat. Bank *v.* Mayer, 89 Ga. 108, 14 S. E. 891.

to the credit of [the name of the depositor];"[65] and "for collection to the credit of [the name of the depositor]."[66]

The use of a rubber stamp for the purpose of indorsing checks for deposit has been recognized by custom of banks and merchants, and indorsements so made are valid.[67]

Unendorsed Paper.—The fact that a paper with which a depositor is credited as cash is not indorsed by the depositor will not prevent the title from passing to the bank, at least to such an extent as to authorize the bank to make such a settlement with the debtor as it sees fit; and if, in such case, the bank fail, the depositor can not hold the debtor responsible because he settled with the bank by delivering to it checks which the debtor held upon it.[68]

§ 127 (1c) Right to Charge Back Dishonored Paper.—See ante, "Entry to Credit of Depositor," § 126; "In General," § 127 (1a).

§ 127 (1ca) In General.—Where a bill, check or draft is deposited in the ordinary course of business whereby the depositor receives a credit against which he may draw, the bank may rely on the solvency of the depositor and may charge the same back to him in case it is dishonored,[69] unless the bank has been negligent, or has done something to mislead the depositor, thereby inducing him to act to his own injury on the faith of the goodness of the check, etc.[70] The right of a bank to charge a draft deposited for

65. An indorsement by the customer of a check payable to his own order, "for deposit in the [name of the bank] to the credit of [the name of the depositor]," is sufficient to pass the title to the check to the bank. Security Bank *v.* Northwestern Fuel Co., 58 Minn. 141, 59 N. W. 987.

66. An indorsement "for collection to the credit of * * *," is not a restrictive indorsement, and its effect is precisely the same as that of a bank indorsement. Doppelt *v.* National Bank, 175 Ill. 432, 51 N. E. 753.

67. Rosenberg *v.* Germania Bank, 44 Misc. Rep. 233, 88 N. Y. S. 952.

68. **Unindorsed paper.**—Miller *v.* Reiniger, 39 O. St. 499.

69. **Right to charge back to depositor.**—King *v.* Bowling Green Trust Co., 145 App. Div 398, 129 N. Y. S. 977.

The A. Bank received from a depositor a check upon the B. Bank for collection, and credited its depositor with the amount at the time of receiving the check. The check was returned from the B. Bank dishonored. Held, that the A. Bank might cancel the credit given, and return to its depositor the check; and that the evidence introduced into this case was insufficient to prove a custom, on the part of the banks of the city, to make immediate examinations of checks, and that reasonable diligence was shown. Decatur Nat. Bank *v.* Murphy, 9 Ill. App. 112.

A bank may rely on the solvency of the drawer of a draft deposited on his account with it, and may charge the same back to the drawer if not paid by the drawee. Hendley *v.* Globe Refinery Co., 106 Mo. App. 20, 79 S. W. 1163.

70. Though the amount of a check left for collection has been credited to a depositor's cash, it may be charged back to him in case it turns out worthless, unless the bank has been negligent, or has done something to mislead him, thereby inducing him to act to his own injury. Savings Inst. *v.* Folk, 38 Pa. Super. Ct. 54.

Although the amount of a check left with a bank for collection has been credited to a depositor as cash, it may be charged back to him in case it turns out to be worthless, unless the bank has been negligent, or has done something to mislead the depositor, thereby inducing him to act to his own injury on the faith of the goodness of the check. Union Safe Deposit Bank *v.* Strauch, 20 Pa. Super. Ct. 196.

collection back to the depositor in case of nonpayment does not change the relation of banker and depositor.[71]

Sight Drafts Credited as Cash.—Where a bank receives on deposit, as cash, sight drafts of a depositor, the right of the bank to recall the credit, on default of payment of the drafts, is superior to the depositor's right to check against the fund.[72]

Right of Holder of Outstanding Checks.—A bank, after giving a customer credit by the proceeds of a draft, can not withdraw the credit to the prejudice of the holders of outstanding checks drawn upon the fund pursuant to agreement with the bank when the credit was given, though there was no discount.[73]

Lien on Goods Represented by Bill of Lading.—Where a bill of lading is attached to a draft for the amount of which a bank gave its customer credit, the bank has a first lien on the goods represented thereby, which it is bound to assert for the protection of the holders of checks drawn by the customer on the proceeds of the draft, and can not, after the goods have been attached by creditors of the consignor, abandon its lien and withdraw the credit, to the prejudice of such check holders.[74]

Where Transaction a Loan.—Where the credit to the account of the depositor is an advancement or loan to him on the faith of the payment of the check or draft, he is liable therefor, the draft or check not having been paid.[75]

§ 127 (1cb) Revesting Title in Depositor.—Charging back a dishonored paper to a depositor revests title in him.[76]

§ 127 (1cc) Release of Drawer or Payer.—That a bank which had received a check for deposit regular on its face, without notice of any equities, had, by a bookkeeping entry, charged the amount of the check back

71. Dymock *v.* Midland Nat. Bank, 67 Mo. App. 97.

72. **Sight drafts.**—Jacob *v.* First Nat. Bank, 5 O. Dec. 572, 3 Wkly. L. Bull. 274.

73. **Holder of outstanding check.**—German Nat. Bank *v.* Grinstead, 21 Ky. L. Rep. 674, 52 S. W. 951.

74. **Lien on goods represented by bill of lading.**—German Nat. Bank *v.* Grinstead, 21 Ky. L. Rep. 674, 52 S. W. 951.

75. **Transaction a loan.**—Where plaintiff bank, with which defendants deposited a draft for collection, on getting notice that the draft had been received by the bank to which it was forwarded for collection, entered the amount of the draft to defendants' credit, and permitted them to check it out in the ordinary course of business, this was an advancement or loan to them on the faith of the payment of the draft, so that they were liable therefor to it; the draft not having been paid, through no fault of it or the other bank. Farmers' Nat. Bank *v.* Merchants' Nat. Bank (Tex. Civ. App.), 136 S. W. 1120.

76. **Revesting a title in depositor.**—Defendant indorsed a sight draft to a bank, with which he had an account, and the same was placed to his credit. Said bank forwarded it to the drawee bank, where it was protested, and on its return it was given back to defendant, and charged to him. Defendant then sent it a second time to the drawee, to whom the drawer then paid it. Held, that defendant was the owner of the fund in the hands of the drawee. Pickering *v.* Cameron, 103 Iowa 186, 72 N. W. 447.

to the depositor, where default had been made in its payment, does not release the drawer from his liability thereon to the bank.[77]

§ 127 (1d) Certificate of Deposit Credited as Money.—Where a bank receives certificates of deposit in another bank and credits them as money to the depositor, the title to them rests in it and is not divested by charging them back to the depositor.[78]

§ 127 (1e) Deposit of Check to Make Good Overdraft.—Where checks are deposited to make good an overdrawn account of the customer, such checks become the immediate property of the bank.[79]

§ 127 (1f) Paper Forwarded to Correspondent.—Where the owner of a check indorses it and deposits it in the bank without any agreement as to the transaction, and the bank indorses it to the order of its correspondent in the city where the drawee bank is located, with a guaranty of the previous indorsement, and, forwards it with the deposit slip attached for credit as a deposit to such correspondent, who accepts it, and undertakes to collect it, the title to the check vests in the second indorsee.[80]

§ 127 (2) Bank Agent for Collection.—Where the bank takes the paper as agent for collection it has no title thereto otherwise than as agent.[81] Thus the payee of a draft with bill of lading attached usually retains ownership of both the bill and the draft.[82]

77. **Release of drawer or payer.**—Riverside Bank *v.* Woodhaven Junction Land Co., 34 App. Div. 359, 54 N. Y. S. 266.

78. **Deposit of certificate of deposit.**—Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 33 L. Ed. 747, 10 S. Ct. 450.

One Y. indorsed certificates of deposit to plaintiff bank, and received credit as for so much money. While they were in the hands of plaintiff's correspondent for collection they were attached by defendants as the property of Y. A few days thereafter plaintiff, hearing that the bank issuing the certificates was in a precarious condition, charged them back to Y., so far as appears, without his consent. Held, in an action for the value thereof, that it was error to direct a verdict for defendants, on the ground that the title passed back to Y. when they were charged back to his account. First Nat. Bank *v.* Dickson, 6 Dak. 301, 50 N. W. 124.

79. **Checks to make good overdraft.**—Balbach *v.* Frelinghuysen, 15 Fed. 675.

80. **Paper forwarded to correspondent.**—Noble *v.* Doughten, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A., N. S., 1167.

Where a draft payable to plaintiffs was indorsed for deposit and delivered to a bank, which then indorsed it to its own order "for collection," and it was sent to defendant bank, defendant bank could not be held liable for delay in presenting the draft, on the theory of an agency for plaintiffs, inasmuch as the first bank undertook the collection, and as between it and defendant the first bank was the owner, and the second its agent alone. Morris *v.* First Nat. Bank, 201 Pa. 160, 50 Atl. 1000.

81. **Bank agent for collection.**—The title to checks and drafts deposited in a bank for credit to the depositor's account remains in such depositor until they are collected, although the amount thereof is at the time entered on his book as a credit. Philadelphia *v.* Eckels, 98 Fed. 485.

82. **Draft with bill of lading attached.**—Generally, the payee of a bill of exchange, by indorsing it (otherwise in blank) "for deposit to the credit of" himself, retains ownership not only of the bill, but of its proceeds until they are so deposited. The money realized by collecting the bill is, in the hands of a disinterested bank through whose agency the collection was made, subject to garnishment as

Paper transmitted to the bank before due does not become the property of the bank immediately on its receipt[83] but is taken for collection only.[84]

§ 127 (3) Title as between Bank and Maker or Drawer.—Where the payee of a draft deposited it with a bank, and received credit at the bank as depositor, the proceeds of the draft became the property of the bank, and could not be recovered by the drawer on a failure of consideration of the draft as between the drawer and the payee.[85]

§ 127 (4) Title as between Depositor and Third Person.—Where plaintiffs drew drafts on the persons to whom they had sold cotton for the price thereof, and caused them to be placed in defendant bank after making an agreement with it as to the amount of exchange it should have for collecting them, the officers of the bank knowing that such drafts included plaintiffs' profits on the purchase and sale of the cotton, it will be presumed that the drafts were deposited to plaintiffs' credit, and the bank has the burden of proof to show that they were deposited to the credit of persons from whom plaintiffs bought the cotton.[86] Where defendant bank knew that plaintiffs were negotiating for the purchase of cotton, and that they had customers therefor, and agreed with plaintiffs to collect, for a

assets belonging to such indorser. Freeman *v.* Exchange Bank, 87 Ga. 45, 13 S. E. 160.

Where by a bill of lading goods are deliverable to the order of the consignor, who indorses it in blank and delivers it, together with his draft for the purchase price, to a bank, indorsing the draft for deposit to his own credit, and the bank thereupon forwards both documents to another bank at the place to which the goods are consigned, and a third person pays the draft, receives the bill of lading and takes the goods as purchaser, the bank is not a joint vendor with the consignor, but the consignor alone is the vendor and liable to the purchaser for any defect in the quality of the goods, or any failure of an implied warranty as to their quality. A joint action against such consignor and the bank upon such warranty is not maintainable. Fourth Nat. Bank *v.* Mayer, 89 Ga. 108, 14 S. E. 891.

83. Undue paper.—Where a customer has an account with a bank subject to check, which account draws interest on the average balance, and the customer is in the habit of remitting moneys and bills to the bank, a draft remitted by him, before due, in accordance with such habit, does not become the property of the bank immediately on its receipt by the bank, the latter not being obliged to give credit therefor to the customer before it was paid. Scott *v.* Ocean Bank, 23 N. Y. 289.

84. Defendants left with the plaintiff bank time drafts on a person in another city, entering them on a deposit ticket as a cash item, and stamping on them the indorsement, "For deposit only to credit of" defendants. The drafts were not discounted by plaintiff, nor credited to defendants, but were entered as having been received for collection only. There was evidence that prior to this transaction plaintiff, to secure defendants' business, agreed to receive checks and sight drafts, and credit them as cash, but the agreement did not extend to time paper, and there was no proof that such paper was ever credited except as collected. Held, that the drafts, when received by plaintiff, did not become its property, but were taken for collection only. Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618.

85. Title as between bank and maker or drawee.—Reed Grocery Co. *v.* Canton Nat. Bank, 100 Md. 299, 59 Atl. 716, 70 L. R. A. 959.

86. Title as between depositor and third person.—Farmers', etc., Bank *v.* Slayden, 8 Tex. Civ. App. 63, 27 S. W. 424.

certain exchange, the drafts which plaintiffs should draw on their customers for the price thereof, and encouraged the sale and got the benefit of all plaintiffs paid therefor, it is immaterial, on the question of whether plaintiffs deposited the drafts with defendant to their own credit, or that of the persons from whom plaintiffs bought the cotton, that such persons owed defendant, and defendant had an equitable lien on the cotton for such debt, this not being known to plaintiffs.[87]

§ 127 (5) Insolvency of Bank of Deposit.—A depositor of a check[88] or a draft[89] for collection with an insolvent bank or one which becomes insolvent before collection, is entitled to the proceeds as against the bank, since no title passed to it except as bailee.[90] Where a general deposit is made before formal insolvency, there can be no recovery in preference to other creditors; but where the deposit has been kept separate, and not fully received before formal insolvency, the depositor may claim it; and money received upon collections subsequent to formal insolvency belongs to the owner of the paper, and can be recovered in full if it can be traced to the particular paper.

Return of Check.—Where a bank received a check on another bank indorsed for deposit to the credit of "the drawers," and the next day the bank receiving the check became insolvent and the drawers stopped payment, they were entitled to a return of the check.[91]

Checks Deposited as Cash.—Where checks are indorsed and deposited in a bank as cash they become the property of the bank, and on the insolvency of the bank the depositor can not follow them or their proceeds into

87. Farmers', etc., Bank *v.* Slayden, 8 Tex. Civ. App. 63, 27 S. W. 424.

88. **Acceptance while insolvent—Recovery.**—The acceptance of a deposit by a bank irretrievably insolvent constitutes such a fraud as entitles the depositor to reclaim his drafts or their proceeds. St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 576, 33 L. Ed. 683, 10 S. Ct. 390. See Easton *v.* Iowa, 188 U. S. 220, 230, 47 L. Ed. 452, 23 S. Ct. 288, where it is said that, though there is no express prohibition of such receipt in the federal statutes, there are apt provisions, sanctioned by severe penalties, to protect depositors and other creditors from fraudulent banking.

A city treasurer deposited checks in a bank, indorsed by him "For deposit," and the checks were immediately credited to him on his pass book, though not in pursuance of any agreement to that effect. He had been a depositor in the bank for some years, but had no agreement that his checks should be treated as cash, or that he should draw against them before collection. The bank became insolvent before the checks were collected, and their proceeds passed into the hands of a receiver. Held, that no title passed to the bank except as a bailee, and that the depositor was entitled to the proceeds. Beal *v.* Somerville, 1 C. C. A. 598, 50 Fed. 647, 17 L. R. A. 291.

89. Where a sight draft is credited by a bank to a depositor in his pass book and on its own books as cash, the bank does not become owner of the draft, so as to be entitled to the proceeds when afterwards paid, when it was insolvent at the time of making the credit, and closed its doors before the draft was paid. St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390.

90. American Exch. Nat. Bank *v.* Loretta Gold, etc., Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233.

91. **Returning check.**—Geuder, etc., Mfg. Co. *v.* American, etc., Sav. Bank, 51 Ill. App. 349, affirmed in 150 Ill. 536, 37 N. E. 227.

the hands of a third person, who receives them in good faith in the usual course of business.[92]

§ 127 (6) Insolvency of Payee Bank.—Where a bank receives a check of another bank and credits a depositor and sends the check to a third bank for collection, and the bank to which the check is sent receives the money, but closes its doors before remitting to the collecting bank, the credit given the depositor may be annulled.[93]

§ 127 (7) Evidence as to Whether Title Passed to Bank.—Evidence that the payee of a draft alleged to have been sold to a bank and dishonored afterwards received from the drawer a sum of money in part payment of such draft tends to show that the transaction was a deposit for collection,[94] and not a sale.

§ 128. Title to and Disposition of Deposits[94a]—§ 129. —— In General—§ 129 (1) Title Generally.—See post, "Title Generally and Relation Created," § 131 (1).

Presumption of Ownership.—The legal presumption that follows the deposit of money in the individual name of a man is that the money so deposited is the property of the depositor.[95] Where a person deposits money in a bank, the fact that the deposit is in his own name and that he draws it out on his personal check is prima facie evidence that the money is his.[96]

92. Checks deposited as cash.—Doppelt *v.* National Bank, 175 Ill. 432, 51 N. E. 753.

Where a person deposits in a bank a check payable to his order, indorsed, "For deposit to the credit" of the payee, the depositor can not claim the check, as against another bank, with which it has been deposited by the first bank, which received credit for its full amount, and thereafter, having overdrawn its account, made an assignment for creditors. Ditch *v.* Western Nat. Bank, 79 Md. 192, 29 Atl. 72, 138, 47 Am. St. Rep. 375, 23 L. R. A. 164.

Where a check, which is due, is indorsed in blank by the payee, and deposited by him upon his general account, and he is credited, without dissent on his part, with the amount, the title to the check vests in the bank, which may have recourse to the depositor only upon his indorsement, and, upon the failure of the bank, payment of the check to the indorsee of the bank can not be stopped by the depositor. Metropolitan Nat. Bank *v.* Loyd (N. Y.), 25 Hun 101.

93. Insolvency of payee bank.—Bank *v.* English, 27 Okl. 334, 111 Pac. 386.

94. Evidence.—Bank *v.* Webb, 108 Ala. 132, 12 So. 14. See ante, "In General," § 127 (1a).

In an action by a bank to recover money advanced on a draft, for goods sold, deposited with it by the vendor, where it claims that the deposit was made for collection, and the depositor that it was a sale, it is proper to instruct that, if it was a sale, the bank could not recover, though there is evidence that the vendee, after the deposit, paid part of the price for which the draft was drawn directly to the vendor. Bank *v.* Webb, 108 Ala. 132, 19 So. 14.

94a. Priorities in payment on insolvency of bank, see ante, "Presentation and Payment of Claims," § 80.

Special deposits, see post, "Special Deposits," § 153.

See post, "Title As between Depositor and Third Person," § 127 (4).

See post, "Funds of Person Other than Depositor," § 131.

96. Boatmen's Sav. Bank *v.* Overall, Farmers' Loan, etc., Co. *v.* Fidelity Trust Co., 30 C. C. A. 247, 86 Fed. 541.

96. Boatmen's Sav Bank *v.* Overall, 90 Mo. 410, 3 S. W. 64.

Right to Show True Ownership.—The ownership of the deposit can be shown to be different from the apparent ownership imported by the entry on the book, but whether the bank is chargeable to the true owner must depend upon the circumstances of the case. In conflicting demands on such a deposit the bank stands as a mere stakeholder and would have a right to demand indemnity.[97]

Notice to Bank of Interest of Depositor.—That a depositor has an interest in a fund deposited is sufficiently disclosed to the bank by depositing the money in his own name, though with an addition that does not change the nature of the deposit, and notifying the cashier that no other person than himself is to check on the fund.[98]

§ 129 (2) Obligation of Bank Generally.—It is immaterial, so far as respects the duty of the bank to the depositor, in what capacity the depositor holds or possesses the fund which he places on deposit. The obligation of the bank is simply to keep the fund safely, and to return it to the proper person or to pay it to his order.[99] A bank is not made to exercise supervisory functions over its depositors.[1] It is not sponsor for all its depositors, although it may know the character of their business. Its relations to its depositors are those of debtor; and, generally, receiving and paying out money on the checks of its depositors, it discharges the full measure of its obligations. It is not ordinarily bound to inquire whence the depositor received the moneys deposited, or what obligation such depositor is under the other parties. It is only when there gather around any deposit, or line of deposits, circumstances of a peculiar nature, which individualize that deposit or line of deposits, and inform the bank of peculiar facts of equitable cognizance, that it is debarred from treating the deposit as that of moneys belonging absolutely to the depositor.[2]

§ 129 (3) Special Agreements Respecting Disposition.—A bank deposit is subject to any agreement which the depositor and the banker may make as to it, so long as the rights of third parties are not injuriously affected.[3] And the bank having faithfully performed its trust, no third per-

97. **Right to show ownership.**—Stair *v.* York Nat. Bank, 55 Pa. 364, 93 Am. Dec. 759; Frazier *v.* Erie Bank (Pa.), 8 Watts & S. 18; Harrisburg Bank *v.* Tyler (Pa.), 3 Watts & S. 373; Bank *v.* Macalester, 9 Pa. 475; Bank *v.* Jones, 42 Pa. 536.

98. **Notice to bank of interest of depositor.**—Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 864; Sequel to National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826.

99. **Obligation of bank.**—Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. Rep. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

1. Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

2. Union Stock Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 34 L. Ed. 724, 11 S. Ct. 118.

3. **Special agreement as to disposition.**—Shopert *v.* Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515.

Agreement to apply to certain note.—Where a son, having no account in a bank, deposits a sum of money in his father's account, for the purpose of having the money applied to the payment of an outstanding note of his own payable at the bank, and the teller accepts the deposit and agrees to its application, but before the note was presented, a year afterwards, and when

son is entitled to recover the amount of the deposit from it.[4]

Checks Required to Be Countersigned by Loanor.—The fact that a deposit of borrowed money is made under an agreement that it shall be withdrawn only on checks countersigned by the loanor does not create an interest in the loanor.[5]

Deposit Subject to Check of Depositor or Wife.—Where a husband deposited money in a savings bank belonging to himself, saying he wanted it so that he or his wife could draw the money, and both he and his wife entered their name on the signature book, opposite which the clerk of the bank wrote the words, "To be drawn by either," and a pass book was given to the husband as a voucher for the deposit, the wife was not in respect

long overdue, the father was permitted to draw out the son's money, the bank is liable to the son for the amount which the latter had deposited. Weitzel *v.* Traders' Nat. Bank, 18 Pa. Super. Ct. 615.

Same — Performance impossible.—Where a bank depositor deposited a draft to his own credit, a previous understanding between him and the bank cashier that the proceeds of such draft, when it was deposited, should be credited upon a certain note previously executed by the depositor, did not authorize the cashier to credit the proceeds of such draft to the account of the payee of the note at a time when the note was in the hands of another bank, and beyond the payee's control, so that it was impossible to indorse the payment on the note, and thus relieve the depositor, to the extent of the payment, from liability to the holders of the note. Kunze *v.* Tawas State Sav. Bank, 130 Mich. 688, 90 N. W. 668.

Death of owner as terminating agreement.—If three persons appear together at a bank, and make a deposit in the name of a fourth, who is the real owner, and it is agreed between them and the bank that the deposit shall be withdrawn only when all are present, and the person in whose name the deposit is made afterwards dies, this does not put an end to the agreement. Riley *v.* Albank Sav. Bank (N. Y.), 36 Hun 513.

4. When, by the terms of a contract of deposit, money is received on deposit in the name of the daughter of the depositor, with the agreement that the depositor may draw such deposit on checks signed by him, and he does draw the money so deposited on checks so signed, the daughter can not hold the bank for the money so deposited and drawn out. Greene *v.* Bank, 7 Idaho 576, 64 Pac. 888.

The owner of a tract of land, desiring to sell it, placed it in the hands of an agent, who made a conditional sale, and received from the proposed purchaser a sum, which was to constitute a part of the purchase money if the conditional sale was approved, and, if not, the money was to be returned. The money was deposited in a bank, to be disposed of in accordance with these conditions, and the bank issued an ordinary deposit slip without any conditions written thereon, which was delivered to the owner of the land. He did not ratify the sale, and the money was withdrawn by his agent, and returned to the proposed purchaser. Subsequently the owner brought an action against the bank on the deposit check, claiming that it was an unconditional agreement, and that the bank was absolutely liable for the amount deposited. Held, that the bank faithfully performed its trust, and that the landowner was not entitled to recover. Brown *v.* Kinsley Exch. Bank, 51 Kan. 359, 32 Pac. 1113.

5. Check required to be countersigned.—B. solicited P. to obtain a loan of $20,000 to finance a publishing proposition, agreeing to pay a bonus of $5,000 therefor. B. executed notes for the amount, part of which was deposited to the credit of a special bank account, under the agreement that it should be withdrawn only on checks countersigned by P. Held, that the relation of the parties was that of borrower and lender only, and that P. had no interest in the deposit either as a partner in the publishing enterprise or as a tenant in common of the fund. National City Bank *v.* Third Nat. Bank, 100 C. C. A. 556, 177 Fed. 136. See post, "Countersigning," § 138 (4ce).

thereto a creditor of the bank, but the husband was the sole creditor.[6]

§ 129 (4) To Whom Payment to Be Made—§ 129 (4a) In General.—The obligation of a bank receiving money from a depositor for his own use, without any knowledge that it belongs to some other person, is to repay the money to him on his order, upon the return of the certificate properly indorsed,[7] or where the deposit is subject to check upon presentation of the depositor's check.[7a]

Money Subject to Lien.—See post, "Source from Which Funds Deposited Derived," § 133 (1c).

§ 129 (4b) Payment to Person Other than Depositor—§ 129 (4ba) In General.—The relation between a bank and a depositor being that of debtor and creditor, the bank can justify a payment on the depositor's account only upon the actual direction of the depositor.[8] It is sufficient if the bank practically carries out the instructions of a depositor as to paying his deposit to the third person;[9] but it is liable for payment of a deposit upon the direction of a person who was unauthorized to give it.[10] A bank is also liable for paying a deposit to one to whom the depositor without the privity of the bank, and without an order, has promised it.[11]

Oral Order—Necessity for Check.—A check is only a written order, and the bank may lawfully transfer a deposit on the depositor's oral order.[12]

§ 129 (4bb) Payment to Wrong Person—§ 129 (4bba) In General.—The principle upon which the liability of a bank for a wrongful payment on a deposit depends is that the bank is liable for its violation of by-law contracts, and for its negligence. If it pays out a deposit contrary to its by-laws, or if, from negligence, it pays to a wrong person, it must pay again to the true owner. But where it pays according to its rules without

6. **Deposit subject to check of depositor's wife.**—Brown *v.* Brown (N. Y.), 23 Barb. 565.

7. **To whom payment to be made.**—Fiore *v.* Ladd, 22 Ore. 202, 29 Pac. 435.

7a. Fiore *v.* Ladd, 22 Ore. 202, 29 Pac. 435. See post, "Payment of Checks," § 137.

8. **Payment to person other than depositor.**—Judgment, 103 N. Y. S. 1141, 118 App. Div. 907, affirmed, which affirms 100 N. Y. S. 740, 51 Misc. Rep. 103. Seaboard Nat. Bank *v.* Bank, 85 N. E. 829, 193 N. Y. 26.

9. Where a bank officer, acting at the request of plaintiff without compensation, on being instructed to pay plaintiff's money to one of the defendants on his presenting a note signed by himself and indorsed by the other defendant, made the payment on presentation of a note signed by one of the defendants, with a communication from the other stating that he would sign the note, neither such bank officer nor the bank is liable; the instructions of plaintiff being practically carried out. Petty *v.* Gacking, 97 Ark. 217, 133 S. W. 832.

10. Ilgenfritz *v.* Pettis County Bank, 21 Mo. App. 558.

11. Bankers, who receive money from A. B., and hold it subject to his order, may not pay it to one to whom A. B., without the privity of the bankers, and without an order, has promised it. Coffin *v.* Henshaw, 10 Ind. 277.

12. **Oral order sufficient.**—Whitsett *v.* People's Nat. Bank, 138 Mo. App. 81, 119 S. W. 999. See post, "Payment of Checks," § 137.

negligence, payment will be good, even though it is made to one who had no right to receive it.[13]

Mistake of Identity—Depositors' Having Same or Similar Names.—Whether a bank, having deposits standing in the names of two separate persons, which are spelled differently, but pronounced alike, in paying the amount due to one of these depositors, ought to have known or supposed that he was the person intended as the defendant in a trustee process served upon the bank, in which his name was spelled like that of the other depositor, is a question of fact not open on appeal.[14] A bank, which pays as garnishee under execution against a judgment debtor other than its depositor, though bearing the same name, the deposit, or a part thereof, of such depositor, is liable to him to the amount of the payment.[15]

Mistake as to Identity of Person Named in Order.—If a person presents a telegraph order for money to a bank, and represents himself to be the person named in the order, and a man of good standing and character identifies him as the person named in the dispatch, and indorses his signature to a receipt for the money as correct, the bank is not guilty of negligence in paying him the money, although it turns out he is not the person named in the order.[16]

Failure to Notify Correspondent of Beneficiary's Right.—On the ground of negligence, a bank is liable, to the beneficiary, for a deposit with it to the credit of a second bank for the use of an individual, where it delivers such deposit to a third bank, to be credited to the said second bank, without preserving its identity by giving notice of the beneficiary's rights.[17]

Signature of Depositor Required to Accompany Deposit.—The fact that a bank makes a practice of requiring the signature of customers to accompany their deposits will not protect it from liability to the real owner for paying out the deposit to another person.[18]

§ 129 (4bbb) Bank Payee of Check.—A bank which is payee of a check in taking it for deposit becomes answerable to the drawer of it for its disposition.[19] Thus, where the drawer of a check upon one bank in favor of another delivers the check to a person with oral instructions to deposit it to the drawer's credit in the bank in favor of which it is drawn, and that person deposits it there to his own credit, as trustee for the drawer,

13. **Payment to wrong person.**—Providence Assisting Ass'n *v.* Citizens' Sav. Bank, 19 R. I. 142, 32 Atl. 306.

14. **Depositor's names not spelled alike.**—White *v.* Springfield Inst., 134 Mass. 232.

15. O'Neil *v.* New England Trust Co., 28 R. I. 311, 67 Atl. 63.

16. **Mistake as to identity of payee.**—California *v.* Western Union Tel. Co., 52 Cal. 280.

17. **Failure to notify correspondent of beneficiary's right.**—Union Stock-Yards Nat. Bank *v.* Dumond, 33 Ill. App. 102.

18. **Signature of depositor required to accompany deposit.**—Sims *v.* United States Trust Co., 103 N. Y. 472, 9 N. E. 605.

19. **Bank payee of check.**—Mills *v.* Nassau Bank, 52 Misc. 243, 102 N. Y. S. 1119; Sims *v.* United States Trust Co., 103 N. Y. 472, 9 N. E. 605.

and afterwards draws the money, the bank is liable to the drawer of the check for the money so paid.[20]

§ 129 (4bbc) Right of Bank to Recover Money.—Where money deposited in a bank by one person is by mistake credited to another person, and drawn out by him, it may be recovered by the bank from the person to whom it was paid by mistake.[21]

§ 129 (4bc) Particular Person—§ 129 (4bca) Endorsee of Certificate of Deposit.—As between the depositor and the bank the bearer of a certificate of deposit endorsed in blank has authority to control the fund, and is entitled to receive payment thereof.[22]

§ 129 (4bcb) Assignee of Creditors.—Where, after an assignment for the benefit of creditors, the assignor continued his deposit account with a bank in his own name, without notice to the bank of the assignment; the assignee could maintain suit against the bank to recover a balance therein on the check of the assignor.[23]

§ 129 (4bcc) Committee or Guardian.—Committee of Legal Owner.—A payment by a bank of money on deposit to the committee of the legal owner bars a recovery against the bank by an indorsee of the depositor.[24]

Deposit by Ward as Executor or Administrator.—See post, "Deposits by Executor or Administrator," § 131 (11).

20. Sims *v.* United States Trust Co., 103 N. Y. 472, 9 N. E. 605.

21. **Right of bank to recover money.**—McKinney *v.* Traders' Deposit Bank, 15 Ky. L. Rep. 30.

22. **Endorsee of certificate of deposit.**—Weirick *v.* Mahoning County Bank, 16 O. St. 296.

The maker of a note made a deposit in a certain bank to the credit of the bank holding the note, taking a letter addressed to the latter bank acknowledging the deposit to its credit and by whom made. The depositor then addressed the letter in blank, and delivered it to a third person, to be carried to the bank for the purpose of having the amount applied upon the note, but, instead of so doing, the indorsee drew the money for his own use. Held, that the indorsement, in the absence of notice of the circumstances under which it was made, authorized the bank to pay the money to the holder of the letter. Weirick *v.* Mahoning County Bank, 16 O. St. 296.

Depositor indebted to bank on note of indorsee.—The holder of a letter or certificate of deposit, who is indebted to a bank on a promissory note given for the accommodation of a third person, indorsed the letter to such third person to have it delivered to the bank, and the amount credited on the note, but instead of so doing the indorsee drew the money for his own use. Held, that the fact that the depositor was indebted to the bank on the note of such indorsee did not constitute notice that the fund was to be applied in payment thereof. Weirick *v.* Mahoning County Bank, 16 O. St. 296.

23. **Assignee of creditors.**—Stewart *v.* National Security Bank (Pa.), 6 Wkly. Notes Cas. 399.

24. **Committee of legal owner.**—When plaintiff deposited money of B.'s in his own name in a bank, and gave B. checks for the same, who indorsed them to C., and B. was declared a lunatic, and the money paid to his committee, and C. recovered a judgment against plaintiff on the checks, the payment to the committee bars an action by plaintiff against the bank to recover. Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743.

§ 129 (4bcd) Donee.—Where money is deposited in a bank, and the depositor receives from the bank a deposit book containing a rule requiring depositor to draw money by written order or power of attorney, this condition of the contract of deposit does not impair the rights of the depositor as a creditor of the bank, and his donee may draw the money without a written order or power of attorney signed by the depositor.[25] The donee, after the death of the donor, need not procure the appointment of an administrator to make a demand for the deposit.[26]

§ 129 (4bce) Partner.—A representation by a depositor that one who presented a check in his favor, purporting to be signed by depositor, was his partner in respect to the deposit, would authorize the bank to pay the same to such person, however drawn.[27]

§ 129 (4bcf) Surviving Spouse.—Deposit in Name of Estate of Deceased Wife.—Where the husband is entitled to the whole of his deceased wife's personal property subject to payment of the debts of the wife, a deposit in bank standing in the name of the deceased wife's estate belongs to the husband.[28]

§ 129 (4bcg) Executor or Administrator.—On the decease of a depositor an amount standing to his credit on general deposit should be paid to his legal representative.[29]

Deposit in Trust or Fiduciary Capacity.—If a deposit of a deceased depositor should be presumed to be trust property the executor or the administrator of the depositor stands in place of the depositor until some beneficiary asserts a claim against the bank and the bank is bound to pay him, as it would have been bound to pay the depositor himself, if living. The trust which inhered in the deposit is upon his death passed to his personal representative, who is bound to administer all the assets of the deceased, as trustee, of whatever kind, and to administer the trust with which the assets are charged.[30] The appendage to the name of the depositor of words merely descriptio personæ does not change the rule.[31]

25. Donee.—Gammond *v.* Bowery Sav. Bank, 7 N. Y. S. 321, 26 N. Y. St. Rep. 930.

26. Gammond *v.* Bowery Sav. Bank, 8 N. Y. S. 856, 15 Daly 483, 29 N. Y. St. Rep. 136.

27. Partner.—Bruin *v.* Garza (Tex. Civ. App.), 26 S. W. 108.

28. Deposit in name of estate of deceased wife.—A deposit stood in the name of "Estate of K., W., Administrator." K. was the deceased wife of W. Held, that the deposit belonged to W., as surviving husband, or, if the relation of debtor and creditor existed between the bank and any other person, the debt was in law one owing to the husband. Order, 49 Misc. Rep. 432, 99 N. Y. S. 853, affirmed. Gittings *v.* Russell, 114 App. Div. 405, 99 N. Y. S. 1064, affirmed in 187 N. Y. 538, 80 N. E. 1110.

29. Personal representative.—Scudder *v.* Trenton Sav. Fund Soc., 58 N. J. Eq. 154, 43 Atl. 3.

30. Deposit in trust.—Boone *v.* Citizens' Sav. Bank, 84 N. Y. 83, 38 Am. Rep. 498; Schluter *v.* Bowery Sav. Bank, 117 N. Y. 125, 22 N. E. 572, 5 L. R. A. 541, 15 Am. St. Rep. 494.

31. Descriptio personæ.—A deposit in a savings bank, made in the name of "W. P. S., Surrogate," can be drawn by the administrator of S., since it must be regarded as a mere personal deposit, where it is not shown that at the time of the deposit there was any

Effect of Payment to Executor or Administrator.—Payment by a bank to the administrator of a depositor whose account was in trust or in a fiduciary capacity, upon production of the letters of the administrator and the deposit book, in the absence of any notice from the beneficiary, is valid and effectual to discharge the bank of any liability for the deposit,[32] even though the administrator to whom the payment was made was a foreign administrator.[33] Payment to the personal representative, although he is a foreign administrator, is good because at the death of the intestate he becomes entitled to all his personal property wherever situated and, having the legal title thereto, he can demand payment of choses in action; and a payment to him made anywhere in the absence of any conflicting claim existing at the time, is valid, although such administrator could not have brought action to enforce it.[34]

Deposits of an Administrator or Executor.—Upon the death of an administrator before the settlement of his account, his executor is entitled to recover from a bank the balance standing to the credit of a deposit account, which said administrator had opened in said bank in his representative capacity. The bank can not defend by setting up payment to the administrator de bonis non of the original intestate.[35] Where a sheriff, appointed executor of a decedent's estate, deposited money in a bank, which was credited to his account as sheriff, in an action by the administrator de bonis non, the sheriff having died, to recover the deposit, which the bank still held, it may be shown, that such money belonged to the decedent's estate.[36]

trust fund under the control of the surrogate, or that there was a statute providing for an official fund to be held by the surrogate. Scudder *v.* Trenton Sav. Fund Soc., 58 N. J. Eq. 154, 43 Atl. 3.

32. Effect of payment to executor, etc.—Boone *v.* Citizens' Sav. Bank, 84 N. Y. 83, 38 Am. Rep. 498.

Previous to 1882 a person deposited money with a bank in her own name in trust for another. After her death, her administrator and executor applied for the moneys, and obtained them on production of letters testamentary and of administration, and on surrender of the pass book. Held, that the payment was good, since, previous to the passage of Laws 1882, c. 185, upon the death of a depositor her rights as trustee devolved upon her administrator and executor; such rule not having been changed by Laws 1875, c. 371, allowing deposits made by or on behalf of minors to be paid them. Schluter *v.* Bowery Sav. Bank, 47 Hun 633, 13 N. Y. St. Rep. 413, affirmed in 117 N. Y. 125, 22 N. E. 572, 5 L. R. A. 541, 15 Am. St. Rep. 494.

33. Foreign administrator.—The mother of plaintiff's intestate deposited a sum of money in defendant's bank as trustee for said intestate, then an infant. The act incorporating the bank provided that deposits should be repaid under such regulations as the board of managers should prescribe. One of defendant's by-laws provided that on the decease of a depositor the amount standing to his credit should be paid to his legal representatives. The depositor having died intestate, her administrator demanded, and was paid, the amount deposited by her. Held, that this payment was effectual to discharge the bank of any liability for the deposit, even though the administrator to whom payment was made was a foreign administrator. Schluter *v.* Bowery Sav. Bank, 117 N. Y. 125, 22 N. E. 572, 5 L. R. A. 541, 15 Am. St. Rep. 494.

34. Schluter *v.* Bowery Sav. Bank, 117 N. Y. 125, 22 N. E. 572, 5 L. R. A. 541, 15 Am. St. Rep. 494.

35. Deposit of an executor or administrator.—Slaymaker *v.* Farmers' Bank, 103 Pa. 616.

36. Stair *v.* York Nat. Bank, 55 Pa. 364, 93 Am. Dec. 759.

§ 129 (5) Particular Deposits—§ 129 (5a) Joint Deposits.—A bank account may be so fixed that two persons shall be joint owners thereof during their mutual lives, and the survivor take on the death of the other.[37]

§ 129 (5b) Deposit by Firm or Partnership.—Notice That Depositor a Firm.—A bank receiving deposits from A. B. P. & Co. is put on inquiry as to whether the depositor is not a partnership, rather than the individual A. B. P.[38]

Deposit with View to Formation of Partnership.—Where a deposit in a bank was made with a view to the formation of a partnership by partners in an old firm and third persons, the partners of the new firm, the moment it became organized, could draw on the account in the name of the new firm, and the bank must honor their checks.[39]

Liability of Bank for Misappropriation by Partner.—See post, "Applying Firm Deposit to Individual Debt," § 134 (8b). A banker is liable for funds misappropriated by one of the firm if at the time of payment of checks drawn by such member he had actual knowledge of such misappropriation, or if he paid them "under such circumstances as that, in the exercise of ordinary diligence, he had reason to know of such misappropriation."[40]

37. Joint depositor.—Judgment, 108 N. Y. S. 1138, reversed in Kelly *v.* Beers, 194 N. Y. 49, 86 N. E. 980.

Where money is deposited in a bank to the credit of two persons jointly, it is presumed that their interests in the deposit are equal. Tompkins *v.* McGinn (Tex. Civ. App.), 85 S. W. 452.

The possession of a pass book by one of the parties in whose name the account in bank stands does not establish the sole ownership of the fund in the party thus in possession; it merely evidences a deposit in their joint names. Tompkins *v.* McGinn (Tex. Civ. App.), 85 S. W. 452.

Where a deposit stands in the names of two persons jointly, the fact that the bank recognized the right of both to draw the entire deposit is but a construction of facts, a legal inference which can have no weight in a controversy as to their rights in the fund. Tompkins *v.* McGinn (Tex. Civ. App.), 85 S. W. 452.

38. Notice that depositor a firm.—Willey *v.* Crocker-Woolworth Nat. Bank (Cal.), 72 Pac. 832.

39. Deposit with view to formation of partnership.—La Montagne *v.* Bank, 141 App. Div. 250, 125 N. Y. S. 1104.

A new firm took over the assets and continued the business of the old firm, and was required to pay the debts of the old firm up to the value at least of the assets received. A partner of the new firm drew a check on its deposit to pay a bona fide debt of the old firm to the bank on an overdraft. Held, that the bank paying the check was not liable for the amount of the check in a subsequent action by the new firm. La Montagne *v.* Bank, 141 App. Div. 250, 125 N. Y. S. 1104.

40. Misappropriation by partner.—Evans *v.* Evans, 82 Iowa 492, 48 N. W. 929.

A partner introduced his co-partner to a bank as a member of the firm, stating that he desired him to keep his account with the bank, but it did not positively appear that the former knew that the account was so kept afterwards, further than that on one occasion he received a check from his co-partner in satisfaction of a private debt owing to him, which the bank paid; nor did it appear that the bank knew that the co-partner was appropriating firm money in satisfaction of his private debts, otherwise than from memoranda on some of the checks, drawn by the co-partner on the firm account, probably made for private information; nor was it shown that the bank derived any benefit from these payments. Held that, in the absence of a fraudulent design or knowledge on the part of the bank of any misappropriation of the firm funds by the co-partner, it was not liable to replace

Individual Check of Partner.—Money deposited in a bank in the name of a firm can not be drawn out by the individual check of one of the firm in his own name only;[41] and, if the bank pay such check out of the joint funds, it is no defense that the individual partner who drew the check told the bank officer that it was drawn on the joint account, and drawn in his individual name by mistake, and directed him to pay it, and any others of the like kind which he might draw, out of the joint funds.[42] A bank paying out funds deposited by a firm on the individual check of one of the partners can relieve itself from liability to the firm only by showing that such funds were used for partnership purposes.[43] Where a bank pays the individual check of a partner out of funds which the firm has on deposit, the presumption arises that it had notice that the funds were for the partner's private use,[44] but this presumption is rebutable.[45]

such wrongful disbursements. Eyrich *v.* Capital State Bank, 67 Miss. 60, 6 So. 615.

When a banker has the funds of a firm deposited with him for the purpose of its especial business, and knows that one of the firm is engaged in individual speculations, and transfers these funds to the separate account of this member, and with a knowledge that the latter appropriate the funds to such speculations, the banker is liable to the firm for the funds thus misapplied, unless they first assure him of their consent. Billings *v.* Meigs (N. Y.), 53 Barb. 272.

Proof of notice.—On a suit by a banker to collect a partnership note, E., one of the partners, who lived in another city, alleged as a counterclaim that the banker had paid to C., the other partner, large sums of money from the firm's account, knowing that C. was misappropriating them. It appeared that C. had made many checks, payable to the firm, to outside parties, and to himself, and that he had a right to draw for himself an amount equal to his share of the profits. E. admitted that he had frequent access to the books, but stated that he did not know that C. was drawing more than his share. Held, that no knowledge that the funds of the firm were being misapplied by C. could be imputed to the banker. Evans *v.* Evans, 82 Iowa 492, 48 N. W. 929.

On the sale by a firm of its business and a transfer of all its assets to a new firm, a check representing the contribution of a special partner to the capital was in the presence of all the members of the new firm indorsed for deposit by a common member of both firms in the name of the new firm, and deposited to the credit of such firm the day before the statement of partnership was filed; the bank being notified that the certificate of partnership, though signed, would not be filed until the next day. Held that, where a check was drawn on such deposit by one of the general partners of the new firm and applied to an overdraft of the old firm, it was not a misappropriation of the assets of the new firm, authorizing the latter to sue the bank to recover the amount thereof, though the new firm was not authorized under its articles to do business until the next day; no notice of such fact being given the bank, and the circumstances not being of such a character as to put the bank on inquiry as to such provision. Judgment (1904) 88 N. Y. S. 21, 94 App. Div. 219, modified. La Montagne *v.* Bank, 183 N. Y. 173, 76 N. E. 33.

41. Individual check of partner.—Coote *v.* Bank, Fed. Cas. No. 3,203, 3 Cranch, C. C. 50.

42. Coote *v.* Bank, Fed. Cas. No. 3,203, 3 Cranch, C. C. 50.

43. Coote *v.* Bank, Fed. Cas. No. 3,203, 3 Cranch, C. C. 50.

44. Coote *v.* Bank, Fed. Cas. No. 3,203, 3 Cranch, C. C. 50.

45. Where a bank pays the individual check of one of a firm out of firm funds on deposit, the fact that the partner had no funds on deposit individually, and that he informed the bank that he drew the check and might thereafter draw others on the partnership account, is insufficient to overcome the presumption that the bank had notice that the funds were to be appropriated to the private use of the partner. Coote *v.* Bank, Fed. Cas. No. 3,203, 3 Cranch, C. C. 50.

§ 129 (5c) Deposit for Specific Purpose.—See post, "Special Deposits," § 153. Where checks operate as specific appropriation to the extent named therein, of the drawer's funds, which he had placed at the disposal of the bank for a special purpose, to be applied by the bank solely to the payment of such sum or sums as he might become liable to pay, in the event of his failure to comply with the terms of a contract; the bank, as custodian of the money for that specific purpose, had no right to appropriate it in any other way.[46]

§ 129 (5d) Funds Deposited by Mistake.—A bank obtaining possession of funds by mistake, and not for value, can not be said to have any equitable claim thereto, and no injustice is done in compelling it to surrender the same to the true owner.[47]

§ 129 (6) Credits Allowed Bank in Case of Wrongful Payment.—Where a bank paid out money intrusted to it at the direction of a person, who was not authorized to give the direction, and who afterwards paid to the owner of the money a portion of the amount, the owner could recover of the bank the amount intrusted to it, less the amount returned to him by such person.[48]

§ 129 (7) Attachment and Garnishment—§ 129 (7a) Liability to Attachment—§ 129 (7aa) In General.—Ordinarily a deposit in bank is subject to attachment at the instance of a creditor of the depositor, but where a depositor can not himself maintain an action against a bank for the recovery of his deposit on the day of the garnishment, the attaching creditor can not do so.[49] The process is effectual to stop payment and

46. **Deposits for specific purposes.**—Parker *v.* Hartley, 91 Pa. 465.

Money specifically appropriated by check.—A. made certain contracts for the delivery of oil at his own option within a stated time. He deposited in a bank the counterparts of these contracts, and, as security for said contracts, also deposited the checks of H., who was a depositor in the bank. These checks were made payable to the cashier of the bank, "for margin for oil sold as per contracts in the hands" of said cashier. The counterparts of the contracts were indorsed by A. to the effect that the margin was a guaranty for the fulfillment of the contracts, and with the further stipulation that, if more margin was needed, demand should be made on A., and, if not met, the contract was to be sold. The cashier also indorsed on the counterparts the receipts for the margins on the conditions therein set forth. Before the contracts matured, they were settled, and the margins were carried by the bank to the credit of A., who drew them out by check. H. sued the bank for the margins. Held, that the checks operated as a specific appropriation, to the extent named therein, of the drawer's funds, to be applied by the bank solely to the payment of such sum as A. might become liable to pay, on the event of his failure to comply with the contracts; and the bank, as custodian of the money for that specific purpose, had no right to appropriate it in any other way, and was liable. Parker *v.* Hartley, 91 Pa. 465.

47. **Funds deposited by mistake.**—Mingus *v.* Bank, 136 Mo. App. 407, 117 S. W. 683.

48. **Credits in case of wrongful payment.**—Ilgenfritz *v.* Pettis County Bank, 21 Mo. App. 558.

49. **Liability to attachment.**—Rice *v.* Third Nat. Bank, 97 Mich. 414, 56 N. W. 776; Karp *v.* Citizens' Nat. Bank, 76 Mich. 679, 43 N. W. 680.

In garnishment against a bank, it appeared that defendant had been accustomed to deposit with the bank

makes the bank liable to the attaching creditor instead of the depositor, but it can not give him any greater right against the bank than the depositor had.[50] In other words the attachment is a lien on only such property of the debtor as the bank holds when the notice is served on its officer.[51]

§ 129 (7ab) Particular Deposits.—Deposit in Debtor's Name Belonging to Another.—A creditor of a bank depositor, who attaches the deposit, stands in the position of the depositor as to the rights of third parties, and can take nothing if the deposit is of money in fact belonging to another, although deposited in the debtor's name.[52]

Funds deposited in a bank, in the name of one other than the attachment defendant, are not bound by service of the attachment upon the bank as garnishee, even though they actually belong to defendant.[53]

Deposit Made to Pay Check.—Where one deposits money, with directions that it be paid upon a check he has given, the depositee is liable as his garnishee until he has paid, or promised the usee to pay, it, unless the deposit was made under some special arrangement with the usee.[54]

Deposits of Trust Funds.—A trust fund which the depositor may recover from the bank at will is subject to garnishment at suit of creditors of the depositor.[55]

Public Funds.—Where a public officer has received public money in

drafts drawn on customers, and receive credit therefor on account, and it was agreed that, if any drafts were dishonored, the bank should charge them back to defendant; he at all times keeping a certain amount on deposit to cover such returned drafts. When process was served on the bank, defendant had an apparent credit on the account, but, before trial, drafts drawn by defendant, amounting to more than his apparent credit, were returned unpaid. Held, that garnishee was not liable. Rice *v.* Third Nat. Bank, 97 Mich. 414, 56 N. W. 776.

50. Rice *v.* Third Nat. Bank, 97 Mich. 414, 56 N. W. 776.

51. When plaintiff garnishes a bank he acquires a lien on only such property of defendant as the bank holds when the notice is served on the officers. Johnson *v.* Brant, 38 Kan. 754, 17 Pac. 794.

A. deposited money in a bank, payable to the order of B., to whom a certificate of deposit was issued. The bank was garnished as a debtor of B., and subsequently refused to pay the certificate to B. Held, that the debt evidenced by the certificate was subject to garnishment, and that the garnishee process bound the bank from the time payment was refused. Exchange Bank *v.* Gulick, 24 Kan. 359.

52. Deposit belonging to another than depositor.—Adams Co. *v.* National Shoe, etc., Bank, 44 Hun 629, 9 N. Y. S. 75, 23 Abb. N. C. 172; Farmers', etc., Nat. Bank *v.* King, 57 Pa. 202, 98 Am. Dec. 215.

R. obtained money of S., giving him a receipt therefor, the form of which did not appear, and deposited the money in a bank in his own name, and to his own credit, and on the same day drew out on his own check, a large portion thereof in bills of the bank, and made a subsequent deposit in his own name, of bills of the bank, not shown to be the same bills. Held, that S. could not assert a title, as against subsequent attaching creditors of R., to the money last deposited, although R. was insane at the time of receiving and depositing the money, and that it could not be presumed in favor of S. that the receipt given him by R. was in "common form," especially after he had declined to produce it. Fuller *v.* Randall (Mass.), 1 Gray 608.

53. Deposit in name of another than attachment defendant.—Gibson *v.* National Park Bank, 98 N. Y. 87.

54. Deposit to pay check.—Mayer *v.* Chattahoochee Nat. Bank, 51 Ga. 325.

55. Trust funds.—Commercial Nat. Bank *v.* Manufacturers' Equitable Ass'n, 20 Ill. App. 133.

his official capacity and deposited it in bank in his individual name, as a general deposit, without disclosing the fact that the money was a public fund, but without adding or mixing it with his individual moneys, the fund is liable to be seized by the process of garnishment in favor of a creditor without notice that they are public funds and can not be recovered in an action by such officer against the judgment creditor or the agent who received the money. In such case, if the judgment creditor, at or before the time he attached the fund, knew that they were public funds he would not be liable to exemplary damages.[56]

Deposit of Attorney.—Where money is deposited in a bank by an attorney as "atty.," if the bank has no other information as to the ownership of the fund than that indicated by the designation "atty.," it will be justified in paying the money over to the officer levying an attachment in an action against such attorney.[57]

Deposit by Agent as "Agent."—Money belonging to a principal, deposited by an agent in bank in his name as "agent," can not be garnished by creditors of the agent,[58] but a deposit of money in a bank as agent without disclosing any principal may be reached by attachment at the instance of a creditor of the depositor, where no other person claims the money.[59] Where the contention is that money deposit in bank as "agent" in fact belonged to the depositor individually and not to another for whom he claimed to act as agent in making the deposit, the bank can not, except at its peril, pay over the money to the alleged principal.[60]

Deposit by Guardian of Property of Ward.—The property of a person under guardianship on deposit in a bank may be taken on execution or attached on mesne process in all the usual modes, including trustee process.[61]

56. Public funds.—Long *v.* Emsley, 57 Iowa 11, 10 N. W. 280.

Where a township clerk converts money belonging to the town by depositing it in a bank in his own name, and it is there garnished by an individual creditor of his, and judgment is entered against the garnishee and paid, before notice to the judgment creditor that the money is public property, the clerk can not recover the same back. Long *v.* Emsley, 57 Iowa 11, 10 N. W. 280.

57. Deposit of attorney.—Cunningham *v.* Bank, 13 Idaho 167, 88 Pac. 975, 10 L. R. A., N. S., 706.

58. Deposit "as agent."—Des Moines Cotton Mill Co. *v.* Cooper, 93 Iowa 654, 61 N. W. 1084.

59. A. deposited money in a bank as "agent," without disclosing any principal. Held, that the bank might be charged as A.'s garnishee, no other person claiming the money. Proctor *v.* Greene, 14 R. I. 42.

60. Pettey *v.* Dunlap Hardware Co., 99 Ga. 300, 25 S. E. 697.

Where an agent, without collusion of his principal, deposits proceeds of the sale of the latter's goods in a bank in his own name, the principal's beneficial interest therein is not thereby devested, and his claim is good as against an attaching creditor of the agent, unless the latter rightfully retained the funds for his compensation. Skilman *v.* Miller (Ky.), 7 Bush 428.

61. Deposit of guardian.—Simmons *v.* Almy, 100 Mass. 239. See, also, Woods *v.* Milford, etc., Sav. Inst., 58 N. H. 184.

Where a ward's money was deposited in a bank by his guardian, O., on an account to the credit of "O., guardian for A.," and the income of the fund was afterwards paid by the bank to O.'s successors without any change in the title of the account, or any claim of the capital by O., held,

The fund of a life insurance company derived from assessments for the payment of death claims, but not expected to be used for the payment of any particular claim, being collected for the payment of approved claims generally, and deposited in a bank payable to the company or its order, on demand, is the property of the company, and liable to attachment at the instance of a beneficiary in a life policy whose claim has been approved but not paid. The relation between the bank and the company was that of debtor and creditor, and a beneficiary in a life policy whose claim had been approved and who attached the fund in the bank, acquired a lien thereon which would not be defeated by the subsequent appointment of a receiver of the company.[62]

§ 129 (7ac) Certified Checks Outstanding.—The certification of a check for a depositor is not such payment of his deposit account as to remove it from attachment. In such case the bank can not defend by showing payment of the check to one who to its knowledge did not hold it for value as in good faith and who in fact held it for no other purpose than to defeat the attachment.[63] Aliter, where the check properly certified had passed into the hands of a bona fide taker for value.

Money Belonging to Another than Depositor.—Money deposited by an individual in a bank, for which the bank has given him credit, and for which the bank has certified checks drawn against the fund, can not be attached as a debt due or owing from or by the bank to a third person, even if it appears that the money was really the property of such third person, and that the depositor placed the amount in the bank and got checks certified to the amount of the deposit, for the purpose of preventing the money

that the bank was chargeable as trustee of the ward in foreign attachment. Simmons *v.* Almy, 100 Mass. 239.

62. Funds of insurance company.—National Park Bank *v.* Clark, 92 App. Div. 262, 87 N. Y. S. 185.

63. A railroad company obtained from a bank a certified check for the amount of its deposit, payable to the order of its treasurer. While this check was outstanding, a creditor of the railroad company brought suit, and served a warrant of attachment upon the bank. Afterwards the treasurer of the railroad company deposited the certified check to his individual account, and drew against it from time to time to pay debts of the company. Held, that the certification did not pay the deposit account so as to remove it from attachment. Bills *v.* National Park Bank, 89 N. Y. 343.

A bank, having on deposit funds of a corporation, certified a check drawn by the treasurer of the corporation, for the amount thereof, payable to him as such treasurer. Before the check was paid, or had passed from his hands, an attachment was served on the bank for a debt of the corporation; and subsequently, but on the same day, said treasurer opened an account with the bank in his individual name, depositing this same check. The deposit was subsequently exhausted by such treasurer in paying debts of his corporation. In an action brought against the bank by the attaching creditor to recover the amount of the fund for which such check was drawn, the evidence tended to show that the bank knew of the pecuniary embarrassment of the corporation. Held sufficient to justify a finding that the bank had reason to and did believe that the fund when deposited by such treasurer was the property of the railroad company, and that, therefore, the bank was liable for not holding it subject to the attachment. Gibson *v.* National Park Bank, 98 N. Y. 87.

from being reached by the creditors of such third person.[64]

§ 129 (7b) Sufficiency of Process.—Middle Initial of Debtor.—Where the middle name or initial is an essential part of the name, notice of garnishment served on a bank, mistaking[65] or omitting[66] the middle initial of the debtor, does not bind money due at the time by the bank to the person intended to be sued and subsequently paid out by it, unless the bank had actual knowledge of the identity of the debtor and the person named in the writ. The bank, having no funds belonging to any person of the name appearing in the writ, and acting in good faith and with no notice or knowledge of the identity of the person intended to be sued and the person named in the writ, and having lawfully paid over to the depositor the funds in its hands belonging to him, can not by subsequent amendment to the writ be made liable to pay the same over again to the attaching creditor.[67] The misnomer could not, indeed, be taken advantage of by the principal defendant, who had been duly served and defaulted, or against whom judgment had been rendered; it might, as between him and the attaching creditor, be amended at the discretion of the court, but such an amendment could not affect intervening rights of third persons.[68]

§ 129 (7c) Time from Which Lien Attaches.—Garnishee process to subject a deposit belonging to the attachment defendant binds the bank from the time when the notice is served on its officers.[69]

Payment on Day of, but before Service of Writ.—A bank is not liable on trustee process against a depositor for moneys paid out on his check on the day of, but before, the service of the writ on it, though the entry was not made on its books until some days later.[70]

Duty of Bank to Impound and Preserve Funds.—Where the officers of a bank have notice of the service of an attachment, attaching the funds of one of its depositors, it is their duty to take immediate steps to impound the funds in their hands and prevent the payment by any of its agents,

64. Greenleaf *v.* Mumford (N. Y.), 4 Abb. Prac., N. S., 130, 50 Barb. 543, 35 How. Prac. 148.

65. **Middle initial.**—Notice of garnishment served on a bank, naming the debtor as "W. J. M.," does not reach money due at the time by the bank to "W. G. M.," and subsequently paid out by it, unless the bank had actual knowledge of the identity of the debtor and the person named in the process. German Nat. Bank *v.* National State Bank, 5 Colo. App. 427, 39 Pac. 71.

66. A savings bank, which, after being summoned as trustee on a writ made out against "Sarah Sisson," paid to Sarah F. Sisson a fund deposited by her, held not to be chargeable, although the writ was in fact served on this depositor, and after the payment was amended accordingly; the bank not being shown to know that she was intended to be sued. Terry *v.* Sisson, 125 Mass. 560.

67. Terry *v.* Sisson, 125 Mass. 560.

68. Terry *v.* Sisson, 125 Mass. 560.

69. **When lien attaches.**—Johnson *v.* Brant, 38 Kan. 754, 17 Pac. 794.

Where a bank allows a judgment debtor to check out his deposit while a scire facias sur bill of discovery is pending against it, it will be liable to the plaintiff thereon. Schram *v.* Cartwright, 16 Pa. Co. Ct. Rep. 618, 4 Pa. Dist. R. 632.

70. **Payment on day of, but before service of writ.**—Foster *v.* Swasey, Fed. Cas. No. 4,985, 3 Woodb. & M. 364.

except to a bona fide holder of its obligations. It can not shield itself from liability by alleging the ignorance of the agent making the payment, while other agents having authority and owing a duty to act in the premises had knowledge of the facts, which made such payment a violation of duty on the part of the bank. Where the circumstances raise a presumption of knowledge in the bank which require explanation on its behalf, it is quite significant that no officer of the bank is produced to testify his ignorance of the fact that the deposit belonged to the garnished debtor, or that the bank supposed it was paying it in good faith to a bona fide holder. The facts relating to this question being peculiarly within the knowledge of the bank, the presumption arising from its omission to furnish such evidence strongly supports the view that the bank had notice that the person to whom it transferred the deposit was not entitled thereto.[71]

§ 129 (7d) Defenses by Bank—§ 129 (7da) Effect of Admission of Indebtedness.—Where the answer of the bank contains an admission of indebtedness it is sufficient to charge the bank as garnishee and the burden is thrown on the bank to show sufficient facts to discharge it.[72]

§ 129 (7db) Equitable Right of Third Persons.—Where a suit in attachment is brought against a depositor and the bank summoned as garnishee, it can not ordinarily avail itself in defense, of the equitable rights of third persons not before the court where the relationship of the bank to the depositor in respect to the funds is such that the depositor may recover possession of it at will. In such suit a bank summoned as garnishee stands as nearly as possible in the same position it would have occupied if sued at law by the depositor.[73]

§ 129 (7e) Supplemental Complaint.—Where in garnishment proceedings the garnishee bank, denies any indebtedness to the defendant, but admits that on its books there is a credit for deposits in defendant's name "as agent," this deposit is not conclusive evidence that the deposit is defendant's money, or that the bank thereby became his debtor, and the plaintiff can only proceed further by filing a supplemental complaint.[74]

§ 129 (7f) Effect of Payment to Attaching Creditor.—Where a bank is summoned as trustee of a depositor, in an action against him and

71. **Duty of bank to impound and preserve funds.**—Gibson *v.* National Park Bank, 98 N. Y. 87.

72. **Effect of admission of indebtedness.**—Commercial Nat. Bank *v.* Manufacturers' Equitable Ass'n, 20 Ill. App. 133.

73. **Equitable rights of third persons.**—Commercial Nat. Bank *v.* Manufacturers' Equitable Ass'n, 20 Ill. App. 133.

In an action against an incorporated association by a member thereof, an answer is not available by a bank, summoned as garnishee, that the money in the bank is a trust fund, equitable ownership whereof is in the members of the association in proportion to their respective rights. Commercial Nat. Bank *v.* Manufacturers' Equitable Ass'n, 20 Ill. App. 133.

74. **Supplemental complaint.**—Ingersoll & Co. *v.* First Nat. Bank, 10 Minn. 396 (Gil. 315); so holding under Laws of 1860 C. 70. See ante, "Particular Deposits," § 129 (7ab).

the whole amount due to him paid under the execution issued on the judgment in that suit, which ran against his goods, effects and credits in the hands of the bank, the bank is exonerated from further liability if the proceedings were regular and valid.[75]

After Notice of Claim of Third Person.—After the bank has been notified of a claim to the deposit by another than the depositor, an attachment by a creditor of a depositor would not authorize the bank to pay the money to the creditor.[76]

Cestui Que Trust Having Notice of Suit.—Where a deposit is legally due to a depositor notwithstanding the word "trustee" was added to his name, a bank summoned as trustee of such depositor was bound to act in good faith towards parties claiming an interest in the fund and might fairly and properly leave it to them to protect their own rights, where the cestui que trust had notice of the suit immediately after the service of writ therein and ample opportunity to appear and maintain his rights. The cestui que trust, having neglected to make his claim in the suit, he can not afterwards disregard the judgment against the bank and enforce his merely equitable claim against it; for the bank was discharged from liability to the amount of the payment on the judgment.[77]

Property of Person under Guardianship.—A depositary of money, who, having been charged as trustee therefor, in a suit against the depositor's guardian for the depositor's board, has been compelled by legal process to pay the money in satisfaction of the judgment rendered in that suit, is not liable for the same money to the depositor after the guardianship is revoked.[78]

§ 129 (8) Payment under Execution.—Since no valid levy can be made on a general deposit, the depositor not being entitled to any specific

75. Effect of payment to attaching creditor.—Leonard *v.* New Bedford, etc., Sav. Bank, 116 Mass. 210.

A proceeding by a depositor against a savings bank, for the recovery of money deposited, was submitted on an agreed statement of facts, from which it appeared that defendant had been summoned as trustee of the plaintiff, and had paid the money in controversy on an execution issued upon a judgment against plaintiff, and "likewise awarded against the goods, effects, and credits" of the plaintiff in the hands of the savings bank. The statement also recited that "it did not appear by the record, nor by the docket of the court, that said savings bank was ever adjudged trustee" for plaintiff. Held that, notwithstanding the latter statement, on the misnomer of the trustee defendant was entitled to judgment. Leonard *v.* New Bedford, etc., Sav. Bank, 116 Mass. 210.

Mistake as to identity of depositor.—See ante, "In General," § 129 (4bba).

76. After notice of claim of third person.—Adams Co. *v.* National Shoe, etc., Bank, 44 Hun 629, 9 N. Y. S. 75, 23 Abb. N. C. 172. See ante, "Particular Deposits," § 129 (7ab).

77. Cestui que trust having notice of suit.—Randall *v.* Way, 111 Mass. 506.

G. deposited with W., a banker, money belonging to H., in the name of "G., Trustee." W., with H.'s knowledge, was summoned as trustee of G. H. neglected to appear, and judgment went against W. by default. W. paid the judgment, although knowing that G. was trustee for H. Held, that W. was discharged from liability, to the amount of the payment. Randall *v.* Way, 111 Mass. 506.

78. Property of person under guardianship.—Woods *v.* Milford, etc., Sav. Inst., 58 N. H. 184. See ante, "Particular Deposits," § 129 (7ab).

pieces of money, it is, therefore, no defense to an action for a balance due on general deposit in a bank, that such balance had been levied on under an execution against the depositor by a judgment creditor and payment made by the bank to the sheriff.[79]

§ 129 (9) Waiver of Right to Deposit.—A depositor who knew that the deposit had been transferred by the bank to another under the belief that it belonged to such other could, by his conduct in acquiescing in the transfer, waive his right to the deposit without expressly assenting to the transfer. A depositor, after learning that his deposit had been transferred to another by the bank, could by his conduct and acquiescence waive his right to the deposit without any consideration.[80]

§ 129 (10) Right of Depositor to Recover from Third Person Moneys Paid by Bank.—A depositor has no right to sue a third person to recover money paid him by the bank.[81]

§ 130. —— Trust Funds[81a]—§ 130 (1) In General—§ 130 (1a) Relation Created.—Where a trustee deposits the trust fund in a bank with no agreement that it is to be held as a special deposit, the relation of debtor and creditor is created between him and the bank.[82]

§ 130 (1b) Effect on Character of Title to Fund.—Deposit to Credit of Trustee.—Trust funds do not lose their character as such by being deposited in bank by the trustee to his own account.[83] Although

79. **Payment by bank to execution creditor of depositor.**—Scott, etc., Co. *v.* Smith, 2 Kan. 438.

80. **Waiver of right to deposit.**—Whitsett *v.* People's Nat. Bank, 138 Mo. App. 81, 119 S. W. 999.

81. **Right of depositor to sue third person for moneys paid by bank.**—Defendant and H. were partners in business, and kept a deposit account in a bank. H. owed plaintiffs a separate debt, for which they drew on him, and sent the draft to the bank for collection. H. paid part of the draft with his own funds, and the bank, by his direction, paid the remainder of the draft, and charged the amount to the account of the firm; but no check of the firm was drawn therefor. Held, that the money so paid by the bank was its own money, and neither defendant nor the firm could recover the amount from plaintiffs. Whether H. had authority from the firm to direct the payment and the charge to the firm's account was immaterial, as against plaintiffs. Davis *v.* Smith, 29 Minn. 201, 12 N. W. 531.

81a. **Effect of insolvency of bank,** see ante, "Presentation and Payment of Claims," § 80.

Application to debts due to bank, see post, "Application of Deposits to Debts Due Bank or Set-Off by Bank," § 134.

Knowledge of officers as affording notice to bank of trust character of fund, see ante, "In Respect to Deposits," § 116 (3).

Preferred claim against bank on insolvency, see ante, "Deposit of Trust Funds," § 80 (7).

82. **Relation created.**—Union School Tp. *v.* First Nat. Bank, 102 Ind. 464, 2 N. E. 194; People *v.* Wadsworth, 63 Mich. 500, 30 N. W. 99.

Money deposited in the name of an officer or trustee, in the absence of an agreement that it shall be held as a special deposit, does not create the relation of bailor and bailee; but the bank becomes a debtor, and the depositor a creditor, to the extent of such deposit. Anderson *v.* Walker (Tex. Civ. App.), 49 S. W. 937, affirmed in 93 Tex. 119, 53 S. W. 821.

83. **Effect on character of title to fund.**—Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693. See, also Manhattan Bank *v.* Walker, 130 U. S. 267, 32 L. Ed. 959, 9 S. Ct. 519; Union Stock

when a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done, had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the cestui que trustent, it must be deemed specifically theirs, as between the trustee and his executors, and the general creditors after his death on one hand, and the trust on the other.[84]

Deposit Not a Conversion.—A deposit of trust fund in a bank to the credit of the trustee is not of itself a conversion of the fund.[85]

Deposit in Name of Depositor in Trust for Another.—Whenever a deposit is made in a bank by a person in his own name in trust for another, and there are no circumstances rebutting the presumption, it will be presumed that the depositor has divested himself of the legal and beneficial title to the funds, and has vested himself with the legal title, as trustee of the person named as cestui que trust;[86] but when the depositor does not make the deposit in trust with the intention of giving to the person named as cestui que trust any beneficial interest in the fund, but for his own benefit, he does not divest himself of his legal title to the deposit but continues to be the beneficial owner thereof, notwithstanding the form of the deposit.[87]

Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 34 L. Ed. 724, 11 S. Ct. 118; Union Stock Yards Nat. Bank *v.* Haskell, 2 Neb. 839, 90 N. W. 233.

A deposit in bank does not change the property in trust funds deposited by a trustee. Frank *v.* Kurtz, 4 Pa. Super. Ct. 233.

84. Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693.

Where a depositor of a bank, which was not his creditor, had a deposit account with it only to his personal credit, and deposited a check payable to him as trustee, it can not be ruled, as a matter of law, that such act was a dishonest act on his part. Batchelder *v.* Central Nat. Bank, 188 Mass. 25, 73 N. E. 1024.

85. Deposit not a conversion.—It is not a conversion for a trustee to deposit trust money in bank to his credit as agent, though the bank may have knowledge of the trust. Munnerlyn *v.* Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159.

86. Deposit in name of depositor in trust for another.—In re Dohrmann's Estate, 15 App. Div. 67, 44 N. Y. S. 280; Martin *v.* Funk, 75 N. Y. 134, 31 Am. Rep. 446; Boone *v.* Citizens' Sav. Bank, 84 N. Y. 83, 9 Abb. N. C. 146, 38 Am. Rep. 498; Willis *v.* Smyth, 91 N. Y. 297; Mabie *v.* Bailey, 95 N. Y. 206; Fowler *v.* Bowery Sav. Bank, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 Am. St. Rep. 479, 2 Silvernail App. 280; Beaver *v.* Beaver, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531.

87. In re Dohrmann's Estate, 15 App. Div. 67, 44 N. Y. S. 280; Cunningham *v.* Davenport, 147 N. Y. 43, 41 N. E. 412, 32 L. R. A. 373, 49 Am. St. Rep. 641; Weber *v.* Weber (N. Y.), 58 How. Prac. 255; Mabie *v.* Bailey, 95 N. Y. 206.

Admissions against interest.—A finding that a deposit of money in the name of the depositor in trust for another, was not made with the intent of giving the person named as beneficiary any interest therein, is supported by the admissions of the beneficiary out of court to that effect, though he testified to the contrary. In re Dohrmann's Estate, 15 App. Div. 67, 44 N. Y. S. 280.

Mingling Trust and Personal Funds of Trustee.—If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, although it was mixed with his own moneys.[88]

Effect of Mingling with Bank's Funds.—The cashing by a bank of checks impressed with a trust and deposit with it, as, for instance, checks deposited with contracts for the purchase of lands, to be held until the consummation of trades, does not take from the funds their trust character.[89]

Order of Application to Checks.—See post, "Order of Application of Deposits," § 140 (8).

§ 130 (1c) Notice of Trust Character of Fund—§ 130 (1ca) Effect of Notice—§ 130 (1caa) As Impressing Funds of Bank with Trust.—A bank which receives a deposit of trust funds with notice of the trust becomes a trustee with regard to such funds.[90] The receipt by a bank of a trust fund, with the knowledge of its trust character, impressed the assets of the bank, which were increased to that extent, with a trust for the payment of such fund.[91]

§ 130 (1cab) Right to Follow Funds.—When the depositor puts the money of another into a bank and his title is such as to impress it with a trust character of which the bank has knowledge, the fiduciary may follow it, and recover it from the bank, although it be money, and wanting in respect of the earmarks formerly essential to this right. The rule can not be so far extended as to enable the cestui que trust to pursue funds beyond the custody of the bank into the hands of innocent parties.[92] The funds may be followed into the hands of the third person wherever knowledge of

88. **Commingling trust and personal funds.**—Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693.

89. **Mingling with bank's funds.**—Covey *v.* Cannon (Ark.), 149 S. W. 514.

90. **Effect of notice.**—In the case of National Bank *v.* Insurance Co., 104 U. S. 54, it is said that while the relation of a bank to its depositor is ordinarily that of debtor and creditor, yet if the money deposited is held by the depository in a fiduciary capacity and is knowingly accepted by the bank, the fund in the hands of the bank is still impressed with the original trust and the bank assumes thereby a fiduciary relationship. Campbell *v.* National Banks, 4 N. P., N. S., 245, 16 O. D. N. P. 730.

The convenience of banking houses in transacting business with persons acting in a fiduciary capacity is subordinate to the protection of the property rights of persons in actual or quasi wardship from the greed of their protectors. Lane *v.* Reserve Trust Co., 10 O. C. C., N. S., 512.

Where the Bank of Tennessee received bonds deposited by another bank with the comptroller of the state, under the Act of 1852, creating the system of free banks, which bonds were deposited to secure the note holders of such other bank, with notice of the trust impressed upon them, and the illegality of their withdrawal from the comptroller, it took them charged with the trust, and became trustee with regard to such bonds. Clark *v.* State, 47 Tenn. (7 Coldw.) 306.

91. **Impressing assets of bank with trust.**—Paul *v.* Draper, 73 Mo. App. 566.

92. **Right to follow funds.**—National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Hummel *v.* First Nat. Bank, 2 Colo. App. 571, 32 Pac. 72.

the trust can be brought home to him or where circumstances are apparent which will charge him with knowledge of the character of the fund.[93]

§ 130 (1cb) What Constitutes Notice or Knowledge.—To charge a bank with notice of a trust in funds deposited with it by a customer, the circumstances must be such as to justify a finding that the bank had reason to and did believe that the funds when deposited were not the depositor's own personal funds.[94]

The addition of words descriptio personæ to the name of a depositor in his account, as, for instance, the word "assignee,"[95] or "trustee,"[96] does not charge the bank with notice that the deposit is a trust fund. The appendix is regarded merely as descriptio personæ.

Marginal Memoranda on Checks.—No bank is bound to take notice of memoranda and figures upon the margin of a check, which a depositor places there merely for his own convenience, to preserve information for his own benefit; and in such case, the memoranda and figures are not a notice to the bank that the particular check is to be paid only from a particular fund.[97]

93. One H. having agreed to loan money to R., it was arranged between R., H., and E., a banker, that R. should draw on E. at sight for the amount of the loan, and that on receipt of the draft H. should provide money to meet it. H. then surrendered to E. certificates of deposit in E.'s bank to the amount of the draft, and his account was credited therewith. Plaintiff sent the draft to E., with directions to remit the proceeds to another bank for plaintiff's credit, and H. gave E. a check for the amount. E. charged the check to H., and marked the draft as paid, but, before remitting as directed by plaintiff, he died. Held, that H. parted with credit, and the fund thus arising did not become a part of E.'s estate, but became a trust fund in plaintiff's favor, and was recoverable by him as such. Hummel *v.* First Nat. Bank, 2 Colo. App. 571, 32 Pac. 72.

In an action against E.'s administrator to recover the fund, defendant set up as a defense that when E. died there was no money in the bank, except a deposit made by one T., and that a trust therein existed in T.'s favor. Held, that it having been adjudged that the money paid in by H. was a trust fund, which could not be diverted by E. to any other purpose, and therefore did not become a part of E.'s estate, such fund was held by defendant merely as a bailee, and it was no defense for him to say that when the money came into E.'s hands, it became liable to the assertion of a superior equity by T., but that such defense could only be made by T. Hummel *v.* First Nat. Bank, 2 Colo. App. 571, 32 Pac. 72.

94. What constitutes notice.—State Bank *v.* McCabe, 135 Mich. 479, 98 N. W. 20; In re Dohrmann's Estate, 15 App. Div. 67, 44 N. Y. S. 280.

Public funds.—See post, "Public Funds," § 130 (2).

95. Assignee.—The word "assignee" appended to the name of a depositor in his account does not identify the deposit as belonging to any particular fund. Laubach *v.* Leibert, 87 Pa. 55.

96. State Bank *v.* McCabe, 135 Mich. 479, 98 N. W. 20. See, also, In re Dohrmann's Estate, 15 App. Div. 67, 44 N. Y. S. 280.

A bank is not bound to assume that a deposit standing in the name of its debtor as "trustee" is the individual property of such debtor. State Bank *v.* McCabe, 135 Mich. 479, 98 N. W. 20.

97. Marginal memoranda on checks.—State Nat. Bank *v.* Dodge, 124 U. S. 333, 31 L. Ed. 458, 8 S. Ct. 521; Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

Where, in the manner in which it kept the account of a deposit therein to the credit of a district court of the United States, of bankruptcy funds, the bank at all times followed the directions of the clerk; and there is nothing in the transactions which implies any notice to or duty upon the

Deposit under Agreement.—Knowledge of the trust may result from the terms of the agreement under which the deposit was made.[98]

Form of Check Deposited.—A check which reads "pay to the order of * * * cashier to deposit to the credit of * * * trustee,"[99] charges the bank with notice of the trust; but a check which reads "pay to the order of * * * trustee,"[1] does not have that effect.

A check payable to a person appointed commissioner to sell land, followed by the word "commissioner," shows on its face that it did

bank to keep or deal with the deposits made under each number as a separate account, especially in view of the regular balancings of the account on this principle, with return of book and checks to the clerk showing the balance, the bank had a right to assume that the memorandum numbers in the deposits and in the checks, stating the case in or on account of which it was drawn, were merely for the convenience of the court and its officers; and it also had a right to presume that the court and its officers were properly performing their duty in distributing its trust funds. State Nat. Bank *v.* Dodge, 124 U. S. 333, 31 L. Ed. 458, 8 S. Ct. 521, citing Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693.

"The deposits (of bankruptcy funds) being, as required, in the name and to the credit of the court, the bank was authorized and required to honor all checks drawn by the court, and to pay them generally out of such deposits; and the order or check for withdrawing the money, in stating the cause in or on account of which it was drawn, was a memorandum imposing no duty upon the bank, but only operating for the convenience of the court and its officers, in keeping its account. The obvious purpose of the memorandum of numbers in the deposit book of the court and upon the checks, was to enable the court and the clerk to properly keep the accounts, and that the checks might operate as vouchers, showing the manner in which the moneys in any particular case were distributed, and to enable the clerk to show to the court that he had deposited the funds which he had received. There is no evidence anywhere of any intention that the bank should be controlled by the numbers in paying any check drawn upon it." State Nat. Bank *v.* Dodge, 124 U. S. 333, 31 L. Ed. 458, 8 S. Ct. 521.

A bank credited to the personal account of C., who was trustee of an estate, the proceeds of a check deposited therein, issued in payment of a debt due such estate, in these words: "Pay to the order of S., cashier, $2,000, for deposit to the credit of C., being the balance of purchase money due him as trustee from J." C. drew the money from the bank, and embezzled it. Held, that the bank was not liable to the estate on the theory that it knowingly participated in the breach of trust, since it credited the proceeds as directed in the check. Duckett *v.* National Mechanics' Bank, 86 Md. 400, 39 L. R. A., 84, 63 Am. St. Rep. 513, 38 Atl. 983.

98. **Money deposited under agreement.**—Where a fund was deposited with a bank under an agreement which expressly provided that no money should be paid out of said fund except to the creditors of a corporation until all its debts are paid and discharged in full, the deposit became a trust fund for the payment of the corporation's debts. Ellis *v.* National Exch. Bank, 38 Tex. Civ. App. 619, 86 S. W. 776, affirmed in 101 Tex. 635, no op.

99. **Form of check deposited.**—Duckett *v.* National Mechanics' Bank, 86 Md. 400, 39 L. R. A. 84, 38 Atl. 983, 63 Am. St. Rep. 513.

The bank was liable to an estate for the proceeds of a check deposited therein, and credited to C.'s personal account, and afterwards drawn and embezzled by C., where the check was: "Pay to the order of S., cashier, $2,024.30, to deposit to the credit of C., trustee." Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

1. The fact that a check deposited by a customer of a bank to his personal account was one payable to his order as "trustee," does not charge the bank with notice that he was acting dishonestly or in violation of his trust. Batchelder *v.* Central Nat. Bank, 188 Mass. 25, 73 N. E. 1024.

not belong to him individually, so that a bank giving him credit therefor individually and aiding him in unlawfully applying the funds was liable to the beneficiaries.[2]

Form of Indorsement.—Where the indorsement on a check is an explicit instruction to the bank to deposit its proceeds to the credit of the payee as trustee of a specified trust the bank has no authority to place it to his individual credit and if it does so and loss ensues by reason of his drawing the fund out by checks on his personal account the bank is liable to make restitution to the trust estate.[3]

Notice to Agent or Officer of Bank.—Where the officers of a bank have notice of the trust character of the funds of one of its depositors, this is notice to the bank, and it can not shield itself from liability by alleging the ignorance of the agent making payment, while other agents having authority and owing a duty to act in the premises had knowledge of the facts which made such payment a violation of duty on the part of the bank.[4]

Ratification of Act of Bank by Trustee.—The liability of the bank was not affected by the fact that the trustee ratified its act in placing the money to his individual credit.[5]

Notice of Attachment.—See ante, "Effect of Payment to Attaching Creditor," § 129 (7f).

§ 130 (1d) Payment to Trustee—§ 130 (1da) Right of Trustee to Withdraw.—A depositor, although holding money on deposit in a trust or fiduciary capacity, may draw it out of the bank ad libitum. A bank account, even when it is a trust fund, and designated as such by being kept in the name of the depositor as trustee, differs from other trust funds which are permanently invested in the name of trustees for the sake of being held as such; for a bank account is made to be checked against, and represents a series of current transactions.[6]

§ 130 (1db) Effect of Payment to Trustee or Order Generally.—Where a bank without notice of the trust pays to a depositor trust funds which he had deposited with it, the obligation of the bank is discharged

2. **Check payable to commissioners.**—Bank *v.* McPherson (Miss.), 59 So. 934.

3. **Form of indorsement.**—Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

4. **Notice to agent or officer of bank.**—Gibson *v.* National Park Bank, 98 N. Y. 87.

Plaintiff's husband took a bond of hers and her bank book to the cashier of a bank. The cashier put the bond in the bank safe, and wrote on plaintiff's bank book a memorandum showing a receipt of the bond from plaintiff. Held, that the bank could not claim that the cashier was acting in his individual capacity alone, and that the bank had no notice of plaintiff's title. Zugner *v.* Best, 44 N. Y. Super. Ct. 393.

5. **Ratification of act of bank by trustee.**—Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 893, 39 L. R. A. 84, 63 Am. St. Rep. 513.

6. **Right of trustee to withdraw.**—Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Anderson *v.* Walker (Tex. Civ. App.), 49 S. W. 937, modified in 93 Tex. 119, 53 S. W. 821.

and there can be no recovery of the amount from the bank where the trustee diverts the fund.[7]

Joint Suit by Trustee and Cestui Que Trust.—Where a trustee, after depositing the trust fund in a bank, withdrew it for his individual benefit, he can not, by joining the beneficiary with him as party plaintiff, recover the fund as belonging to the trust, though the bank had knowledge that he was himself using the fund.[8]

Checks Signed without Designation of Trustee.—Where a trustee has deposited money in bank, payment by the bank to him on his checks will discharge it, whether such checks be signed with or without the designation of trustee.[9]

§ 130 (1dc) Duty of Bank to See to Application and Liability for Misappropriation—§ 130 (1dca) In Absence of Notice of Intention to Misappropriate or Divert.—In the absence of notice or knowledge that a breach of trust is being committed by an improper withdrawal a bank can not question the right of its customer to withdraw funds, nor refuse to honor his demands by check; and, therefore, even though the deposit be to the customer's credit in trust, the bank is under no obligation to look after the appropriation of the trust funds when withdrawn, or to protect the trust by setting up a jus tertii against a demand.[10] If a fund be deposited in bank by one as trustee, the depositor as trustee has the right to withdraw it, and the bank, in the absence of knowledge or notice to the contrary, would be bound to assume that the trustee would appropriate the money, when drawn, to a proper use.[11] Any other rule would throw upon a bank the duty of inquiring as to the appropriation made of every fund deposited by a trustee or other like fiduciary; and the imposition of such a duty would practically put an end to the banking business, because no bank could possibly conduct business if, without fault on its part, it were held

7. **Effect of payment to trustee, or order.**—Erisman *v.* Delaware County Nat. Bank, 1 Pa. Super. Ct. 144.

Where the payee of an accommodation check, given for a particular purpose, deposits it in a bank in his own name, and the bank makes advances and extends credit on the faith of the deposit without notice of the trust, its rights and equities are superior to the drawer of the check. Erisman *v.* Delaware County Nat. Bank, 1 Pa. Super. Ct. 144.

Depositor's account overdrawn.—Where a bank has no notice that funds deposited are trust funds, and they can not be traced to anything in its possession, and the depositor's account is overdrawn, it is not liable therefor. In re Plankinton Bank, 87 Wis. 378, 58 N. W. 784.

8. **Joint suit by trustee and cestui que trust.**—Munnerlyn *v.* Augusta Sav. Bank, 94 Ga. 356, 21 S. E. 575.

9. **Checks signed without designation of trustee.**—Munnerlyn *v.* Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159.

10. **Absence of notice of intention to misappropriate or divert.**—Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

11. Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

As a general rule a bank may assume that a trustee will apply money deposited by him to its proper purposes under the trust, and is not accountable for any misappropriation of trust funds in which it does not participate. American Trust, etc., Co. *v.* Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167.

accountable for the misconduct or malversations of its depositors who occupy some fiduciary relation to the fund placed by them with the bank.[12]

§ 130 (1dcb) Banks Having Notice of Breach of Trust.—A bank or trust company receiving a deposit from one acting in a trust or representative capacity can not justify a payment to him, if it knows, or facts are presented which, if acted on, would disclose, that the fund is about to be wrongfully and unlawfully diverted from the true owner.[13] To charge a bank with notice that a depositor is acting in violation of his trust, so as to render it liable for the amount paid out on his check or order,[14] the circumstances must be such as to raise a presumption of knowledge that the depositor is acting dishonestly.

Texas.—A depositor, though holding money in a fiduciary capacity, may draw it out of the bank at his pleasure, and the bank is bound to honor his checks, and incurs no liability in so doing so long as it does not participate in any misappropriation of funds or breach of trust, though the conduct or course of dealing of the depositor may charge the bank with notice that he is violating his trust.[15] The mere payment of the money to, or upon the checks of, the depositor does not constitute a participation in an actual or intended misappropriation by the fiduciary, although his conduct or course of dealing may bring to the notice of the bank circumstances which would enable it to know that he is violating his trust. Such circumstances do not impose upon the bank the duty or give it the right to institute an inquiry into the conduct of its customer in order to protect those for whom it may hold the fund, but between whom and the bank there is no privity.[16]

12. Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

13. Bank having notice of breach of trust.—Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513; Parks *v.* Knickerbocker Trust Co., 137 App. Div. 719, 122 N. Y. 521.

Effect of knowingly paying check drawn for personal ends.—Union Stock Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 34 L. Ed. 724, 11 S. Ct. 118.

14. Batchelder *v.* Central Nat. Bank, 188 Mass. 25, 73 N. E. 1024.

Paying overdraft proceeds of which misused with trust funds.—If a bank, in which a trustee has an account, permits him to overdraw, and to pay the overdraft with the proceeds of trust property, which he had a right to sell, the bank is not responsible to the trust estate, if the money overdrawn is misused by the trustee, in the absence of evidence that the bank was fairly put upon inquiry whether the money was to be used for other purposes than those of the trust. Loring *v.* Brodie, 134 Mass. 453.

15. *Texas.*—Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885, reversing 77 S. W. 44; Coleman *v.* First Nat. Bank, 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871.

Where a banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust and draws a cheque for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the cheque, for if he did so he would be making himself a party to an inquiry as between his customer and third persons. He would be setting up a supposed jus tertii as a reason why he should not perform his own distinct obligation to his customer. Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885, reversing 77 S. W. 44.

16. Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885, reversing 77 S. W. 44; Coleman *v.* First Nat. Bank, 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871, affirming 43 S. W. 938.

§ 130 (1dcc) Banks Participating in Breach of Trust—§ 130 (1dcca) In General.—Where a bank knowingly participates with a depositor in a misappropriation of trust funds and reaps the fruit of the breach of trust, it becomes liable to the beneficiary for whatever loss the latter sustains.[17] Where a bank, with notice of the fiduciary character of funds acquired by a commissioner, appointed to sell land in partition, credits them to the commissioner's individual account, it is liable to the beneficiaries for the diversion of the funds.[18]

§ 130 (1dccb) Acceptance in Payment of Trustee's Debt to Bank.—Where money deposited in a bank was known by the bank to be held by the depositors in trust, the bank, in accepting such deposit, in payment of a debt due it by the depositors, became liable therefor;[19] for it had at once not only abundant proof of the breach of trust, but participated in it for its own benefit.[20]

17. Participation of bank in breach of trust.—Washbon *v.* Lincott State Bank (Kan.), 125 Pac. 17; Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

A trustee, authorized to receive trust money in his cotrustee's absence, indorsed a check payable to both, as if he were sole trustee, and it was credited to him as such in bank. He then gave S. a check on this fund, to pay a debt which he owed in another capacity. The trustee check was refused, when presented to the drawee for payment, because indorsed by but one trustee. The trustee, by agreement with his bank, then added his cotrustee's name to the indorsement, and to the signature of the check to S., and opened the account in the joint trustees' names. Held, that the trustees' bank had notice of the misappropriation of the trust funds, and that, by paying the check to S., it became a party to the wrong, and liable therefor. Swift *v.* Williams, 68 Md. 236, 11 Atl. 835.

18. Bank *v.* McPherson (Miss.), 59 So. 934.

19. Acceptance in payment of trustee's debt to bank.—Merchants' Nat. Bank *v.* Phillip, etc., Machinery Co., 15 Tex. Civ. App. 159, 39 S. W. 217, affirmed in 93 Tex. 667, no op.; Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885, reversing 77 S. W. 44.

A check was sent to defendant bank to indemnify it for furnishing a bond for plaintiff, the purpose for which it was given being indorsed on the check. The president and the cashier, as individuals, became sureties, the check was deposited to their credit, and afterwards paid, and they executed a receipt therefor to plaintiff. Held, the proceeds having subsequently been used to pay notes held by the bank against such officers, that the bank was liable for the amount thereof, as a participant with notice, in a misappropriation of trust funds. Merchants' Nat. Bank *v.* Phillip, etc., Machinery Co., 15 Tex. Civ. App. 159, 39 S. W. 217, affirmed in 93 Tex. 667, no op.

C., a guardian, having embezzled $12,000 of the funds of the ward, deposited $5,000 of his own money in bank to his own account, obtained a $7,000 cash advance from the bank on his own securities as collateral, which $7,000 was credited to his personal account, and then for the $12,000 had the bank issue a certificate of deposit to "C., guardian." He then exhibited the certificate in the matter of his guardianship as funds of the ward, thus making it such in restoration of what he had embezzled. Held, that the bank, which then, on his surrender of the certificate, paid it by credit $7,000 of it to extinguishment of his personal debt to it, surrendering his collateral, and credited the remaining $5,000 to his personal account, which he withdrew on his personal check, participated in his misappropriation of the certificate so as to make it liable therefor. United States Fidelity, etc., Co. *v.* Adoue (Tex.), 137 S. W. 648, reversing judgment, 128 S. W. 636. Rehearing denied in 138 S. W. 383.

20. Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 577, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885, reversing 77 S. W. 44.

§ 130 (1dd) Joint Trustee Deposits.—A check having the signature of but one trustee, where the fund deposited belongs to several, is not good as against the fund. If a deposit is placed to the credit of divers persons or as trustees each trustee must sign, or the check may be refused payment; in other words, the signature of all is indispensable to the validity of the check and the bank will not be discharged if it pay it, unless subsequent to the deposit the drawer becomes solely entitled thereto.[21] Where a deposit is placed to the credit of a joint trustee account, the absence of one trustee's name gives notice to the bank that something may be wrong, and, of course, the bank can not, without heeding it, actually aid in perfecting the wrong by having the additional name added after the check in its original form was paid. The addition of a new name as maker, without assent, changes the character of the check and discharges the one not assenting.[22]

§ 130 (1e) Payment to Receiver of Depositor.—Where the order appointing a receiver authorized him to demand and receive a particular deposit in a bank to the credit of a customer for whose property the receiver was appointed, the bank may pay the balance due to such receiver; but where the order did not authorize him to demand and receive a particular deposit in a fiduciary capacity, as, for instance, as executor, it is a breach of the trust upon which it was received for the bank to pay it to the receiver, and the depositor, as trustee, can recover from the bank the amount so paid.[23]

§ 130 (1f) Payment to Beneficiary or Cestui Que Trust.—The cestui que trust is a trust of money which is deposited by the trustee in a bank has no dominion over and can not collect the deposit from the bank.[24]

21. Joint-trustee deposits.—Swift *v.* Williams, 68 Md. 236, 11 Atl. 835.

22. Swift *v.* Williams, 68 Md. 236, 11 Atl. 835.

23. Payment to receiver of depositor.—Scrantom *v.* Farmers', etc., Bank, 24 N. Y. 424.

An executor, indebted to the estate, made an assignment to himself, as executor, of an interest in a policy of insurance held by him, which assignment appeared to have been known to no other person than himself. He afterwards, upon loss, obtained a draft from the insurance company, payable to himself, as executor, and deposited the proceeds in a bank, where he kept his account, as executor. Afterwards, he being insolvent, the receiver of his property demanded and received from the bank this sum. Held, that the payment by the bank to the receiver, though on the ground that the executor was trying fraudulently to save the money for himself, was wrongful and unauthorized, and constituted no defense to an action brought by him as executor. Scrantom *v.* Farmers', etc., Bank, 24 N. Y. 424.

24. Payment to beneficiary or cestui que trust.—A father deposited money in a bank in his name as trustee for his daughter, creating an irrevocable trust. After that, in an action against the bank wherein the father was not joined, the daughter sought to recover this deposit. Under the rules of the bank and Banking Law (Consol. Laws 1909, c. 2), § 114, deposits in trust shall upon the death of the trustee be paid to the person for whom the deposit is made. In this case there was no contention that the trustee was dead. Held, that the cestui que trust had no dominion over and could not collect the deposit from the bank; for the bank made the contract of deposit with the trustee. Hemmerich *v.* Union Dime Sav. Inst., 144 App. Div. 413, 129 N. Y. S. 267.

The contract created by the dealings in a bank account is between the depositor and bank alone, without reference to the beneficial ownership of the moneys deposited. No one can sue at law for a breach of that contract, except the parties to it. There is no privity created by it between the bank and the beneficial owner. The latter is not liable to the bank for an overdraft by the depositor.[25] And, conversely, for the balance due from the bank, no action at law upon the account can be maintained by the beneficial owner.[26]

Authority from Trustee to Beneficiary to Draw on Fund.—Where an executor deposited in a bank funds belonging to the deceased's estate, and authorized the beneficiary under the will to draw on them, and the latter continued to do so after the death of the executor, a receiver of the bank can not recover from such beneficiary, for the benefit of the bank's creditors, the funds drawn after the death of the executor.[27]

Where the bank itself is a trustee for the cestui que trust the latter may collect the deposit upon expiration of the trust.[28]

§ 130 (1g) Attachment and Garnishment.—See ante, "Attachment and Garnishment," § 129 (7).

§ 130 (1h) Loss or Destruction of Deposit.—Cases in which a fiduciary has been held to responsibility for the loss of the money of his ward or of an estate, which had been deposited in his own name, have all been those in which the fiduciary fund was mingled with his own private or personal funds or used by him for his own purposes, or where the de-

25. Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693; National Bank *v.* Insurance Co., 103 U. S. 783, 26 L. Ed. 459.

26. Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 66, 26 L. Ed. 693.

Where the beneficial interest in a deposit is wholly in another, it is doubtful whether the beneficiary can maintain an action at law for the money. It seems certain that he can not do so, unless he shows clearly that the money belongs to him, and that he is entitled to receive it. Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804, sequel to National Bank *v.* Noiting, 94 Va. 263, 26 S. E. 826.

27. **Authority from trustee to beneficiary to draw on fund.**—Bank *v.* Waddell, 100 N. C. 338, 6 S. E. 414.

28. **Bank itself trustee.**—The trustees of the state reform school gave permission to one of its inmates to enlist as a volunteer in the military service of the United States upon condition that his bounty money should be deposited for his benefit in a bank, and they thereupon deposited his bounty money in the bank upon the following special condition prescribed by the trustees in all such cases, and entered upon the books of the bank, viz: "All bounty money received by said boys shall be deposited in the Portland Savings Bank, and there remain * * * till they have severally reached the age of twenty-one years, and no part of said deposits is to be withdrawn without the consent of the trustees of the state reform school." A creditor of the volunteer brought a suit for necessaries furnished after his discharge, and, before he had attained his majority, attached the deposit in the hands of the bank by trustee process. Held, that the money is due absolutely to defendant, and payable to him or his order on his reaching the age of twenty-one years, without the consent of the trustees of the reform school, and the bank is chargeable as trustee, though not compelled to pay until the amount is payable under the contract. Foxton *v.* Kucking, 55 Me. 346.

posit was made in depreciated money as compared with the money received.[29] A bona fide deposit of his ward's money by guardian in his own name, provided it be shown that it was his ward's money, will protect him from liability for any loss which ensues, not by the form of the deposit, but by the general destruction of the currency and banking interests of the state.[30]

§ 130 (2) Public Funds—§ 130 (2a) Relation Created by Deposit and Title Generally—§ 130 (2aa) In General.—The mere deposit by a public officer in his own name, with his official addition, is no accounting for the money received by him in his official capacity.[31] A deposit to the credit of the official account of a public officer is simply prima facie evidence that the money came to his hands in some official transaction, but imports ownership in no particular person. It is, however, as competent to rebut this prima facie effect by proof of actual ownership as if the deposit had been in such officer's personal account.[32]

Relation Created.—Where a public officer deposits money in a bank with no agreement that it is to be held as a special deposit, the relation of debtor and creditor is created between him and the bank,[33] and the money

29. Loss or destruction of deposit.—Parsley *v.* Martin, 77 Va. 376, 46 Am. Rep. 733.

A commissioner was appointed in November, 1861, to collect money and report it to the court at its next term. He collected the money and deposited it in a solvent bank of good commercial standing, to the credit of himself and his law partner. This account was kept for the fiduciary funds under the control of the firm and each of its members. No part of the money was used by the commissioner, nor mingled with his individual funds. No term of the court for the transaction of business was held until after the war. In the meanwhile the commissioner died, and the bank was ruined and the money lost by the results of the war, which destroyed the whole currency of the country. Held, the commissioner was not liable for the loss. Barton *v.* Ridgeway, 92 Va. 162, 23 S. E. 226.

30. Deposit of ward's money.—Parsley *v.* Martin, 77 Va. 376, 46 Am. Rep. 733; Barton *v.* Ridgeway, 92 Va. 162, 23 S. E. 226; Davis *v.* Harman, 62 Va. (21 Gratt.) 194; Pidgeon *v.* Williams, 62 Va. (21 Gratt.) 251; Cooper *v.* Cooper, 77 Va. 198.

31. Title generally.—Swartwout *v.* Mechanics' Bank (N. Y.), 5 Denio 555; Pittsburg *v.* First Nat. Bank, 230 Pa. 176, 79 Atl. 406.

32. Stair *v.* York Nat. Bank, 55 Pa. 364, 93 Am. Dec. 759.

33. Relation created.—Long *v.* Emsley, 57 Iowa 11, 10 N. W. 280; Anderson *v.* Walker (Tex. Civ. App.), 49 S. W. 937, modified in 93 Tex. 119, 53 N. W. 821.

The deposit of money in a bank establishes the relation of debtor and creditor between the depositor and the bank, and this, though the fund deposited arose from taxes levied for municipal and school purposes. In re Salmon, 145 Fed. 649.

Where all of the money received from notes purported to have been executed by a school trustee as such, as well as all money received from school revenues, was deposited to his individual credit, in a bank, and all money was paid out on his individual checks, he and not the school district was the creditor of the bank. Union School Tp. *v.* First Nat. Bank, 102 Ind. 464, 2 N. E. 194.

"Where the bank in which a treasurer makes a deposit is not one which is determined by law as a public agency for deposit, the money which he deposits is at his own risk and is not a public bailment, and becomes a private debt from the banker to him." Lansing *v.* Wood, 57 Mich. 201, 23 N. W. 769, approving Perley *v.* Muskegon, 32 Mich. 132, 20 Am. Rep. 637; Pittsburg *v.* First Nat. Bank, 230 Pa. 176, 79 Atl. 406.

ceases to be the property of the officer, and becomes that of the bank, which becomes obligated to refund any balance, not in the identical money deposited, but in the funds of the bank,[34] unless the power of such officer to create the relation of debtor and creditor between himself and the bank in respect of such funds is controlled by statutes.[35] But it does not follow that such officer becomes, as to the public, the absolute owner of the funds, so that no one can question the use made of them.[36]

§ 130 (2ab) Funds Left for Safe-Keeping.—Public funds left with a bank for safe-keeping in its vaults over night do not become the property of the bank, and are subject to the right of withdrawal by the bailor, although a credit for the amount was entered on the bank's books before the hour of opening next morning, the bank being insolvent at the time.[37]

§ 130 (2ac) Money Borrowed from Bank.—The deposit in a bank by the county treasurer, to the credit of his trust account, of a sum previously borrowed from said bank on his individual note, constitutes such money a trust fund, not subject to his individual debts without the consent of the county. By such deposit the money ceased to be the individual money of the officers and became at once money of the county, subject to be drawn out upon the check of the county treasurer as such, but not upon his individual check. This being so what he could not do himself the bank could not do as his creditor.[38]

Estoppel to Deny Credit.—A bank which gives a public official fictitious credit to enable him to conceal a defalcation or shortage in his ac-

34. Where a city treasurer deposited money with a bank under an arrangement with it to collect and disburse taxes, the money ceased to be the property of the treasurer, and became that of the bank, which became obligated to refund and balance, not in the identical money deposited, but in the funds of the bank. People *v.* Wadsworth, 63 Mich. 500, 30 N. W. 99.

35. It is not within the power of the treasurer of a school district, by a general deposit of funds held by virtue of his office, to create between such district and his banker the relation of debtor and creditor. State *v.* Midland State Bank, 52 Neb. 1, 71 N. W. 1011, 66 Am. St. Rep. 481.

36. Board *v.* Wilkinson, 119 Mich. 655, 78 N. E. 893, 44 L. R. A. 493.

37. Funds left for safe-keeping.—Philadelphia *v.* Eckels, 98 Fed. 485.

The treasurer of a city, in accordance with an arrangement with a bank in which he kept an account as treasurer, deposited at night funds which had come into his office after banking hours, and which belonged in part to the city and in part to the state, for safe-keeping until the next morning, when, as was his custom, he separated out the portion of the funds belonging to the city, and had the same placed to his credit on his bank book. On the morning in question this was done before the hour for opening the bank. The bank was insolvent, and known to be so by its officers, and was at the time virtually in possession of the bank examiner, who took formal possession before the time for opening arrived, and the bank was not thereafter opened for business. The treasurer at once demanded the return of the funds, which were still in the bank, but they were retained by the examiner, and subsequently turned over to the receiver, who credited them to the treasurer on the bank books. Held, that such funds did not become the property of the bank, and were recoverable by the city from the receiver. Philadelphia *v.* Eckels, 98 Fed. 485.

38. Money borrowed from bank.—Custer *v.* Walker, 10 S. Dak. 594, 74 N. W. 1040.

count, is estopped from denying the truth of its representation in favor of any one, entitled to rely upon its truth, who has been induced by reliance upon it so to act or refrain from acting as to place himself in a situation to suffer loss or damage, if the bank were allowed to show that the statement was false; but only one who will suffer legal injury if its falsity be established can assert the estoppel.[39]

Question for Jury.—Where a county treasurer who had misappropriated county funds gives to the bank with which he deposited such funds, his demand note, as treasurer, for the amount of the misappropriation, and procures entry of a credit of a like sum on his account as treasurer, at the same time giving to the bank his check as treasurer for such sum, payable on the next day, on which day the bank charged up the check thus balancing the credit and also cancelling the note, it is, in view of the fact that the county treasurer can not bind the county by the note given, a question for the jury whether or not the bank misappropriated the amount credited by it to the treasurer.[40]

Liability for Unauthorized Application.—If the purpose of the treasurer and the officers of the bank was to fabricate evidence by which to conceal the former's defalcation from officers whose duty it was to represent the public in passing upon his account, and was accepted by them as true, the conduct of the bank would be sufficient to estop it from denying the truth of its representation in favor of the county; but if the purpose was to conceal from the grand jury the treasurer's defalcation, with no intent that any real right in the county should result, the bank would not be liable as for an unauthorized application of the amount represented by the credit.[41]

39. Estoppel to deny credit.—Anderson *v.* Walker, 93 Tex. 119, 53 S. E. 821.

A county treasurer borrowed $1,000 from defendant bank on his individual note, and then deposited it to his account as county treasurer, presumably to take the place of funds previously collected for the county. Thereafter the bank delivered to the treasurer drafts, including one for the $1,000, payable to his order as county treasurer, which were exhibited by him to the county commissioners, and his accounts settled in reliance thereon. Held, that the bank was estopped from claiming a lien on the $1,000 on account of the loan, or from setting up an agreement with the treasurer, that, if the note was not paid in full, the balance was to be charged back to the account. Custer *v.* Walker, 10 S. Dak. 594, 74 N. W. 1040.

40. Question for jury.—Anderson *v.* Walker, 93 Tex. 119, 53 S. E. 821.

41. Liability for unauthorized application.—Anderson *v.* Walker, 93 Tex. 119, 53 S. E. 821.

A county treasurer, who had misappropriated county funds, gave to the bank with which he deposited such funds his demand note, as treasurer, for the amount of the misappropriation, and procured the entry of a credit of a like sum on his account as treasurer. At the same time he gave to the bank his check, as treasurer, for such sum, payable on the next day; and on that day the bank charged up the check, thus balancing the credit, and also canceled the note. It appeared that on the day the note was given the bank represented to a committee appointed by the district court to investigate the county's finances that the treasurer's balance was a certain sum, which included the amount of the note; but the officers of the bank testified to their good faith in the transaction, and that they relied on the treasurer's statement that the county needed the money and would replace it the next day, and that they only agreed to extend a credit until that time, and for that purpose made the entry and canceled the credit. Held, that if the

If the jury should accept as true the statement of the officers of the bank that the latter relied on the treasurer's representation that the county needed the money and would replace it next day, and agreed only to extend a credit until that time, and for that purpose made the entry and canceled the credit, the bank would not be liable as for an unauthorized application of the amount represented by the credit.[42] If the money was loaned to the treasurer for the purpose of making a deposit of it to the credit of the county, to make good his defalcation, and the note and check were taken simply to enable the bank to apply the money so deposited to the treasurer's individual debt, which the note, in legal effect, was, the title of the county would have attached by such deposit, and such an application of it would be unauthorized.[43]

§ 130 (2ad) Entry of Credit to County.—A credit to a county entered upon the bank's books prima facie represents so much money on deposit belonging to county; but this is only evidence of the fact, and is open to explanation. The entry does not control the understanding under which it was made, and confers no greater right than the parties to the transaction intended by it. Evidence is admissible to show the whole of the transaction and the purposes of the parties are to be deduced from the whole of such evidence. The jury should be allowed, under proper instructions, to determine the effect of all the evidence for themselves, as the case is not one in which the transaction has necessarily a precise legal effect, which the court can declare as matter of law.[44]

§ 130 (2b) Notice of Title.—An account in the name of a depositor with the addition of words designating an office held by him is not by itself notice that the funds are held in his official capacity, as, for instance, the addition of the words, "collector,"[45] "treasurer,"[46] "sheriff,"[47] or "surrogate."[48] Such addenda are merely descriptio personæ, and do not imply

purpose of the treasurer and the officers of the bank was to fabricate evidence by which to conceal from the committee and the grand jury the former's defalcation, with no intent that any real right in the county should result, the bank would not be liable as for an unauthorized application of the amount represented by the credit. Judgment, 49 S. W. 937, modified. Anderson *v.* Walker, 93 Tex. 119, 53 S. W. 821.

42. Judgment 49 S. W. 937, modified in Anderson *v.* Walker, 93 Tex. 119, 53 S. W. 821.

43. Judgment 49 S. W. 937, modified in Anderson *v.* Walker, 93 Tex. 119, 53 S. W. 821.

44. Entry of credit to county.—Anderson *v.* Walker, 93 Tex. 119, 53 S. E. 821.

45. Notice of title—"Collector."—Swartwout *v.* Mechanics' Bank (N. Y.), 5 Denio 555; Pittsburg *v.* First Nat. Bank, 230 Pa. 176, 79 Atl. 406.

46. "Treasurer."—Perley *v.* Muskegon, 32 Mich. 132, 20 Am. Rep. 637; Swartwout *v.* Mechanics' Bank (N. Y.), 5 Denio 555; Pittsburg *v.* First Nat. Bank, 230 Pa. 176, 79 Atl. 406.

An account in the name of "A., County Treasurer," is not by itself notice that the funds belong to the county. Eyerman *v.* Second Nat. Bank, 84 Mo. 408.

47. "Sheriff."—Powell *v.* Morrison, 35 Mo. 244; Swartwout *v.* Mechanics' Bank, 5 Denio (N. Y.), 555; Pittsburg *v.* First Nat. Bank, 230 Pa. 176, 79 Atl. 406.

48. "Surrogate."—Schudder *v.* Trenton Sav. Fund Soc., 58 N. J. Eq. 154, 43 Atl. 3; Swartwout *v.* Mechanics' Bank (N. Y.), 5 Denio 555; Pittsburg *v.* First Nat. Bank, 230 Pa. 176, 79 Atl. 406.

that the money was held in trust.

Recitals in Warrant.—The recitals in warrants issued by an auditor[49] or other public officer, which show the account on which they were issued, may charge a bank with which the payee deposits the same with notice that the funds belong to the public and that the payee is acting as agent.

§ 130 (2c) Payment to or Order of Officer—§ 130 (2ca) In General.—A public officer who opens an account with a bank with his official addition and keeps a separate account in such capacity, can collect such deposits in his own name, and the bank will not be permitted to show that the moneys deposited are public funds.[50]

Payment on Warrant Equivalent to Check.—Where a borough treasurer deposited borough money in a bank in his own name as treasurer, the account was that of the treasurer and not of the borough; and where he issued warrants reciting that they would be paid, when properly indorsed, at the bank, such warrants being signed with his name as treasurer, they were equivalent to checks drawn directly by him upon the bank.[51]

§ 130 (2cb) Knowledge of Intention to Divert.—Where a public officer deposits money in a bank, with no special agreement that it is to be held as a special deposit, the bank, unless it knows, or by the exercise of due care could have known, that the depositor intended to illegally divert the fund, may lawfully honor checks drawn by the officer or trustee.[52]

§ 130 (2cc) Bank Participating in Misappropriation.—Where a treasurer of the town executed sundry notes as treasurer without authority from the town, which were discounted by the defendant bank and the avails placed to his credit as treasurer of the town, and then as treasurer drew out the town money to pay the notes, he was doing what the bank must be taken to have known that he had no right to do and the bank can not retain the money against the demand of the town.[53]

49. Recitals in warrant.—M., county treasurer of Lafayette county, gave to L. an order to the auditor of public accounts for the amount due to said county as interest due on Chickasaw school fund. L. received the auditor's warrants on the state treasurer for the same, and deposited them in bank as collaterals to secure his own indebtedness to the bank. Held that, from the recital in the warrants that they were issued on account of interest on Chickasaw school fund, the bank had notice that the funds belonged to the county of Lafayette, and that L. was acting as agent or attorney in fact for the county treasurer. Isom *v.* First Nat. Bank, 52 Miss. 902.

50. Payment to or order of officer.—Swartwout *v.* Bank (N. Y.), 5 Denio 555; Pittsburg *v.* First Nat. Bank, 230 Pa. 176, 79 Atl. 406; Perley *v.* Muskegon, 32 Mich. 132, 20 Am. Rep. 637, which was a case of a county treasurer; Lansing *v.* Wood, 57 Mich. 201, 23 N. W. 769; Scrantomy *v.* Farmers', etc., Bank, 24 N. Y. 424; Scudder *v.* Trenton Sav. Funds Soc., 58 N. J. Eq. 154, 43 Atl. 3.

51. Payment on warrant equivalent to check.—Pittsburg *v.* First Nat. Bank, 230 Pa. 176, 79 Atl. 406.

52. Knowledge of intention to divert.—Anderson *v.* Walker (Tex. Civ. App.), 49 S. W. 937, modified in 93 Tex. 119, 53 S. W. 821.

53. Bank participating in misappropriation.—East Hartford *v.* American Nat. Bank, 49 Conn. 539. See post, "Interest on Funds Used by Bank," § 130 (2h).

§ 130 (2d) Payment to Another than Officer or Order—§ 130 (2da) Assignee in Bankruptcy.—Where a county treasurer, who has deposited money belonging to the county in a bank, the account being kept in his name as "treasurer," and no money of his own being mixed therewith, becomes bankrupt, the balance of such account belongs to the county. Payment thereof by the bank to an assignee in bankruptcy constitutes no defense to an action brought by the county for its recovery.[54]

§ 130 (2db) Executor or Administrator of Officer.—See ante, "Executor or Administrator," § 129 (4bcg).

Administrator d. b. n. of Deceased Public Officers.—See ante, "Executor or Administrator," § 129 (4bcg).

§ 130 (2dc) Attachment or Execution Creditor.—See ante, "Particular Deposits," § 129 (7ab).

§ 130 (2e) Right of Officer to Follow Funds into Hands of Third Persons.—Whenever a public official, who has the absolute control of money, deposits it in a bank, without condition, he so far parts with the title that he can not pursue it into the hands of those to whom it is paid in the legal course of the bank's business, at least without the proof that the payee had knowledge of the trust, and that the money he received was a part of that fund.[55]

§ 130 (2f) Subject to Order of Successor.—Money deposited in bank by a public officer as such is subject to the order of his successor,[56] without an assignment thereof. An assignment from the predecessor to his successor is not necessary to authorize the latter to sue as the amount of the deposit vested in him by virtue of his succession.[57] The successor's remedy against the bank for refusal to pay over the money is by action at law and not by bill in equity.[58] The fact that the retiring officer had

54. Assignee in bankruptcy.—Board *v.* Bank, 5 Hun 649.

55. Right of officer to follow funds in hands of third persons.—Hummel *v.* First Nat. Bank, 2 Colo. App. 571, 32 Pac. 72.

56. Subject to order of successor.—Money deposited in bank by a board of street examiners, as such, who are superseded by a new board, is subject to the order of the new board. Carman *v.* Franklin Bank, 61 Md. 467.

57. Meridian Nat. Bank *v.* Hauser, 145 Ind. 496, 42 N. E. 753.

58. The board of chosen freeholders of a county deposited in a bank public moneys for the purpose of drawing against the same by check. The deposits were made in the name of S., the then county collector, and were drawn, under directions of the board, only by checks signed by S., and countersigned by the county auditor. Another collector having been elected and qualified, the bank refused to pay out the money on checks signed by him, and countersigned by the auditor, and the board filed a bill of equity against the bank and S. to recover the money, on the ground that S. was the depositor and creditor of the bank, and the board had a merely equitable interest therein, capable of being asserted only in an equitable proceeding. Held, that it was error to overrule a demurrer, since the board had an adequate remedy by an action at law against the bank to recover the money; the board, and not S., being the creditor of the bank. Smith *v.* Chosen Freeholders, 48 N. J. Eq. 627, 23 Atl. 268, reversing 48 N. J. Eq. 51, 21 Atl. 185.

issued checks against the fund and that payment thereof had been refused by the bank could not be set up by it as a defense to the suit by the incumbent.[59]

§ 130 (2g) Preference on Insolvency as to Other Creditors.—When, except as specially authorized by statute, a treasurer or other custodian of public money makes a general deposit thereof in his own name, a trust results in favor of the beneficial owner, and upon the insolvency of the bank receiving such funds with notice of their character, its assets are chargeable with the full amount of the deposit, to the prejudice of non-preferred creditors,[60] as, for instance, where a treasurer deposits public funds in his own bank.[61]

§ 130 (2h) Interest on Funds Used by Bank.—Where a county treasurer without authority under the depository law, deposits the public funds with a bank which receives the funds with full knowledge of their character, and loans the same at interest, such bank will be required to account to the public for the interest so received.[62]

Power to Sue.—The prosecuting attorney has authority to bring the action requiring the banks to account for, and restore such interest.[63]

Measure of Damages.—In an action to recover interest from a bank by way of damages for unlawful use of county funds, obtained from county treasurers, the measure of recovery is the amount of profit accruing to the bank from the use of the county funds; and if it is impracticable or impossible to determine exactly the amount of this profit, interest should be allowed at the rate of six per cent.[64]

59. Where a treasurer of the board of trustees of the Central Hospital for the Insane deposited money received by him from the state treasurer in a bank, subject to his check as treasurer, and the bank refused to honor his check, his successor could recover the amount of the deposit, without an assignment thereof having been made to him. Meridian Nat. Bank *v.* Hauser, 145 Ind. 496, 42 N. E. 753.

60. **Preference on insolvency as to other creditor.**—State *v.* Midland State Bank, 52 Neb. 1, 71 N. W. 1011, 66 Am. St. Rep. 484, citing Independent District *v.* King, 80 Iowa 497, 45 N. W. 908; Bunton *v.* King, 80 Iowa 506, 45 N. W. 1050; Meyers *v.* Board, 51 Kan. 87, 32 Pac. 658.

Where a county treasurer, prior to the passage of a law providing for the designation of county depositories, made a general deposit of the county funds in the bank in his own name as treasurer, the title to the money did not pass, though there was no agreement that the identical money should be returned, and, on the insolvency of the bank, the county was entitled to recover an equal amount from the receiver of the bank prior to the payment of general depositors. Watts *v.* Board, 21 Okl. 231, 95 Pac. 771.

61. Moneys deposited in a bank by the board of fire and water commissioners of a city are a trust fund, under Pub. Acts 1875, p. 158, providing for the safe-keeping of public moneys, where the law by which the board was created provided for the election of the treasurer, and a resolution of the board placed the money in his hands, and the treasurer deposited the money in his own bank. Board *v.* Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493.

62. **Interest on funds used by bank.**—Campbell *v.* National Banks, 4 N. P., N. S., 245, 16 O. D. N. P. 730.

63. **Power to sue.**—Campbell *v.* National Banks, 4 N. P., N. S., 245, 16 O. D. N. P. 730.

64. **Measure of damages.**—Welty *v.* Ohio Nat. Bank, 7 N. P., N. S., 43, 19 O. D. N. P., 82, affirmed in 83 O. St. 449.

§ 130 (3) Deposits by Factors, Agents or Attorneys—§ 130 (3a) Deposits by Agents—§ 130 (3aa) Deposits by Agent in His Own Name—§ 130 (3aaa) Effect on Title of Principal.—The fact that an agent deposits his principal's money in a bank in his own name, without informing the bank that any one else has an interest in it, does not divest the principal's beneficial interest therein. In other words, the money belongs to the principal though deposited in the name of the agent.[65] Where an agent deposits in a bank to his own account moneys of his principal a trust is impressed upon the deposit in favor of the principal, and his right is not affected by the fact that the agent at the same time deposited other moneys belonging to himself.[66] The principal's claim to the money is good as against that of the agent's assignee for the benefit of creditors,[67] or an attaching creditor.[68]

§ 130 (3aab) Relation between Bank and Principal.—Where checks are lawfully deposited in a bank by a clerk of the payee, authorized to indorse the same to the bank, and the bank receives the proceeds, the relation between the bank and the payee is that of debtor and creditor, and the checks and proceeds may be credited by the bank to any person without altering its relations with the payee.[69]

Indorsement.—Where a bank, authorized to receive checks indorsed by the clerk of the payee by means of a rubber stamp, received checks with such indorsement and an additional indorsement signed in the clerk's name

65. **Effect on title of principal.**—Skilman *v.* Miller (Ky.), 7 Bush 428; Phillips *v.* Franciscus, 52 Mo. 370.

In a proceeding supplementary to execution to subject money deposited by defendant to his own credit, it appeared that the entire deposit was composed of rents collected as the agent of T. and of moneys received by defendant as the sheriff's deputy, and that neither T. nor the sheriff knew of the deposit, or of the form in which it was made, till after the supplementary proceedings were commenced. Held, that the moneys belonged to T. and the sheriff. Howe *v.* Shiels (N. Y.), 1 City Ct. R. 128.

Where, in a business transaction, plaintiff agreed to meet defendant's checks drawn in advance of the deposit of the proceeds of the business, a part of the proceeds to become the property of plaintiff, and defendant drew the money and converted it to his own use, as to such money defendant was merely plaintiff's agent, and it belonged to plaintiff, though deposited in the name of defendant. Straight *v.* Shaw, 56 Misc. Rep. 426, 107 N. Y. S. 1036.

66. **Principal's fund mingled with those of agent.**—Where an agent deposits in a bank, to his own account, the proceeds of property sold by him for his principal, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposited other moneys belonging to himself. Van Alen *v.* American Nat. Bank, 52 N. Y. 1.

67. Phillips *v.* Franciscus, 52 Mo. 370.

B. made a special deposit of a package of money, that he had collected for plaintiff, in a bank, without informing the bank that any one else had any interest therein, and the bank gave him a certificate, specifying that the package was to be delivered to him or his order. After making an assignment for creditors, B. assigned the certificate to plaintiff. Held, that plaintiff was entitled to the deposit, and not B.'s assignee. Phillips *v.* Franciscus, 52 Mo. 370.

68. Skilman *v.* Miller (Ky.), 7 Bush 428.

69. **Relation between bank and principal.**—Deri *v.* Union Bank, 65 Misc. Rep. 531, 120 N. Y. S. 813.

in ink, and received the proceeds of the check, and credited the same to the clerk's account, and then permitted the clerk to draw out the same, it was not guilty of converting the checks, for the additional indorsement did not prevent the bank from lawfully receiving the checks and the proceeds thereof.[70] But where the bank received irregularly indorsed checks and treated them as it did those indorsed in the authorized manner, it converted the checks and obtained no title thereto until the owner elected to treat the unauthorized act as a conversion.[71]

§ 130 (3aac) Payment to Agent—§ 130 (3aaca) In General.—Where a customer of a bank deposits money to his credit as agent, the bank is liable to pay out the same on the check of the depositor and can not allege that the money as deposited belongs to someone else. This may be done by an attaching creditor, or by the true owner of the fund, but the bank is estopped by its own act.[72]

Addition to Name as Affecting Character of Deposit.—The addition of the word agent to the name of a depositor is mere descriptio personæ and does not affect his right to withdraw the same.[73]

"Cashier."—Where a cashier opened an account in a bank in his name as cashier, the addition of "cashier" to his name did not affect the character of the deposit as between the bank and the depositor.[74]

§ 130 (3aacb) Duty of Bank to See to Application Generally.—A bank is not responsible for the proper application of funds by an agent when it has properly paid them to him.[75] The bank has the right to as-

70. Indorsement.—Deri *v.* Union Bank, 65 Misc. Rep. 531, 120 N. Y. S. 813.

71. A bank, authorized to receive checks indorsed by a clerk of the payee by means of rubber stamps reading, "Pay to the order of * * * [bank]," and the name of the payee, received checks containing in writing the name of the payee and the clerk, and the indorsement by means of the stamp, "Pay to the order of the" bank, and also received a check indorsed by the rubber stamp, "Pay to the order of" bank, and in writing the name of the clerk. It collected the proceeds of the checks, and credited the same to the clerk's account, and paid the same to the clerk. Held, that it converted the checks, for it was without authority to receive checks so indorsed. Deri *v.* Union Bank, 65 Misc. Rep. 531, 120 N. Y. S. 813.

72. Payment to agent.—Nolting *v.* National Bank, 99 Va. 54, 62, 37 S. E. 804; Patterson *v.* Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778; Hemphill *v.* Yerkes, 132 Pa. 545, 19 Atl. 342, 19 Am. St. Rep. 607.

73. Addition to name as affecting character of deposit.—Patterson *v.* Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778; Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

74. "Cashier."—Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

Where money is deposited in a bank, it is sufficient notice to the bank that the depositor has an interest in the funds that he brings it to the bank and deposits it in his own name, though with the addition of "cashier" to his name, which does not change the nature of the deposit, and notifies the bank that no other person than himself was to check out the fund. Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

75. Duty of bank to see to application generally.—Gate City Bldg., etc., Ass'n *v.* National Bank, 126 Mo. 82, 28 S. W. 633, 27 L. R. A. 401, 47 Am. St. Rep. 633.

The mere collection by bankers of drafts of their customer, and the placing of the money to his credit as a depositor, with the knowledge that it is advanced to him by another to enable him to buy and deliver cattle to such

sume that an agent dealing with a fund or deposit is acting within the terms of his agency, and will appropriate it to its proper uses and trusts,[76] even where the agent has given the bank instructions to remit the fund to his principal but, before the remittance has been made, revoked the order and checked them out.[77]

§ 130 (3aacc) Notice of Agent's Want of Authority.—A bank can not be held to account to the owner of a fund deposited by an agent in his own name, and paid out on his own check, without knowledge by the bank of any want of power on the part of the agent,[78] but a bank having notice of an agent's want of authority to check out funds of his principal deposited by the agent in his own name, is responsible for the conversion of the deposit where it permits the agent to draw out the fund upon his own account.[79]

Notice Expressly Given by Agent to Bank.—Where defendant deposited money in the bank as agent, and notified the officers that the money deposited consisted of funds belonging to other persons, in which he would have no personal interest, the bank had notice of the fact that such deposit was a trust fund.[80]

Deposit Made in Agent's Name at Instance of Bank.—Where money was consigned by a principal to his agent, but without instructions as to its

other, creates no implied obligation on the part of the bankers to exercise a supervisory control over the business of their depositor, so as to see that the money is properly applied by him. Randolph *v.* Allen, 19 C. C. A. 353, 73 Fed. 23, distinguishing Union Stock Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 34 L. Ed. 724, 11 S. Ct. 118.

76. First Nat. Bank *v.* Valley State Bank, 60 Kan. 621, 57 Pac. 510.

77. When an agent, rightfully in possession of his principal's money, deposits it in a bank of which he is president to his own credit and as a part of his general deposit account, and tells the cashier the name of the person to whom it belongs, and instructs him to remit it to the owner, but the remittance is not made, and the agent in a short time checks against the general balance of the account, inclusive of the deposit in question, reducing it far below the amount of such deposit, the bank has the right to presume that the agent knows the remittance has not been made and has revoked the order to make it, and that the checking out of the deposit by the agent is within the authorized terms of his agency; and the bank will not be charged with notice of a trust in favor of the owner of the money to the extent of the deposit made by the agent. First Nat. Bank *v.* Valley State Bank, 60 Kan. 621, 57 Pac. 510.

Where an agent, rightfully in possession of his principal's money, deposits it in a bank of which he is president to his own credit, and as a part of his general deposit account, and tells the cashier the name of the person to whom it belongs, and instructs him to remit it to the owner, but the remittance is not made, and the general agent in a short time checks against the general balance of the account, a trust in favor of the principal does not arise, although the agent, at a time when his general deposit is below the amount of his principal's money deposited by him, discovers that the remittance has not been made, and directs that the balance to his credit be applied upon his debt due to his principal, if he is at the time indebted to the bank, and it chooses to assert its lien upon his funds for its protection. First Nat. Bank *v.* Valley State Bank, 60 Kan. 621, 57 Pac. 510.

78. Notice of agent's want of authority.—Martin *v.* Kansas Nat. Bank, 66 Kan. 655, 72 Pac. 218.

79. Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

80. Notice expressly given by agent to bank.—Lindsay *v.* Continental Nat. Bank, 82 Mo. App. 301.

disposition, and the agent took the money to a bank, and with the knowledge of the officers of the bank that the money belonged to the principal and had been so consigned, and by their advice to deposit it to await instructions from his principal, the money was deposited in the agent's name, the bank was liable for a conversion, and became directly responsible to the principal, and not merely to the agent.[81] There clearly was a conversion for which the bank was responsible when the bank permitted him to appropriate it to the payment of his indebtedness, and the balancing of his account with the bank.[82] It was immaterial whether the entry in the agent's name was intended, in the first instance, as a deposit to his credit, or whether it was afterwards so treated; the bank officers supposing they had no control over it to prevent his drawing upon it on his own account, in known violation of his trust, as, in either case, it operated as a fraud upon the principal.[83] The bank became responsible for the conversion, at whatever time it permitted the agent to draw for the money on his own account.[84]

Deposit as Agent of Named Principal.—A person may deposit money in a bank representing himself as agent of a fictitious principal, and in such case he can draw the money in the name in which the deposit was made; but a bank can not assume that a named principal is a fictitious principal, or, if it does so, it will be at its own peril.[85]

Proceeds of Check Placed to Credit of Payee or Agent of Drawer.—The fact that the proceeds of a check are placed by the bank to the credit, not of the payee individually, but to the payee as agent of the drawer, charges the bank with notice of the fiduciary character of the deposit.[86]

Certificate of Deposit to Agent Individually.—The mere fact that an agent asks for a certificate of deposit in his own name for moneys of his principal is equivalent, nothing to the contrary appearing, to a declaration by the agent that the money is received by him in his individual capacity, for his individual use, and is enough to put the bank on inquiry as to why the agent wanted the certificate so issued, especially where the president of the bank knew the agent to be irregular and unreliable in his business methods.[87]

Certificate to Agent Individually for Draft as Agent.—When an agent draws a draft in the name of his principal and receives from a bank

81. **Deposit made in agent's name at instance of bank.**—Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

82. Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

83. Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

84. Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

85. **Deposit as agent of named principal.**—Honig *v.* Pacific Bank, 73 Cal. 464, 15 Pac. 58.

A bank has no right to assume that a depositor, designating himself as agent, represents a fictitious principal, and that he himself is entitled to receive the fund, and, if it does so, it acts at its peril. Honig *v.* Pacific Bank, 73 Cal. 464, 15 Pac. 58.

86. **Proceeds of check placed to credit of payee or agent of drawer.**—Aurora Nat. Bank *v.* Dils, 18 Ind. App. 319, 48 N. E. 19.

87. **Certificate of deposit to agent individually.**—Farmers' Loan, etc., Co. *v.* Fidelity Trust Co., 30 C. C. A. 247, 86 Fed. 541.

money therefor, the presumption, in the absence of any showing to the contrary, is that he receives the money in the same capacity in which he draws the draft, that is to say, as agent. When the agent, for such a draft, asks for and receives from the bank a certificate of deposit in his individual name, not only is such bank thereby put upon inquiry as to why, for money of the principal, the agent wants such certificate in his individual name, but such conduct—nothing to the contrary appearing—is equivalent to a declaration by the agent that the money is received by him in his individual capacity, and for his individual use; and certainly the legal presumption that follows the deposit of money in the individual name of a man is that the money so deposited is the property of the depositor.[88]

Same—Previous Drafts.—That previous drafts drawn by an agent, and credited to him individually, or cashed when drawn, had been paid by his principal, does not warrant the bank in issuing a certificate of deposit to him individually for the proceeds of a draft drawn by him as agent.[89]

§ 130 (3aacd) Losses for Which Bank Liable.—A banker, who knowingly permitted an agent to deposit money of his principal to his own account and mingle the same with his own funds in violation of his contract, which required the deposit to be in the name of his principal, if for that reason chargeable with liability to the principal, in the absence of fraud or conspiracy, is accountable only for losses resulting directly from such wrongful deposit, such as for sums applied by the agent to his own use, and not for losses resulting from the use of the money by the agent as contemplated by the contract of agency.[90] In such case the banker can not be held to account for a sum originally advanced by the principal to the agent to be used for the purposes of the agency, and so deposited by the agent to his own credit, but which was afterwards treated by the principal as a loan to the agent, and for which his note was taken, nor for a sum lent by the banker to the agent personally, and which, having been used for agency purposes, was repaid by the principal with knowledge of the facts.[91]

§ 130 (3aace) Credits Due to Bank.—Aside from any question of authority, ratification, or knowledge, any of the principal's money paid by the bank to the agent, which the latter delivers to the principal, or retains with the principal's consent, etc., will be a credit to the bank on the deposit account, unless thus to follow the fund, and to apply it, would violate some peculiar equity.[92]

§ 130 (3aacf) Ratification of Act of Agent.—It is not essential to the discharge of a bank, from which an agent has withdrawn the funds of

88. **Certificate to agent individually for draft as agent.**—Farmers' Loan, etc., Co. *v.* Fidelity Trust Co., 30 C. C. A. 247, 86 Fed. 541.

89. **Same—Previous drafts.**—Farmers' Loan, etc., Co. *v.* Fidelity Trust Co., 30 C. C. A. 247, 86 Fed. 541.

90. **Losses for which bank liable.**—Harris & Co. *v.* Chipman, 84 C. C. A. 429, 156 Fed. 929.

91. Harris & Co. *v.* Chipman, 84 C. C. A. 429, 156 Fed. 929.

92. **Credits due to bank.**—City Bank *v.* Kent, 57 Ga. 283.

his principal, that the principal, in ratifying the receipt of the funds by the agent, knew that false checks had been used for the purpose of withdrawing the money.[93]

§ 130 (3aacg) Estoppel of Principal to Recover.—The rule of law that, where one of two innocent parties must suffer through a wrongful act of a third party the one who has enabled such third party to accomplish the wrong must bear the loss, is applicable to a case in which the bank or the principal must suffer a loss resulting from an unauthorized or wrongful act of the agent. Where the principal by entrusting his money to the agent enables him to do the wrong, the principal rather than the bank should bear the loss.[94]

§ 130 (3aad) Recovery by Principal after Notice.—Although a bank on receiving deposits becomes a debtor to the depositor therefor, yet, if the depositor is an agent, when his principals assert their right to the money before its repayment, and give notice to the bank of their ownership, and of their unwillingness that the money shall be paid to their agent, his right to reclaim it ceases;[95] and a balance standing on the books of a bank to the credit of one who is agent for plaintiff can be recovered by the principal on proof of the agency.[96]

Payment to Agent after Notice.—Where an agent fraudulently deposits, in his own name the money of his principal, and the bank, after having been notified of the fraud and requested not to repay the fund to said

93. Ratification of act of agent.—City Bank *v.* Kent, 57 Ga. 283.

Where an agent, to whom specie had been consigned, deposits the same in bank to await instructions, and informs the bank to whom it belongs, and the bank afterwards permits the agent to apply the money to his private account with the bank; quære, whether the doctrine of ratification applies, and whether any settlement of the principal with the agent, short of satisfaction or an express agreement to discharge the bank, would have that effect. But if the doctrine of ratification applies, the evidence of their (the principals') assent and acquiescence ought to be very clear and satisfactory, to hold them bound by the fraudulent appropriation of their funds, to the very parties who had practiced the fraud upon them. Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

94. Money of husband misappropriated by wife.—Plaintiff directed his wife to deposit money which they had accumulated in some bank, whereupon she went to defendant's bank in company with one H., whom the bank believed to be her son, opened an account, and, being illiterate, was directed to sign checks with a mark, in the presence of H., who should sign as a witness. The bank, without knowledge of her coverture, thereafter paid out the whole deposit on her check so signed, and plaintiff, who was also illiterate, on ascertaining that the money had been drawn without his knowledge or consent, sued defendant for the deposit. Held, that the wife, being plaintiff's agent to make the deposit, would be presumed to have authority to withdraw the same; but, in any event, the bank having no notice of her coverture, plaintiff could not recover, since by intrusting her with the money he had enabled her to do the wrong, and he, rather than the bank, should bear the loss. Dacy *v.* New York Chemical Mfg. Co., 2 N. Y. Super. Ct. 589.

95. Recovery of principal after notice.—Farmers', etc., Nat. Bank *v.* King, 57 Pa. 202, 98 Am. Dec. 215.

96. Smith *v.* Philadelphia Nat. Bank (Pa.), 1 Walk. 318.

agent, does repay it, the principal may recover against the bank,[97] with interest.[98]

Ratification of Deposit of Agent.—Upon a ratification of the unauthorized acts of an agent in depositing in a bank certain sums of money, a recovery may be had by the principal of the full amount deposited, as evidenced by certificates of deposit issued by the bank, and wrongfully paid to the agent, without showing the amount actually received by the bank, and although the money drawn by the agent on the first certificate may have been used to purchase the second.[99]

§ 130 (3ab) Deposits by Agent to Credit of Principal.—Acceptance by Principal.—A mere deposit of money by an agent in the name of his principal does not show ownership in the latter in the absence of any showing of acceptance or presumption thereof.[1] It will not be presumed that a principal accepted a deposit to his credit by an agent where such presumption involves a further presumption that such principal participated in an unlawful act of his agent.[2]

Payment of Certificates of Deposit Payable to Principal or Order.—Where a deposit was made by an agent and certificates delivered to him payable to his principal or order, if the bank afterward pay such certificates upon the endorsement of the agent it is liable to the principal for the certificates so paid.[3]

Signature Appearing in Register of Certificates of Deposit.—In the absence of a contract that certificates of deposit are payable only when endorsed according to the signature in the bank's register, the principal of an agent making a deposit in the name of A. (principal) by B. (agent) may ratify the act of the agent in making such deposit and recover the same from the bank.[4]

97. **Payment to agent after notice.**—Frazier *v.* Erie Bank (Pa.), 8 Watts & S. 18.

98. B. gave a bank notice that money deposited therein to the credit of S. was partly his, instructed the bank not to pay it to S., and indemnified it, but the bank paid the money to S. Held, that B. could recover the amount, with interest. First Nat. Bank *v.* Bache, 71 Pa. 213.

99. **Ratification of deposit of agent.**—Honig *v.* Pacific Bank, 73 Cal. 464, 15 Pac. 58.

1. **Acceptance by principal.**—Leech *v.* First Nat. Bank, 74 S. W. 416, 99 Mo. App. 681.

2. A customer of an agent who conducted a "bucket shop" in violation of Rev. St. 1890, § 2221-2225, put up "margins," which were deposited by the one who conducted the "bucket shop" in a bank to the credit of his principal. Held, that it would not be presumed that the principal had ever accepted the deposit, since it would not be presumed that he participated in the unlawful act of his agent. Leech *v.* First Nat. Bank, 99 Mo. App. 681, 74 S. W. 416.

3. **Payment certificates of deposit payable to principal or order.**—Honig *v.* Pacific Bank, 73 Cal. 464, 15 Pac. 58.

4. **Signature appearing in register of certificate of deposit.**—P., a collector in the employ of H., deposited in a bank, without the latter's knowledge, certain sums of money, and, in designating to whose order the same was to be payable, wrote in the bank register, "N. H., by S. A. P." Thereupon the bank issued and delivered to P. certificates of deposit payable to the order of N. H., which were afterwards paid by the bank upon the indorsement by P. of "N. H., by S. A. P." Subsequently, H., learning of the transaction, ratified the act of P. in

§ 130 (3ac) Deposits by Principal to Credit of Agent.—Where a principal introduces an employee to a bank as a trusted agent, and deposits money to his account as such, without restrictions on the power to check out same, the bank is bound to honor the agent's checks, unless it has positive knowledge that they are drawn in violation of his trust.[5]

§ 130 (3ad) Agent Allowed to Check against Deposit of Principal.—If knowledge comes to the bank that an agent who is allowed to check upon the funds of a principal on deposit with it is about to commit a breach of trust in drawing checks upon the fund in bank, in such event, it would be the duty of the bank to protect the rights of the principal; but, to acquire the knowledge, such bank will not be required to assert itself beyond the channels of its business. To hold a bank to a higher duty than that of being bound within the channels of its business in acquiring information of any projected breach of trust by an agent who has the power to check upon the funds of the principal in the bank would imperil the banking interests of the country.[6] Where a principal is the depositor, and occupies a contractual relation to the bank, but an agent is given authority to draw checks against the deposit for the benefit of the principal or his business, the bank is not authorized to pay checks drawn by the agent for his own benefit if it know, or, it is sometimes said, if it have good reason to know, the fact.[7] No restrictions having been made by the principal upon the power of its agent to draw checks upon the fund deposited by the principal to the account of the agent, unless the bank had positive knowledge that a fraud, such as a breach of trust, was being attempted by the agent, the bank was bound to honor any checks he might draw.[8]

How Notice Acquired and Negligence.—To acquire knowledge that checks drawn by an agent are drawn in violation of his trust the bank need not exert itself beyond the channels of its business.[9] The fact that the bank knows that the agent, who has authority only to buy spot cotton, sustained a loss of his principal's money in cotton futures several years previous, and that a few months before the check in question was drawn he bought a draft on New York, and that the cashier then thought it might

depositing the money, and sued the bank upon the certificates so paid. Held, there was no contract, express or implied, that the certificates were payable only when indorsed according to the signature in the register, and that H. was entitled to recover. Honig *v.* Pacific Bank, 73 Cal. 464, 15 Pac. 58.

5. **Deposit by principal to credit of agent.**—Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

6. **Agent allowed to check against deposit of principal.**—Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

7. Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885, reversing 77 S. W. 44.

8. Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750; Knobeloch *v.* Germania Sav. Bank, 43 S. C. 233, 21 S. E. 13; Simmon Hardware Co. *v.* Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700; Fogarties *v.* Bank, 12 Rich. L. 518.

9. **How notice acquired and negligence.**—Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

be for cotton futures, does not put the bank on notice that the agent is misapplying the deposit.[10] The fact that the bank does not inform the principal of the agent's previous misapplication of funds, the agent having restored same without the principal's knowledge, does not render it liable, on the ground of negligence, for funds subsequently checked out and misapplied.[11]

Estoppel of Principal to Assert Invalidity of Check.—While holding property purchased with a check drawn by an agent having authority to draw checks, and paid by the bank on which it was drawn, the principal can not assert the invalidity of the check, as against the bank, because it was postdated.[12]

Money Drawn to Pay Subagents.—If the principal allows the agent to employ subagents, the bank may presume that money drawn out by him to supply them was properly drawn.[13]

§ 130 (3ae) Agent Authorized to Sign Principal's Name to Check.—When an agent, having power of attorney to collect any and all moneys due or to become due his principal from any source, and especially a certain claim, to give receipts for the same, to apply portions of such moneys to debts of the principal, and generally to do and perform any other acts, in and about said business, that may be deemed necessary or proper, deposits in bank, to the principal's credit, some of the money arising from the claim specially mentioned in the power, and afterwards, during the existence of the agency, draws out the deposit on checks purporting to be signed by the principal, and believed by the officers of the bank to be genuine, the bank is discharged, whether the checks be in fact genuine or not. They are, in effect, acquittances in the name of the principal.[14]

Payment to Agent upon Forged Indorsement of Principal.—A bank is liable to a person to whom it issues its certificate of deposit payable to his order, where it pays the certificate to an agent of such person upon his forged indorsement thereon of the name of his principal.[15]

§ 130 (3af) Proceeds of Check Indorsed by Agent without Authority.—Where an agent has no legal authority to indorse a check payable to the order of his principal, his indorsement of his principal's name is as ineffectual to pass any title as if he had forged such name, and the bank paying out the proceeds of such check for the use of such agent

10. Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

11. Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

12. **Estoppel of principal to assert invalidity of check.**—Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

13. **Money drawn to pay sub-agent.**—Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

14. **Agent authorized to sign principal's name to check.**—City Bank *v.* Kent, 57 Ga. 283.

15. **Payment to agent upon forged indorsement of principal.**—Gueydon Bros. *v.* Quintanilla (Tex.), 2 Wilson Civ. Cas. Ct. App., § 617.

is liable to the principal for conversion.[16]

§ 130 (3ag) Liability of Agent for Loss.—The deposit of money in bank by an agent in his own name, if intended to be by the agent for the benefit of the principal, is not a conversion thereof to his use, so as to make him the debtor of the principal for the amount, where the same is lost.[17]

§ 130 (3b) Factors and Commission Merchants.—Where, by their general authority as factors and by their course of dealing, commission merchants had authority to make deposits in bank for their principals, such deposits were rightfully made and received, and created the relation of banker and depositor, though, at the time of making them, the commission merchants, to the knowledge of the bank, were insolvent, and had committed an act of bankruptcy, on account of which they were subsequently adjudged bankrupt.[18]

Payment to Factor or Order.—Where a commission merchant deposits the proceeds of sales for his principal in a bank to his own credit, and draws out the same on his individual checks, his principal can not recover the amount so drawn out from the bank.[19]

Paying Checks after Insolvency.—The mere insolvency of a factor, that is, inability to pay his debts at maturity, where he does not surrender or the law assume control of his affairs, does not revoke his authority to deposit and check against the funds from sale of his customers' property; the bank can not question his right to do so, as long as the customers con-

16. Proceeds of check indorsed by agent without authority.—Robinson *v.* Chemical Nat. Bank, 86 N. Y. 404.

C. and B. were the trustees of an estate, B. being the acting trustee, and having the exclusive management. He employed L. as his clerk and agent for the collection of rent. Acting as such agent, L. received a check for rent due the estate, payable to the order of B. This L. indorsed, payable to his own order, signing the name of B. by himself as attorney, and then indorsed it "for deposit" with defendant, signing his own name. He deposited the check with defendant, who collected it and placed it to the credit of L., and the latter subsequently checked out the same for his own use. In an action for a conversion of the check, held, that L. had no authority to indorse or use the check or its proceeds, and defendant, as against B. or the trustees, was not authorized to collect and appropriate the proceeds, and was therefore liable. Robinson *v.* Chemical Nat. Bank, 86 N. Y. 404.

17. Liability of agent for loss.—Hale *v.* Wall, 63 Va. (22 Gratt.) 424.

18. Factors and commission merchants.—Judgment, 77 S. W. 44, reversed in Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885.

19. Payment to factor or order.—Boyle *v.* Northwestern Nat. Bank, 125 Wis. 498, 104 N. W. 917, 103 N. W. 1123, 1 L. R. A., N. S., 1110, 110 Am. St. Rep. 844.

Where a grain broker sold grain for customers on commission, and deposited the proceeds, including his commissions, in a bank to the credit of an account under which he did business, pending a settlement with the shippers of the grain so sold, and it appeared that after a deposit amounting to $1,161.43 of plaintiff's money had been made to such account the lowest balance to the credit of the account, and before any money belonging to interveners was deposited therein, was $153.50, such sum was in equity the property of plaintiff. Boyle *v.* Northwestern Nat. Bank, 125 Wis. 498, 103 N. W. 1123, 104 N. W. 917, 1 L. R. A., N. S., 1110, 110 Am. St. Rep. 844.

tinued to employ and trust him with their sales; nor does it become liable to them for honoring his checks unless it is a party or privy to his breach of trust.[20] A bank, knowing that a factor depositing in his own name, in the usual course of his business, money received from sales of property belonging to his customers, was insolvent, did not become liable to his principal for such funds by honoring the checks of the factor in favor of third persons, though having the means of knowing that he was thereby misappropriating money belonging to his customers.[21]

Right between Check Holder and General Creditors.—Where factors deposited money in bank received from sales of property belonging to their customers, a check drawn by the factors on the fund payable to the customers but not accepted by the bank creates no preference over general creditors.[22]

Burden of Proof as to Deposits of Insolvent Factors.—In an action for recovery of the proceeds of sales made by insolvent factors and deposited in the defendant bank, the burden is on the plaintiff owners of the property sold to prove that the proceeds from the sales in question were deposited on that particular day and remained in possession of the bank.[23]

§ 130 (3c) Deposits by Brokers.—Where insolvent brokers kept a separate bank account for their brokerage business, persons whose bonds were sold by them are entitled to payment in full, if the amount of the brokerage account in the bank is more than sufficient to pay all claims against the brokerage business.[24]

§ 130 (3d) Deposits of Attorneys.—Where an attorney deposits money in a bank in his name as attorney, the same relation exists between him and the bank as between it and any other general depositor;[25] but the

20. **Paying checks after insolvency.**—Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885, reversing 77 S. W. 44.

21. Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885, reversing 77 S. W. 44.

22. **Right between check holder and general creditor.**—Smith *v.* City Hall Bank, 13 O. C. C., N. S., 122.

23. **Burden of proof as to deposits of insolvent factors.**—Smith *v.* City Hall Bank, 13 O. C. C., N. S., 122.

24. **Deposits by brokers.**—The complainant's brokers sold his bonds and held the proceeds, at the time of their failure, deposited in their names in a bank account, which they kept exclusively for their brokerage transactions, the balance of which account was more than sufficient to meet the charges arising from such transactions. Held, that complainant was entitled to receive in full the amount of the proceeds of his bonds. Voight *v.* Lewis, Fed. Cas. No. 16,989, 11 Phila. 511.

25. **Deposits of attorneys.**—Where money is deposited in the name of C. as "atty.," as between C. and the bank the latter is liable to pay the money so deposited to C. on his checks, and between him and the bank the same relation exists as between the bank and any other general depositor. Cunningham *v.* Bank, 13 Idaho 167, 88 Pac. 975, 10 L. R. A., N. S., 706.

Where an attorney of an executrix deposits with a bank a check payable to the order of the executrix, and indorsed by him with her name, under authority conferred on him, and it collects the check and passes the proceeds to the credit of the attorney, it is not responsible to the executrix for the proper application of the money, and, where the attorney uses it for

relation of trust between the attorney and his client does not pass to or charge the bank as trustee of the client in respect to the money so deposited;[26] hence the bank is liable to pay the money so deposited to the attorney or on his check without liability to the true owner,[27] it having no notice of the attorney's intended misappropriation.[28]

Notice to Bank of Claim of Client.—Where an attorney collected money for a client which he deposited to his credit in bank, and thereafter gave the client check on the account for the amount due less his fees, the fact that the client was dissatisfied with the settlement obtained, and notified the cashier of the bank that there was yet due a certain sum of the money so deposited, did not entitle him to sue the bank to recover the amount so claimed.[29]

Attachment.—See ante, "Particular Deposits," § 129 (7ab).

§ 130 (3e) Deposit by Officers or Agents of Corporations.—When an officer of a corporation deposits moneys in bank in his name as treasurer of the corporation, taking a certificate of deposit payable to his order as such treasurer, the money so deposited becomes eo instanti the property of the corporation and no subsequent act of ratification on its part is necessary to complete its title of the funds.[30]

Absence of Notice of Want of Authority to Withdraw.—Where a corporation suffered an officer of the corporation to deposit its money in a bank, without informing the bank that he had no power to withdraw the funds, and the bank, without notice of the depositor's want of authority, allowed him to draw out the money, the bank was not responsible for the loss of it.[31]

Officer Held Out as Having Authority to Withdraw.—Where the president of a corporation, who was the general manager and director

his own purposes, the executrix can not recover from the bank. Mills *v.* Nassau Bank, 52 Misc. Rep. 243, 102 N. Y. S. 1119.

26. Where an attorney collected money belonging to plaintiff as her attorney, and deposited the same to his credit in defendant bank, the relation of trust between plaintiff and the attorney did not pass to or charge the bank as trustee of the plaintiff in respect to the money so deposited. Rhinehart *v.* New Madrid Banking Co., 99 Mo. App. 381, 73 S. W. 315.

27. Cunningham *v.* Bank, 13 Idaho 167, 88 Pac. 975, 10 L. R. A., N. S., 706.

28. Where F. opened an account in a bank in the name of "F., Attorney for B.," he is the depositor; so that the bank may pay checks so signed by him without liability to B., having no notice of F.'s intended misappropriation. Pennsylvania, etc., Trust Co. *v.* Real Estate Loan, etc., Co., 201 Pa. 299, 50 Atl. 998.

29. Notice to bank of claim of client.—Rhinehart *v.* New Madrid Banking Co., 99 Mo. App. 381, 73 S. W. 315.

30. Deposit by officer or agents of corporations.—C., the treasurer of a building and loan association, a corporation, who had received over $6,000 of the moneys of the association, opened an account in bank in his name as treasurer of the association, and in that name and title deposited $6,000, taking therefor a certificate of deposit, payable to him as such treasurer. Held, that the money so deposited became eo instanti the property of the corporation, and no subsequent act of ratification on its part was necessary to complete its title to the fund. Lindsey *v.* Lambert Bldg., etc., Ass'n, 4 Fed. 48.

31. Absence of notice of want of authority to withdraw.—Fulton Bank *v.* New York, etc., Canal Co. (N. Y.), 4 Paige 127.

of its business, represented to a bank that a certain person was the corporation's authorized agent for the sale of its goods, with power to take, indorse, and procure the discount of notes for goods sold, the bank was entitled to credit for all moneys drawn by the agent in the ordinary course of the business and apparently within his authority.[32]

Liability for Trust Deposit in Absence of Notice Trust.—Where officers of a corporation borrow money to be deposited in a bank as a trust fund for its creditors, but such intention and the insolvent condition of the corporation are unknown to the bank, its payment in good faith of such fund on the check of an officer of the corporation does not render it liable as a trustee to other creditors of the corporation, because the proceeds of the check, with the consent of the bank, were used to take up the note on the faith of which the loan had originally been made by the bank.[33]

Duty to See to Application of Proceeds.—Where a bank acts in good faith, and an officer of the corporation in his official capacity has power to withdraw or collect its funds, the bank is not responsible for their proper application by him,[34] where it pays according to its by-laws without negligence.[35]

Notice of Intended Misappropriation.—Where a bank has notice from the checks that a treasurer of a corporation is appropriating its money to his individual benefit, it is liable to the corporation therefor.[36]

32. Officer held out as having authority to withdraw.—Marine Bank *v.* Butler Colliery Co., 52 Hun 612, 5 N. Y. S. 291, 23 N. Y. St. Rep. 318, 1 Silvernail 155, judgment affirmed in 125 N. Y. 695, 26 N. E. 751.

33. Liability for trust deposit in absence of notice trust.—Wyman *v.* National Bank, 51 Neb. 636, 71 N. W. 277.

34. Duty to see to application of proceeds.—Where the general fiscal agent of a building and loan association, who, while not by its by-laws the custodian of its funds, was the custodian of its securities, and authorized to make its collections and transact its banking business, deposits a check to the order of the association to his own credit, the bank in which the check is deposited is not liable for his misapplication of the money, though by the by-laws of the association the treasurer was the only person who could pay out its funds. Gate City Bldg., etc., Ass'n *v.* National Bank, 126 Mo. 82, 28 S. W. 633, 27 L. R. A. 401, 47 Am. St. Rep. 633.

35. Defendant bank refused to allow plaintiff association to withdraw funds on deposit unless a notice of ninety days was given. The trustees of plaintiff association then signed a paper under seal and in form a check for $700, payable to themselves, and gave it to their president, to be presented as notice. One W. agreed to let the president have $640, provided defendant would allow the $700 to be credited to him on its books. The $700 was charged to plaintiff in its pass book and in the books of defendant, and credited to W. The president, who had been accustomed to draw the funds of the association, absconded with the $640. Held that, as defendant violated none of its rules, was liable to W., and was not guilty of bad faith or negligence, it was not liable to plaintiff for the amount of the check. Providence Assisting Ass'n *v.* Citizens' Sav. Bank, 19 R. I. 142, 32 Atl. 306.

36. Notice of intended misappropriation.—Plaintiff corporation had a deposit account with the C. Trust Company subject to checks signed by V. as its treasurer. Between April 21, 1906, and June 15th following, V., as treasurer, drew three checks against an account payable to the order of another or himself, and signed with plaintiff's name by V. as treasurer, amounting in all to plaintiff's total deposit. These checks V. indorsed in blank and deposited them with defendant to the credit of his individual account. Defendant presented the checks to the

The word "treasurer," immediately following the name of the depositor in a certificate, is, in connection with a direction that in case of his death or disability the moneys represented by it should be payable to three specified officers of an association, sufficient notice that the deposit did not belong to the depositor personally, and, when he endeavored to thus use it, justified refusal to pay, or, at least, put the obligor on inquiry as to his authority.[37]

Certificate of Deposit Issued to Company.—An arrangement made between the treasurer of a company and a bank with which the funds of the company are deposited, that all funds deposited to the credit of the company shall be transferred to the private account of the treasurer, made without any knowledge of the managers of the business of the company, is a mere private arrangement for the convenience of the treasurer, and does not authorize the bank to transfer to the credit of the treasurer funds for which it has issued a certificate of deposit to the company, so as to relieve itself of liability to the company on such certificate.[38]

Payment after Retiring from Office.—An arrangement between a bank and the treasurer of a company depositing funds therein, whereby all moneys, as soon as deposited by the company, are to be transferred to the private account of the treasurer, for his convenience, whether binding on the company while the treasurer continued in office, or not, will not authorize the bank to transfer money deposited by the company to his private account after he ceased to be such treasurer, and his successor is elected, and whether he had notice of his successor's election or not would be immaterial.[39]

§ 131. —— Funds of Person Other than Depositor—§ 131 (1) Title Generally and Relation Created.—The fact that money is deposited in a bank to the individual credit of the depositor shows, prima facie, that it belonged to him, but not conclusively so.[40] The true ownership of a deposit may be proved to be in another than the person in whose name such deposit is made.[41]

Presumption Where Bank's Funds Never Less than Amount Wrongfully Deposited.—On a showing by the legal owner of money

drawee, received the proceeds, and credited them to V.'s account, which it later permitted him to withdraw. The trust company charged the checks against plaintiff's account, and closed it. Held, that such checks were notice to defendant that plaintiff's treasurer was drawing its money for his individual benefit, and defendant, having received the money from the drawee bank, received it to plaintiff's use, and was liable to plaintiff therefor. Havana Cent. R. Co. *v.* Knickerbocker Trust Co., 135 App. Div. 313, 119 N. Y. S. 1035.

37. Parks *v.* Knickerbocker Trust Co., 137 App. Div. 719, 122 N. Y. S. 521.

38. **Certificate of deposit issued to company.**—Cushman *v.* Illinois Starch Co., 79 Ill. 281.

39. **Payment after retiring from office.**—Cushman *v.* Illinois Starch Co., 79 Ill. 281.

40. **Title generally and relation created.**—Bessemer Sav. Bank *v.* Anderson, 134 Ala. 343, 32 So. 716, 92 Am. St. Rep. 38.

41. Stair *v.* York Nat. Bank, 55 Pa. 364, 93 Am. Dec. 759.

that ever since a third person deposited it in a bank without his knowledge or consent, the general funds of the bank have exceeded the amount of deposit, he establishes a presumption that the money is still in the bank, as effecting his right to recover against the receiver thereof. Under such circumstances his claim would become a lien upon the whole fund in the bank.[42]

Relation Created.—Where a customer of a bank deposits the funds of another in his own name, without notice to the bank, the deposit is a general deposit, by which the money becomes the property of or a part of the funds of the bank, subject to its use as any other of its property; and by it the relation of creditor and debtor between the depositor and the bank is created.[43]

Notice of Ownership of Deposit by Insolvent.—Where a bank accepts a deposit from a patron known by it to be insolvent at the time, with knowledge sufficient to put it on inquiry whether the fund belonged to the depositor, it is liable to the true owner of the fund for the amount of loss sustained by him, where the bank permits the fund to be diverted to other uses than the payment of the owner.[44]

§ 131 (2) Right of Bank to Assert Title of Legal Owner.—When a bank has received money from a depositor, credited him on its books, and so impliedly contracted to honor his check, it is estopped to allege that the money belongs to some one else.[45] Hence a bank can not escape payment by alleging to a deposit to be in a third person,[46] as, for instance, that the money of an agent or clerk belongs to the firm or company employing him,[47] that the money of a wife belongs to her husband,[48] or that money de-

42. Presumption where bank's funds never less than amount wrongfully deposited.—Patek *v.* Patek, 166 Mich. 446, 131 N. W. 1101; Sherwood *v.* Central Michigan Sav. Bank, 103 Mich. 109, 61 N. W. 352; Emigh *v.* Earling, 134 Wis. 565, 115 N. W. 128, 27 L. R. A., N. S., 243; State *v.* Bank, 61 Neb. 181, 85 N. W. 43, 52 L. R. A. 858; Butler *v.* Western German Bank, 159 Fed. 116.

43. Relation created.—Alston *v.* State, 92 Ala. 124, 9 So. 732, 13 L. R. A. 659; Clisby *v.* Mastin, 150 Ala. 132, 43 So. 742.

44. Notice of ownership of deposit by insolvent.—Interstate Nat. Bank *v.* Claxton (Tex. Civ. App.), 77 S. W. 44, judgment reversed in 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885.

45. Right of bank to assert title of legal owner.—First Nat. Bank *v.* Mason, 95 Pa. 113; Citizens' Bank *v.* Alexander, 120 Pa. 476, 14 Atl. 402; Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

In the absence of a claim by a third person, a bank is estopped to deny the ownership of one who makes a deposit in her own name. Booth *v.* Oakland Bank, 122 Cal. 19, 54 Pac. 370.

46. Parks *v.* Knickerbocker Trust Co., 137 App. Div. 719, 122 N. Y. S. 521; Jamison *v.* Collins (Pa.), 33 Leg. Int. 83, 11 Phila. 258.

47. First Nat. Bank *v.* Mason, 95 Pa. 113.

Money deposited by one on his private account with a banker, and so accepted, can not afterwards be credited to the account of a company for which the depositor was acting, without his consent. Jamison *v.* Collins (Pa.), 33 Leg. Int. 83, 11 Phila. 258.

48. A bank can not refuse to pay a wife money deposited in her name on the ground that it belonged to her husband rather than to her. German Bank *v.* Himstedt, 42 Ark. 62.

posited by a sheriff was that of a judgment creditor.[49] The rule is otherwise as to an attaching creditor or the true owner of the fund.[50] A demurrer will be sustained to an answer setting up such defense unless the legal owner had enforced his rights by legal process.[51]

§ 131 (3) Estoppel of Legal Owner to Assert Title.—The true owner of a deposit in bank to the credit of another may be estopped by his conduct or silence from asserting his title thereto; as, for instance, by acquiescing in the deposit of his money in the name of another,[52] by treating the money as a loan to the depositor,[53] and where, by his silence, he approved its payment to the depositor.[54]

Legal Owner Present and Acquiescing in Deposit.—Where a person having possession of money deposits it in a bank, with the knowledge and consent of the person who owned it, who was present at the time, and who thereby either negligently or intentionally placed such depositor in a position to perpetrate a fraud upon the bank, the loss should fall upon the owner who has been the occasion of it.[55] Where the depositor is accom-

49. Pending a motion to set aside a default judgment, the sheriff levied on funds in the defendant bank under the judgment, satisfied the judgment, and deposited the funds in his own name in the bank, taking the usual negotiable certificate of deposit therefor, which he immediately transferred by indorsement to plaintiff. Plaintiff deposited the fund in his own name, subject to check, and drew a check thereon, which the bank paid, and afterwards the judgment was set aside. Held, that the bank could not withhold the money from plaintiff, nor assert that it was deposited in plaintiff's name on behalf of the judgment creditor. Martin *v.* Minnekahta State Bank, 7 S. Dak. 263, 64 N. W. 127.

50. First Nat. Bank *v.* Mason, 95 Pa. 113.

51. A savings bank answered to a suit by the assignee of a depositor, for his deposit, that it was the proceeds of securities belonging to third parties who had notified defendants of their claim. Held, that demurrer would lie to this answer, as the defendant had no right to set up this defense unless the claimant had enforced his rights by legal process. Lund *v.* Seamen's Bank (N. Y.), 37 Barb. 129.

52. Estoppel of legal owner to assert title.—Complainant, by acquiescing in the deposit in a bank of her money in defendant's name, recognizes the right to draw it out, on which the bank may act. Breeder *v.* Parchman (Tenn.), 54 S. W. 677.

53. A allowed B to deposit his money in a bank which gave B a certificate in his own name, knowing it was A's money. A manifested no disapproval, and B presented the certificate, and drew out the money. A continued to regard the money as loaned to B until his insolvency, when he sued the bank in trover. Held, that he could not recover. Bank *v.* Dewar, 6 Ill. App. 294.

54. Where a deposit in question by a mother was moneys earned by her, which she paid to her daughter for services rendered without any objection by her husband, who approved such payment by his silence, it was sufficient to show that the daughter, who held the certificate of deposit, was the owner of the sum deposited. Succession of Meteye, 113 La. 1012, 37 So. 909.

55. Legal owner present and acquiescing in deposit.—Fiore *v.* Ladd, 22 Ore. 202, 29 Pac. 435.

In an action to recover money which F., the plaintiff, claimed to have deposited with defendants, he testified that he delivered the money to defendants' teller on three months' deposit; that the teller received the money and delivered to plaintiff the certificate of deposit, and requested him to write his name in the signature book; but that he could not write, and offered to make his mark in the book, whereupon A., who accompanied plaintiff, said he would write plaintiff's name, and that the teller allowed A. to sign the name; that afterwards A., through fraud, obtained the certificate, forged plaintiff's

panied by the legal owner of the money to the bank when the account is opened and acquiesces therein he is bound by the by-laws of the institution in respect to payment thereof, it being the condition of the contract.[56]

Credit to Person Entering with Owners and Fraudulently Requesting It.—See post, "Moneys or Credit Fraudulently Obtained by Depositor," § 131 (9).

§ 131 (4) Payment to Depositor Generally.—Whenever money is placed in bank on deposit, and the bank's officers are unaware that the fund does not belong to the person depositing it, the bank, upon paying the fund out on the depositor's check, will be free from liability, even though it should afterwards turn out that the fund in reality belonged to some one else than the individual who deposited it.[57] A bank, in the absence of

name thereon, and presented the same, and received the money from defendants. The teller testified that A. and plaintiff were unknown to him; that A. had possession of the money and delivered it to the teller, saying he wanted to deposit it for three months, and gave his name as F., and wrote his name on the book, and that the certificate was delivered to A.; that plaintiff was standing close by, and said nothing to indicate that he had any interest in the money. Held that, if the jury found the facts to be as testified to by the teller, the plaintiff could not recover. Fiore *v.* Ladd, 22 Ore. 202, 29 Pac. 435.

Where it appeared from the evidence for defendants that shortly after A. and plaintiff left the bank A. came back, and stated that he had found a place for the money, and requested the payment of the certificate, which he presented with the name as written in the signature book, and it was paid, it was error to refuse to instruct that, if the jury believed such evidence, plaintiff could not recover. Fiore *v.* Ladd, 22 Or. 202, 29 Pac. 435.

56. Plaintiff, accompanied by his wife, deposited money in her name with the defendant, a bank, and, as a condition of opening the account, the wife signed the by-laws of the defendant, one of which provided that on the death of a depositor the amount to his credit should be paid to his legal representatives. Held, that on his wife's death plaintiff could not maintain an action against the bank for the amount remaining to her credit on the ground that it was his earnings. Kopf *v.* Dry Dock Sav. Inst., 32 Misc. Rep. 35, 65 N. Y. S. 364.

57. Payment to depositor generally.—Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897; Alston *v.* State, 92 Ala. 124, 9 So. 732, 13 L. R. A. 659; Clisby *v.* Mastin, 150 Ala. 132, 43 So. 742; Dumond *v.* Merchants' Nat. Bank, 33 Ill. App. 95; Drovers' Nat. Bank *v.* O'Hare, 119 Ill. 646, 10 N. E. 360; Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

If a person having possession of money deposits it in a bank, and deals with it as his own, the bank has a right to assume without further inquiry, unless there is something in the transaction itself to arouse suspicion, that the money belongs to him and that he is dealing in his true name, and in such case the bank's contract is to pay the money to him or his order; and having done this, it can not be required to pay it again to a person with whom it had no dealing, and who was in no way connected with the transaction, although such third person may have been in fact the owner of the money. Fiore *v.* Ladd, 22 Ore. 202, 29 Pac. 435; United States *v.* National Exch. Bank, 45 Fed. 163; National Bank *v.* Shotwell, 35 Kan. 360, 11 Pac. 141; Robertson *v.* Coleman, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471.

Deposit by one bank to credit of a third bank.—B. & T. deposited with the U. Bank $1,182.30, with a deposit ticket which recited that such sum was "deposited with M. Bank to the credit of the E. Bank, by B. & T., for the use of D." On the same day the U. Bank delivered to the M. Bank a check, with a deposit ticket which showed that $1,182.30 of the amount of the check was for the account of the E. Bank, but did not show that such sum was for the use of D. Afterwards the E. Bank wrote the M. Bank that it could not receive the deposit of $1,182.30 for

notice of an adverse claim, has the right to assume that a person depositing money to his own credit has a right to withdraw it,[58] and will always be justified in making payments upon the orders of the person who made the deposit, or upon orders of any person whom he designates as competent to control it, until he has notice that the ownership is claimed by somebody else, adversely to either of these parties.[59]

Payment to Depositor after Notice.—Where a bank receives moneys or the property of a depositor, payment to that depositor or his order after notice of the claim of a third person thereto will not relieve from liability to such person.[60]

Persons Who May Give and Form of Notice.—Where a bank receives money as the property of a depositor, and receives notice from other parties that the money is a third person's, it can not relieve itself from liability to the latter because he fails to give notice in his own name of his claim to the money.[61]

Notifying Depositor of Adverse Claim.—While a bank, upon notice that a third party claims to be the real owner of money, deposited with it in a customer's account, after satisfying itself that the claim is made in good faith—that is, that there is some real foundation or justification for it—would have the right to retain out of the deposit a sum sufficient to meet such claim, it must exercise diligence in notifying its customer of the adverse claim, and of its intention to protect itself by retaining out of the

the use of D., as it (the E. Bank) had closed its doors before the deposit reached the M. Bank, and directed the M. Bank to pay the sum to D. Held, that D. could not recover the $1,182.30 from the M. Bank as money had and received by such bank to his (D.'s) use. Dumond *v.* Merchants' Nat. Bank, 33 Ill. App. 95.

58. Woodbridge *v.* First Nat. Bank, 45 App. Div. 166, 61 N. Y. S. 258, judgment affirmed in 166 N. Y. 238, 59 N. E. 836.

59. McEwen *v.* Davis, 39 Ind. 109.

Plaintiff gave H. two checks to take up two notes on which he and H. were liable. H. deposited the checks with defendant, and part of the proceeds was used to pay an overdraft of H. Thereafter H. made an assignment, and defendant, after notice from plaintiff of his ownership of the checks, paid the amount thereof, less the portion applied on H.'s debt, to the assignee. Held, that defendant was liable for the amount of the checks, less the dividend received by plaintiff on the distribution of H.'s estate, though plaintiff had joined with other creditors in requesting the assignee to sell the estate, and had released him from all claims on account of the checks. Anderson *v.* Market Nat. Bank, 48 Hun 620, 1 N. Y. S. 136, 16 N. Y. St. Rep. 98.

Where money is sent to a bank in the name of one who has an open account with it, the bank will be protected in allowing him to draw thereon, in the absence of notice that he is not the real owner. Davis *v.* Panhandle Nat. Bank (Tex. Civ. App.), 29 S. W. 926.

60. Payment to depositor after notice.—Where a bank receives money as the property of A., and before paying receives notice that a third person claims the money, such notice is knowledge, and payment to A. will not relieve the liability to such third person. Drumm-Flato Commission Co. *v.* Gerlack Bank, 92 Mo. App. 326.

Where a bank receiving money as the property of A. learns of a claim of a third person thereto, it can not relieve itself from liability to the latter by paying the money to A. with the consent of the party from whom it received the money. Drumm-Flato Commission Co. *v.* Gerlack Bank, 92 Mo. App. 326.

61. Persons who may give, and form of note.—Drumm-Flato Commission Co. *v.* Gerlack Bank, 92 Mo. App. 326.

amount standing to his credit a sum sufficient to meet the claim, and negligence in that regard, resulting in injury to its depositor,[62] will render the bank liable.

Holding Money after Notice.—Where a bank receives money as the property of the depositor, and before payment acquires notice of a third person's claim thereto, it can not be required to hold the money beyond a reasonable time for such third person to protect his rights; and if he does not assert his rights within such time he will be estopped.[63] An agreement that the claimant shall have time to make an investigation and bring suit to which neither the bank nor the persons to whose credit the money is deposited is a party, is not binding on the bank.[64]

§ 131 (5) Payment to Person Making Deposit in Name of Legal Owner.—A person who deposits money in the name of the legal owner[65]

62. Notifying depositor of adverse claim.—Jaselli *v.* Riggs Nat. Bank, 36 App. D. C. 159.

63. Holding money after notice.—Drumm-Flato Commission Co. *v.* Gerlack Bank, 92 Mo. App. 326.

Where the proceeds of a sale of cattle were deposited in a bank, and were thereafter claimed by plaintiff as the alleged mortgagee of the cattle, and notice of the claim given to the bank, the latter was only required, under such notice, to hold the deposit a reasonable time to allow plaintiff to take legal steps to enforce its claim, and not for a time sufficient to enable it to investigate its rights to the deposit and bring suit against the bank to enforce the same. Drumm-Flato Commission Co. *v.* Gerlach Bank, 107 Mo. App. 426, 81 S. W. 503.

64. Where plaintiff claimed the proceeds of certain cattle deposited in a bank to the credit of R., an agreement between plaintiff's agent and the general manager of a commission company by which the cattle were sold and the money deposited that plaintiff should have time to make an investigation and to bring suit, to which neither the bank nor R. were parties, was not binding on them. Drumm-Flato Commission Co. *v.* Gerlach Bank, 107 Mo. App. 426, 81 S. W. 503.

65. Payment to person making deposit in name of legal owner.—Where one deposits another's money in a bank, which issues a certificate payable to the owner, the depositor has no implied authority to withdraw the money; and, if the bank pays it to him, it is liable to the owner, though the depositor writes his name in the signature book as representing the owner. Judgment 24 Misc. Rep. 498, 53 N. Y. S. 849, reversed. Walker *v.* State Trust Co., 40 App. Div. 55, 57 N. Y. S. 525.

Where one deposits another's money in a bank, retaining the certificate, which is payable to the owner or his assigns, on return thereof, the bank is liable to the payee, if it transfers the deposit to the depositor's credit, on return by him of the certificate unindorsed, and subsequently pays the amount to him. Judgment 24 Misc. Rep. 498, 53 N. Y. S. 849, reversed. Walker *v.* State Trust Co., 40 App. Div. 55, 57 N. Y. S. 525.

Where a deposit was made by plaintiff's brother in plaintiff's name, and was so entered on the bank's books and in the pass book, and the bank knew that the money deposited belonged to plaintiff, the brother had no right, because he carried it to the bank, to check it out without authority from plaintiff, and the mere declaration of the brother to the bank that he had such authority was of no weight. Kerr *v.* People's Bank, 158 Pa. 305, 27 Atl. 963.

In an action against a bank to recover a deposit, the court properly charged that, if the money was really plaintiff's the fact that it was deposited by plaintiff's brother in plaintiff's name, and so entered on the books of the bank and in the pass book, warranted no implication of authority in the brother to check it out, but that if, at the brother's suggestion, the account was opened in plaintiff's name only as another form of identifying the brother's deposit of his own money, then the payment on the brother's check protected the bank, and plaintiff could not recover. Kerr *v.* People's Bank, 158 Pa. 305, 27 Atl. 963, following Fletcher *v.* Integrity Title Ins., etc., Co. (Pa.), 31 Wkly. Notes Cas. 503.

or in the name of a third person where the bank has notice of the claim of the legal owner,[66] has no authority to check it out because he carried it to the bank, and if the bank pay it to him it is liable to pay the same to the legal owner.

§ 131 (6) Account Kept in Name of Another than Depositor—§ 131 (6a) Deposit by Legal Owner in Fictitious Name.—A depositor contracting with a bank for the care of his money can control his funds until he has disposed of them, no matter in what name the account is kept, so long as it is understood to be his account and has not been put beyond his control by some act that he can not revoke. And, if the contract is unwritten, its terms and character can be shown by testimony. It is not determined by the bank book, which only shows the state of the funds.[67] A bank can not properly collude with a depositor for the purpose of misleading creditors and covering up his funds under a fictitious name so as to prevent their being subjected to garnishment.[68]

Effect on Title and Right to Repayment.—The mere deposit of money of the depositor in a bank in the name of another, the act being entirely between the depositor and the bank, to which the other party is in no way a party, will not, of itself, pass the title to the latter.[69] A person, by depositing money in the name of another, does not give the money away, and the bank can not refuse to repay it to him.[70] The depositor may main-

66. A judgment against a bank for money paid by it to a grandmother on presentation of a book made out in the name of her grandchild will not be disturbed where the child's mother testified that the money was hers, that it was deposited in the child's name at her request by the grandmother, and that she gave the bank notice of the ownership of the deposits, and requested it not to pay the same to the grandmother. Eagle, etc., Mfg. Co. *v.* Belcher, 89 Ga. 218, 15 S. E. 482.

Whether, after such notice to the bank, the mother's assent to the payment of the money on the grandmother's check could rightly be inferred from a given state of circumstances, such as that the bank sent for the mother and she and the grandmother had a conversion about the deposit and the right of the grandmother to draw out the money, and she did not then or afterwards give notice to the bank that she still objected to any payment to the grandmother, she having previously given notice of her objection in express terms, was a question of fact for the jury, and not one of law for determination by the court. Eagle, etc., Mfg. Co. *v.* Belcher, 89 Ga. 218, 15 S. E. 482.

67. **Deposits by legal owner in fictitious name.**—Davis *v.* Lenawee County Sav. Bank, 53 Mich. 163, 18 N. W. 629.

68. Bank *v.* Rockmore & Co., 129 Ga. 582, 59 S. E. 291.

69. **Effect on title and right to repayment.**—Branch *v.* Dawson, 36 Minn. 193, 30 N. W. 545; Douglas *v.* First Nat. Bank, 17 Minn. 35 (Gil. 18); Kerr *v.* People's Bank, 158 Pa. 305, 27 Atl. 963; Brabrook *v.* Boston, etc., Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222.

Money deposited in name of insolvent corporation.—Where, after the failure of a corporation engaged in buying and selling grain on commission, which was largely indebted to a bank, the president of the corporation continued to sell grain on commission in the name of the corporation, in which was incorporated his own name, and thereafter deposited moneys received for grain sold by him for customers on commission, including his commissions, in the bank, in the same name, such subsequent business will be regarded as his personal business and not a continuance of the corporation's business. Boyle *v.* Northwestern Nat. Bank, 125 Wis. 498, 103 N. W. 1123, 104 N. W. 917, 1 L. R. A., N. S., 1110, 110 Am. St. Rep. 844.

70. Davis *v.* Lenawee County Sav. Bank, 53 Mich. 163, 18 N. W. 629.

tain an action against the bank in his own name to recover the deposit on proof that he did not intend to give or transfer the money to such third person, and on tender of the pass book to the bank, though he gave no bond of indemnity.[71]

Effect of Payment to Lawful Owner.—Though money is deposited and the certificate is issued in the name of another than the lawful owner, payment to the lawful owner is a good defense to a suit on the certificate.[72]

§ 131 (6b) Deposit to Credit of Another—§ 131 (6ba) Delivery and Acceptance.—The mere deposit of money in a bank to the credit of another does not show ownership in the latter, in the absence of any showing of acceptance or presumption thereof.[73] Thus where one person deposits money to the credit of another, but the bank never placed it to the credit of the latter so that it was subject to check or otherwise under his control and at no time delivered the certificate of deposit to him, the money never came into the possession of such person but the original owner retained his title thereto, for the element of delivery is absent.[74] A bank can not deprive a party for whose benefit a deposit is made by a third person, of all benefit therefrom, by inserting the name of another person therein, without his knowledge, consent or acquiescence, as, for instance, the name of the bankrupt husband of a person for whose benefit a deposit is made by a third person.[75]

Suit by Assignee for Creditors as Acceptance.—A suit against a bank by an assignee for creditors for moneys deposited by a third person

71. It was so held where money was deposited in a bank in the name of another person for the purpose of avoiding attachment. Broderick *v.* Waltham Sav. Bank, 109 Mass. 149.

72. **Effect of payment to lawful owner.**—Parks *v.* Knickerbocker Trust Co., 137 App. Div. 719, 122 N. Y. S. 521.

73. **Delivery and acceptance.**—Leech *v.* First Nat. Bank, 99 Mo. App. 681, 74 S. W. 416.

74. Indiana Loan, etc., Co. *v.* Lincoln Trust Co., 207 Mo. App. 207, 105 S. W. 737.

A., plaintiff's assignor, made an illegal contract with a corporation for the investment of his money, which was sent to a trust company with directions to place it to the credit of the corporation, issue to the latter a certificate of deposit therefor, and mail the same to A., to be held by him as collateral. The money was placed by the trust company to the credit of the corporation, but not subject to its check, and a certificate of deposit thereof by the corporation was issued by the trust company and forwarded to A. Thereafter a receiver was appointed for the corporation, which later indorsed the certificate to A., who assigned it to plaintiff. Held that, as the money never came into the possession or under the control of the corporation, plaintiff was entitled thereto as against the receiver. Indiana Loan, etc., Co. *v.* Lincoln Trust Co., 207 Mo. 370, 105 S. W. 737.

75. Robards *v.* Hamrick, 39 Ind. App. 134, 79 N. E. 386, distinguishing Long *v.* Straus, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87.

A married woman sold her real estate to a purchaser, who paid the price, except a specified sum, which by agreement he deposited with a banker to her use on her satisfying a mortgage incumbering the premises. The banker, knowing the facts and without her knowledge, made her husband the depositor. The bank knew that the husband was insolvent. The mortgage was satisfied. A part of the deposit was drawn with the knowledge and consent of the wife, but the balance the banker retained to satisfy a debt of the husband. Held, that the wife could recover from the banker the part of the deposit retained. Robards *v.* Hamrick 39 Ind. App. 134, 79 N. E. 386.

to the credit of his assignor is not an acceptance by the assignor of the benefit of such deposit.[76]

§ 131 (6bb) Deposit by Principal to Credit of Agent and Vice Versa.—See ante, "Deposits by Agent to Credit of Principal," § 130 (3ab); "Deposits by Principal to Credit of Agent," § 130 (3ac).

§ 131 (6bc) Deposit by Husband in Name of Wife.—Where a husband deposited money in a bank in his wife's name, and she checks against it, he can not reclaim it, nor can the bank deny its liability to her,[77] and evidence that it was agreed that it might be withdrawn either upon checks made by her or by him in her name is not admissible without proof of authority in him to act as her agent, or of ratification by her of his acts.[78]

Statutes as to Payment.—A statute which provides that deposits by married women of their earnings shall be paid only to such married women, does not apply to a deposit made by defendant in the name of his wife.[79]

§ 131 (6bd) Deposit by Person in Loco Parentis in Name of Child.—The facts that plaintiff, who deposited money in the names of her nieces, but subject to plaintiff's order, accepted deposit books containing a by-law permitting parents to deposit for children, and that plaintiff stood in loco parentis to the nieces, is not sufficient to show that the deposits were made for the benefit of the nieces, thereby justifying the bank in refusing to allow plaintiff to withdraw them, if plaintiff did not intend to make a gift to the nieces, and did not tell them of the deposits, or relinquish control of them.[80]

§ 131 (6be) Moneys Deposited to Pay Creditor.—Where one bank delivers money and securities to another to pay a creditor, and the account is kept in the name of the depositing bank or its owners absolutely, and not as trustee for the creditor, the depositing bank may withdraw the deposit at any time before the creditor has notice of the transaction.[81]

§ 131 (6bf) Deposit a Tender of Payment.—Where a person deposits money in a bank to the credit of another for the purpose of making a ten-

76. **Suit by assignee for creditors as acceptance.**—Leech *v.* First Nat. Bank, 99 Mo. App. 681, 74 S. W. 416.

77. **Deposit by husband in name of wife.**—People *v.* State Bank, 36 Hun 607, affirmed in 102 N. Y. 740.

78. In an action by a wife to recover of a bank $1,000 of her own funds, deposited at her request by her husband, and credited to her in the pass book received from the bank, parol evidence by the bank that, on making the deposit, he agreed with the teller that it might be withdrawn either upon checks made by her, or by himself in her name, and that the amount had been withdrawn by him on checks made by him in her name, held to be inadmissible without proof of authority in him to act as her agent, or of ratification by her of his acts. Bates *v.* First Nat. Bank, 23 Hun 420.

79. **Statutes as to payment.**—Sayre *v.* Weil, 94 Ala. 466, 10 So. 546, 15 L. R. A. 544, so holding as to Ala. Code, § 1530.

80. **Deposit by person in loco parentis in name of child.**—Savings Bank *v.* McCarthy, 89 Md. 194, 42 Atl. 929.

81. **Money deposited to pay creditor.**—Brockmeyer *v.* Washington Nat. Bank, 40 Kan. 744, 21 Pac. 300.

der of payment to the latter, who, on being informed of it, refused to accept it, the title to the money vested in the bank, and it became debtor in the amount of the deposit, to the person in whose name it stood. The person in whose name it stood alone could withdraw it. But the deposit did not vest in such person as between him and the original owner of the money at once and absolutely, the right to draw it out and use it. The deposit was made for a specific purpose and before the person in whose name it stood could treat the credit created by it as absolutely his own, it was necessary that he should accept it as made. As soon as he rejected the tender, there stood a credit to him for money of the original owner, which as between him and the bank, he had the power to withdraw, but which, had he withdrawn it, would, as soon as it came into his hands, have been the money of the original owner and not his own. The relation between the two upon the withdrawal of the money would be more nearly that of bailor and bailee, or of trustee and cestui que trust, than that of debtor and creditor. An administrator of the person in whose name the deposit stood would have no greater right than he, and upon the administrator's withdrawing the same from the bank it belonged to the original owner who could maintain an action for conversion upon a refusal to pay it to him.[82]

§ 131 (7) Deposits Which Have Been Assigned.—Delivery of Bank Book.—Delivery by a depositor of his bank book or pass book to a third person with an order for payment of the deposit to him, constitutes a valid assignment of the deposit;[83] such delivery and order constitutes a valid gift inter vivos; and this gift, being notified to the bank, is a complete assignment of the depositor's right to the deposit.[84] Where a person directed in writing in his bank book that the "within deposit" should be paid to certain individuals after his death, such writing alone was not sufficient to create a vested interest in the assignees, requiring only the death of the depositor to entitle them to possession of the money.[85] If the book was delivered to the assignees by the depositor during his life, or the assignment in any other way given effect to by him, his death was a condition relating to the time of enjoyment of the interest transferred, and not to its transfer.[86] Whether the book was delivered to perfect the assign-

82. Deposit a Tender of Payment.—R., for the purpose of making a tender or payment to P., made a general deposit in a bank to the credit of P., who, on being informed of it, refused to accept it. Held that, on the administrator of P. withdrawing the money from the bank, it belonged to R., and that he could maintain an action for conversion upon a refusal to pay it to him. Reynolds *v.* St. Paul Trust Co., 51 Minn. 236, 53 N. W. 457.

83. Delivery of bank book.—Schollmier *v.* Schoendelen, 78 Iowa 426, 43 N. W. 282, 16 Am. St. Rep. 455.

A bank depositor gave her bank book and an order for the payment of the deposit to her daughter, who notified the bank. Held, that there was a valid assignment of the deposit. Foss *v.* Lowell, etc., Sav. Bank, 111 Mass. 285.

84. Foss *v.* Lowell, etc., Sav. Bank, 111 Mass. 285.

85. Schollmier *v.* Schoendelen, 78 Iowa 426, 43 N. W. 282, 16 Am. St. Rep. 455.

86. Schollmier *v.* Schoendelen, 78 Iowa 426, 43 N. W. 282, 16 Am. St. Rep. 455.

ment and enable the assignee to obtain the money is a question for the jury.[87]

Delivery of Certificate of Deposit.—The delivery of a certificate of deposit properly endorsed operates as an assignment of the deposit to the endorsee,[88] but where the endorsement on the certificate speaks of the transaction as being, in substance, not an assignment of the fund on deposit but a check upon the bank against a deposit; and where its language showed clearly that it was not to take effect until the death of the depositor, the delivery of the certificate could not operate an assignment of the fund. It can not be valid as a donati mortis causa, even where it is payable in præsenti, unless paid or accepted while the donor is alive.[89]

Delivery of Deposit Slip.—The delivery of a deposit slip issued by a bank acknowledging the receipt of the amount of money therein named, by the depositor, to a third person, does not operate an assignment of the deposit.[90]

Check.—The giving of a check by a bank depositor for the full amount of the deposit does not operate as an assignment to the holder of the check, so as to enable him to enforce payment thereon against the bank prior to its acceptance of the check.[91] A check for a part of the drawer's funds in a

87. A person had the cashier of a bank write in her bank book the following: "Pay to the order of E. S. and D. H. all of the within deposit, after my decease." Thereafter she deposited no more money, and drew out none, and the book was in possession of one of the persons named in such assignment before her death. The book contained a rule to the effect that no money should be drawn out of the bank unless depositor produced his book; and if the bank, having no notice of the loss of the book, should pay the money to a person producing it, but not entitled to the money, it could not be compelled to pay the same again. Held, that such facts were sufficient evidence of a completed assignment during the assignor's life to require submission of the question to the jury. Schollmier *v.* Schoendelen, 78 Iowa 426, 43 N. W. 282, 16 Am. St. Rep. 455.

88. **Delivery of certificate of deposit.**—Schollmier *v.* Schoendelen, 78 Iowa 426, 43 N. W. 282, 16 Am. St. Rep. 455.

89. Schollmier *v.* Schoendelen, 78 Iowa 426, 43 N. W. 282, 16 Am. St. Rep. 455; Basket *v.* Hassell, 107 U. S. 602, 27 L. Ed. 500, 2 S. Ct. 415.

90. **Delivery of deposit slip.**—First Nat. Bank *v.* Clark, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580, affirming 56 Hun 644, 9 N. Y. Supp. 952. See ante, "Deposit Slips," § 121 (4c).

A conversation between a bank depositor and a third person, to whom he had delivered the deposit slip, and in whose favor he had drawn a check for the amount, in which he stated that the deposit would not be available for ten days, and that he wanted the check discounted immediately, which was accordingly done, and the money paid him by such third person, does not, as matter of law, operate as an assignment of the deposit to such third person; and a finding by the jury that it did not will not be disturbed on appeal. First Nat. Bank *v.* Clark, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580.

91. **Check.**—First Nat. Bank *v.* Clark, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580, affirming 9 N. Y. Supp. 952, 56 Hun 644.

In Iowa a check or order drawn against the funds deposited in a bank only operate as an equitable assignment of them to the amount of the order, and notice of the check or order given to the bank would be sufficient to hold them, even without an acceptance. Schollmier *v.* Schoendelen, 78 Iowa 426, 43 N. W. 282, 16 Am. St. Rep. 455; Manning *v.* Mathews, 70 Iowa 303, 30 N. W. 749; Des Moines *v.* Hinkley, 62 Iowa 637, 17 N. W. 915; Roberts *v.* Corbin & Co., 26 Iowa 315, 316; In First Nat. Bank *v.* Dubuque, etc., R. Co., 52 Iowa 378, 3 N. W. 395.

bank constitutes no assignment of that part of such funds, until presented for payment, and accepted by the bank, although verbally assented to by the cashier when absent from the bank.[92] The delivery by a creditor of a check upon his bank for the whole or part of a deposit does not preclude the payee from showing a parol contract, aside from the check, to transfer the deposit itself.[93]

Deposit Made after Assignment.—An assignment of a deposit in bank passes no legal title to a deposit made after the assignment so as to enable the assignee to sue at law.[94]

Transfer in Trust and Power of Attorney in Furtherance Thereof.—A parol transfer in trust accompanied by a power of attorney in furtherance thereof, to enable a bank to collect and pay over to the trustee the amount of a deposit in another bank, operates an assignment of the deposit.[95]

Assignment by Parol.—An assignment of a deposit in a bank may be made by oral agreement, and, if founded on a valuable consideration, vests in the assignee a right to proceed in his own name to collect it.[96]

92. Bullard *v.* Randall (Mass.), 1 Gray 605, 61 Am. Dec. 433.

A debtor, being sued, and a bank summoned as his trustees, gave his creditor a check for a part of his general deposit in the bank, which the creditor delivered to the cashier when absent from the bank, together with an order for the discharge of this trustee process, when the amount of the check should be transferred from the debtor's account to his own on the books of the bank. Held, that this did not constitute such an assignment of part of the funds of the debtor in the bank as would hold against a trustee process served on the bank by another creditor before the amount of the check was so transferred on the books of the bank. Bullard *v.* Randall (Mass.), 1 Gray 605, 61 Am. Dec. 433.

93. First Nat. Bank *v.* Clark, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580, affirming 9 N. Y. Supp. 952, 56 Hun 644.

94. Deposit made after assignment.—S. opened an individual account with a savings bank, being then the executor of the estate of his father, A. After the executor's death the envelope containing the bank book was found, indorsed: "Trust funds belonging to the accounts of C. [and other heirs] with S., Ex. and Trustee." Some years before the deposit was made, C. had assigned to plaintiff all his interest in A.'s estate. Plaintiff claimed that the deposit was part of the accumulated income from A.'s estate, which, by the indorsement on the envelope, was specially set apart for C., and passed by the assignment. Held that, the deposit having been made after the assignment, it passed no legal title to plaintiff, so as to enable him to sue at law. Wheeler *v.* Bowery Sav. Bank (N. Y.), 2 City Ct. R. 392.

95. Transfer in trust and power of attorney in furtherance thereof.—A decedent, holding a pass book showing the amount due him from a bank, delivered it to plaintiff, with a verbal assignment of the money, to be held by plaintiff in trust for decedent's children, reserving the right to draw from said trustee such sums as he wanted to use, which said trust plaintiff accepted. No written assignment was ever made to plaintiff, but decedent gave a power of attorney to a bank to collect the money, and pay over to plaintiff, which was done. Held a valid transfer of the fund in trust. Hellman *v.* McWilliams, 70 Cal. 449, 11 Pac. 659.

96. Assignment by parol.—First Nat. Bank *v.* Clark, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580, affirming 9 N. Y. Supp. 952, 56 Hun. 644; Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421.

The rule that a cause of action may be assigned by parol extends to a portion of an indebtedness due to the assignor from a third person, such as a deposit in a bank. Risley *v.* Phœnix

§ 131 (8) Money in Custody of Public Officer.—Where a public officer deposits in a bank money in his custody belonging to a third person the relation of debtor and creditor arises between such officer and the bank, and the depositor becomes eo instanti a debtor to the person rightly entitled to the money as for a conversion of the same.[97]

§ 131 (9) Moneys or Credit Fraudulently Obtained by Depositor.—See post, "Moneys Fraudulently Obtained by Depositor," § 134 (9).

Liability of Bank Paying Out.—Where money fraudulently obtained is deposited with a bank, which, after notice from the legal owner of his claim, with instructions not to pay to any one else, pays it to the depositor[98] or to a third person,[99] the bank will be liable therefor to the legal owner, though the notice to the bank was informal.

Liability of Person Receiving Money.—A third person receiving in good faith, though upon a precedent indebtedness, money fraudulently obtained and deposited in a bank will be protected,[1] but, if the money was received by him after notice has been given him of the claim therefor, he will be liable therefor to the legal owner.[2]

Credit to Person Entering with Owner and Fraudulently Requesting It.—Where two persons go to a bank at the same time, and one deposits money there, which the other claims as his own, and has carried to his account, but without the knowledge of the person depositing it, who does nothing to countenance the mistake, an action lies for its recovery, by the real owner of the money, against the bank.[3]

§ 131 (10) Funds of Wife Deposited by Husband and Vice Versa.—The fact that the husband had been doing business in his wife's name, and handling her money, without objection on her part, did not create an estoppel against her in favor of the bank, where it was not shown that the

Bank (N. Y.), 11 Hun. 484, affirmed in 83 N. Y. 318, 38 Am. Rep. 421.

Although, under Rev. St., p. 768, § 6, an action can not be maintained upon a verbal promise to pay a check, an assignment of the account may be made by parol, so as to vest in the assignee the right to maintain an action against the bank holding the deposit, and the check may be deemed evidence. Risley *v.* Phenix Bank of New York, 83 N. Y. 318, 38 Am. Rep. 421.

97. **Money in custody of public officer.**—Alston *v.* State, 92 Ala. 124, 128, 9 So. 732, 13 L. R. A. 659; Clisby *v.* Mastin, 150 Ala. 132, 43 So. 742.

Register.—Where money in the hands of a register was deposited by him in a bank in his name as register, the deposit became a part of the funds of the bank, creating the relation of debtor and creditor between the bank and the depositor. Clisby *v.* Mastin, 150 Ala. 132, 43 So. 742.

98. **Liability of bank paying out.**—Adams Co. *v.* National Shoe, etc., Bank, 44 Hun 629, 9 N. Y. S. 75, 23 Abb. N. C. 172. See, also, Hatch *v.* Fourth Nat. Bank, 82 Hun 515, 31 N. Y. S. 530, 64 N. Y. St. Rep. 207, affirmed in 147 N. Y. 184, 41 N. E. 403.

99. Peter Adams Co. *v.* National Shoe, etc., Bank, 44 Hun 629, 9 N. Y. S. 75, 23 Abb. N. C. 172.

1. **Liability of person receiving money.**—Peter Adams Co. *v.* National Shoe, etc., Bank, 44 Hun 629, 9 N. Y. S. 75, 23 Abb. N. C. 172.

2. Peter Adams Co. *v.* National Shoe, etc., Bank, 44 Hun 629, 9 N. Y. S. 75, 23 Abb. N. C. 172.

3. **Credit of person entering with owner and fraudulently requesting it.**—Winter *v.* Bank (N. Y.), 2 Caines 337.

bank had knowledge of it, or acted upon the faith of the husband's general agency.[4]

Texas.—Under the statutes of Texas where the separate funds of a wife are deposited in the bank to her credit by her husband, the husband has a right to check out such funds.[5]

Conversion by Husband.—A bank is not liable for the conversion by a husband of the separate funds of his wife, which he deposits, and afterwards checks out and appropriates, unless it colludes with the husband or participates in the conversion.[6] The fact that to the bank's knowledge the husband was a drunkard, and improvident in the use of money, did not impose on the bank the duty of seeing that the money was drawn out for the wife's use.[7]

4. **Funds of wife deposited by husband and vice versa.**—Brown *v.* Daugherty, 120 Fed. 526.

A husband deposited money which he received from a sale of land owned by his wife, and which, under the law, was her separate property, in a bank in her name; stating to the cashier that he would sign the checks. The bank entered her name as the depositor, and issued a pass book in her name, which the husband showed to his wife. He subsequently drew checks against the deposit, to which he signed her name, and which the bank paid, until the money was all withdrawn and converted to his own use. The wife had not authorized the deposit; nor did she authorize the drawing of the checks, or know of the same until after the money was all withdrawn. Held, that the legal effect of the transaction of the deposit was to establish, prima facie, the relation of creditor and debtor between the wife and the bank, and that having accepted her as a depositor, and the money being in fact her property, the bank could not discharge its indebtedness by paying out the money without her authority, but was liable to her, under the facts shown, for the amount of the deposit. Brown *v.* Daugherty, 120 Fed. 526.

5. *Texas.*—Coleman *v.* First Nat. Bank (Tex. Civ. App.), 64 S. W. 93, citing and approving Coleman *v.* First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938. See, also, Coleman *v.* First Nat. Bank, 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871.

Rev. St. 1895, art. 2967, provides that during the marriage the husband shall have sole management of the wife's separate estate. A husband deposited his wife's money in a bank in her name, and stated that it would be checked out by him. Held, that the bank was authorized to cash checks which were presented by the husband, and signed with the wife's name by the husband as agent. Coleman *v.* First Nat. Bank, 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871.

The husband being entitled to the sole management of the wife's separate property has the right to keep her money, and hence to deposit it in bank and draw it out; and the bank, as in the case of deposit by a trustee, should presume that his check is drawn in the proper discharge of his trust. Coleman *v.* First Nat. Bank, 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871, affirming 43 S. W. 938.

6. Coleman *v.* First Nat. Bank (Tex. Civ. App.), 64 S. W. 93. See, also, Coleman *v.* First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938, affirmed in 94 Tex. 605.

Where a husband who is a customer of a bank, and who is indebted to it by a past-due note, brings into the bank the cashier's check of another bank, payable to his order, indorses it, places it to his deposit account, and gives his personal check thereon in settlement of his note due the bank, the bank, in the absence of mala fides, is not subject to an action by his wife to recover the value of the cashier's check, although it was obtained with her money, and although the bank so accepting it has cause to suspect that the wife was in some way instrumental in procuring it for the husband. Third Nat. Bank *v.* Poe, 5 Ga. App. 113, 62 S. E. 826.

7. Coleman *v.* First Nat. Bank, 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871.

That the officers and agents of a

Knowledge That Husband Misappropriating Money.—The fact that a bank with which a husband deposits the separate funds of his wife knows that the husband is appropriating the money checked out by him does not render the bank a party to the conversion.[8]

Estoppel of Husband to Recover Money Misappropriated by Wife.—See ante, "Estoppel of Principal to Recover," § 130 (3aacg).

§ 131 (11) Deposits by Executor or Administrator.—Where an executor[9] or administrator[10] makes a general deposit of the money of the estate in a bank it creates the relation of debtor and creditor, giving the bank the right to mingle the money with its own funds. There is no contractual relation created with the estate, making the bank liable to account to it for the moneys deposited;[11] and, when mingled with the other money in the bank, its identity is wholly lost.[12]

Payment to Guardian of Deposit Due Ward as Administrator.—A bank which permits a guardian to withdraw money due his ward as administrator is liable therefor, though at the time of the withdrawal there were no known creditors of the estate, and the ward was sole distributee. A guardian has no authority to receive money due his ward in a representative capacity as executor or administrator.[13]

bank knew that the husband of a depositor was an unsafe man to intrust with money, and that he was accustomed to squander money, does not show such fraud and collusion in aiding the husband to convert his wife's estate as to deprive it of the right to charge the checks drawn by the husband against the deposit of the wife. Coleman *v.* First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938, affirmed in 94 Tex. 605.

8. Knowledge that husband misappropriating money.—Coleman *v.* First Nat. Bank (Tex. Civ. App.), 94 S. W. 93.

9. Deposits by executor or administrator.—Woodbridge *v.* First Nat. Bank, 45 App. Div. 166, 61 N. Y. S. 258, affirmed in 166 N. Y. 238, 59 N. E. 836.

10. Where an administrator makes a general deposit of the money of the estate in a bank of which he is president, it creates the relation of creditor and debtor, giving the bank the right to mingle the money with its own funds. Shute *v.* Hinman, 34 Ore. 578, 56 Pac. 412, 58 Pac. 882, 47 L. R. A. 265.

11. Where an executor deposited money belonging to his decedent's estate in a bank in his own name, there is no contractual relation created with the estate, making the bank liable to account to the estate for money deposited. Woodbridge *v.* First Nat. Bank, 45 App. Div. 166, 61 N. Y. S. 258, judgment affirmed in 166 N. Y. 238, 59 N. E. 836.

Where testator bequeathed an annuity to his daughter for life, and both she and her husband, with the executor's consent, collected moneys belonging to the estate, not exceeding the amount of the annuity, and deposited them in a bank to his personal credit, the bank, having notice of the facts, was entitled to assume that such moneys were received by the husband as the beneficiary's agent, to apply on the annuity, and hence can not be required to account therefor to the estate. Woodbridge *v.* First Nat. Bank, 45 App. Div. 166, 61 N. Y. S. 258, judgment affirmed in 166 N. Y. 238, 59 N. E. 836.

12. Where an administrator makes a general deposit of moneys of the estate in a bank, it becomes the property of the latter, and, when mingled with the other money in the bank, its identity is wholly lost when any portion of it is checked out on the subsequent insolvency of the bank. Shute *v.* Hinman, 34 Ore. 578, 56 Pac. 412, 58 Pac. 882, 47 L. R. A. 265.

13. Deposit due ward or administrator.—Ryan *v.* North End Sav. Bank, 168 Mass. 215, 46 N. E. 620.

Checks Payable to an Administrator as Such.—Where checks payable to an administrator as such were indorsed by him in that capacity, and deposited to his individual account, and afterwards the amount was checked out by him, and appropriated, the bank is not liable to the estate.[14]

The administrator d. b. n. is the proper person to receive a deposit belonging to a decedent's estate and made by a deceased executor.[15]

Share of Deposit Belonging to Distributee of Estate.—Where moneys were deposited with a bank by executors as the property of their decedent's estate and is apportioned among the persons entitled to participate in its distribution, checks being drawn for its payment to the distributees, such allotment and division of the sum is sufficient to entitle one of the heirs of the estate to his part of the money, so that a receiver in supplementary proceeds against him and the bank was entitled to the money before either the check itself was paid or passed into the hands of a bona fide holder—if in such case the bank paid the check to the heir, the receiver will be entitled to recover the amount necessary to satisfy the judgment together with interest, cost, and commissions from the bank.[16]

§ 131 (12) Deposits by Guardian.—Money, deposited in a bank by a guardian to his credit as guardian, is the property of the ward, and the bank can not apply it to the payment of any order made by the guardian in any other character than that of guardian, nor can it apply the money to the payment of any debt from the guardian personally to it or to any other person.[17]

Notice of Order of Court as to Entry of Credit.—Where a special guardian of an infant deposits the latter's money in a bank which has notice that the owner is an infant, it is chargeable with notice of the order of court requiring the deposit to be made to the infant's credit, and is liable to the latter for payment to the guardian without special order of court.[18]

Checks Payable to Payee as Guardian.—Where a check, payable to a person as guardian, is indorsed by him and deposited in a bank for collec-

14. **Checks payable to an administrator as such.**—Safe-Deposit, etc., Co. *v.* Diamond Nat. Bank, 194 Pa. 334, 44 Atl. 1064.

15. Stair *v.* York Nat. Bank, 55 Pa. 364, 93 Am. Dec. 759.

16. **Share belonging to distributee of estate.**—On supplementary proceedings against one of the heirs of a decedent's estate, the cashier of a bank disclosed that funds had been deposited in the bank to the credit of the estate. A receiver was appointed, who sent to the bank a written notice stating the appointment of the receiver, and demanding payment of the heir's share of the deposit, and alleging that the amount was due the heir by virtue of a check drawn by the executor of the estate in favor of the heir, and sent to the heir. The bank disregarded the demand, and paid the check when presented. Held, that the receiver could recover of the bank so much of the heir's share as was necessary to satisfy the execution, together with interest, costs, and commissions. O'Connor *v.* Mechanics' Bank, 54 Hun 272, 7 N. Y. S. 380, 27 N. Y. St. Rep. 1, judgment reversed in 124 N. Y. 324, 26 N. E. 816.

17. **Deposits by guardians.**—Judgment (Civ. App.), 103 S. W. 665, modified in Moore *v.* Hanscom, 101 Tex. 293, 106 S. W. 876.

18. **Notice of order of court as to entry of credit.**—Judgment 24 Misc. Rep. 498, 53 N. Y. S. 849, reversed in Walker *v.* State Trust Co., 40 App. Div. 55, 37 N. Y. S. 525.

tion by a customer, the bank is not required to question the title of the depositor, and the ward on coming of age can not sue the bank to recover the amount of the check collected by it.[19]

Payment in Usual and Customary Way to Guardian or Order.—In the absence of fraud or collusion, a bank paying guardianship funds, deposited with it on the order of the guardian in the usual and customary way, is not liable for the misappropriation by the guardian of the funds so paid.[20]

Payment to Garnishee.—See ante, "Particular Deposits," § 129 (7ab).

§ 131 (13) Liability to Attachment.—See ante, "Attachment and Garnishment," § 129 (7).

§ 131 (14) Deposit for Transmission to Another Bank for Use of Third Person.—A bank receiving a deposit with instructions to credit it to the account of another bank for the use of a person specified holds it in trust for that purpose, and can not, by crediting it generally to the bank named, which is its debtor, vest the title to the fund in itself; and where the bank for which the deposit is made fails without having received the deposit, or made advances on account of it, the purpose for which it was made having failed, the bank holding it is liable to the depositor for its return.[21]

19. **Checks payable to payee as guardian.**—Hood *v.* Kensington Nat. Bank, 230 Pa. 508, 79 Atl. 714.

20. **Payment in usual and customary way to guardian or order.**—United States Fidelity, etc., Co. *v.* Adoue (Tex. Civ. App.), 128 S. W. 636.

Where a bank knew that the money and securities deposited with it at the time of the issuance of a certificate of deposit to the depositor in his name, followed by the word "guardian," belonged to the depositor individually, and knew that he was guardian of an incompetent, and that he should as guardian have in his hands the sum called for in the certificate, but did not know that he had misappropriated or intended to misappropriate the guardianship assets, the bank could not, on the surrender of the certificate, properly indorsed, refuse to pay the money to the guardian, and it need not see that money paid was not misappropriated, and the fact that the bank credited the depositor's individual account with the amount called for in the certificate, and surrendered to him the collateral against which the larger part of the certificate had been issued, did not make the bank liable for converting guardianship funds to the payment of the depositor's individual debt to it. United States Fidelity, etc., Co. *v.* Adoue (Tex. Civ. App.), 128 S. W. 636.

21. **Deposit for transmission to another bank for use of third person.**—American Exch. Nat. Bank *v.* Loretta Gold, etc., Min. Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233.

The obligation of the bank receiving the deposit to account therefor was to the depositor; and it appearing that, if it had remitted the amount at once, it would not have been received by the other bank until after its suspension, such obligation could not be changed by book entries made by the banks, so as to convert the depositor into a mere creditor of the suspended bank, and permit the bank holding the deposit, to which neither bank had any equitable right, to retain it in payment of its own debt. American Exch. Nat. Bank *v.* Loretta Gold, etc., Min. Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233.

The conditions under which the deposit was held by the bank receiving it were not changed by the fact that the failing bank, on receipt of advice of the deposit by telegraph from the depositor, credited the amount to the person named on its books, and charged it to the bank holding the deposit, when it did not receive notice of the deposit from such bank until

§ 132. Interest on Deposits[22]—§ 132 (1) Liability of Bank for Interest—§ 132 (1a) In the Absence of Contract.—In the absence of a special contract a general deposit does not bear interest.[23] But upon sums not so deposited and entered interest may be charged.[24] Where a bank

after the suspension, the entries on its books being provisional only, and subject to cancellation at its option until the actual receipt of the money in some form binding upon it. American Exch. Nat. Bank *v.* Loretta Gold, etc., Min. Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233, citing Armstrong *v.* National Bank, 90 Ky. 431, 14 S. W. 411; Cutler *v.* American Exch. Nat. Bank, 113 N. Y. 593, 21 N. E. 710; Commercial Nat. Bank *v.* Hamilton Nat. Bank, 42 Fed. 880.

The right of the depositor to reclaim the deposit would not be prejudiced by the filing, without his knowledge or consent, of a claim for the amount by the person for whose use the deposit was made with the receiver of the suspended bank, and its allowance. American Exch. Nat. Bank *v.* Loretta Gold, etc., Min. Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233.

22. See ante, "Interest on Funds Used by Bank," § 130 (2h).

Deposits in savings bank, see post, "Interest and Dividends on Deposits," § 303.

Interest on certificate of deposit, see post, "Certificates of Deposit," § 152.

Deposits with trust companies, see post, "Insolvency and Receivers," § 317.

23. In the absence of contract.—*Colorado.*—Hilburn *v.* Mercantile Nat. Bank, 39 Colo. 189, 89 Pac. 45.

Connecticut.—Catlin *v.* Savings Bank, 7 Conn. 487.

Georgia.—Funds in the hands of a bank on general deposit may be held without payment of interest. Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96.

Illinois.—First Nat. Bank *v.* Coleman, 11 Ill. App. 508.

Iowa.—State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500.

Kentucky.—In the absence of a special contract, a demand bank deposit does not bear interest. Clark *v.* Farmers' Nat. Bank, 124 Ky. 563, 99 S. W. 674.

New Hampshire.—In the absence of a special agreement to the contrary, a bank is not required to pay interest on deposits. Parsons *v.* Treadwell, 50 N. H. 356.

New York.—Forschirm *v.* Mechanics', etc., Bank, 137 App. Div. 149, 122 N. Y. S. 168.

North Carolina.—Boyden *v.* Bank, 65 N. C. 13.

Ohio.—No interest is paid by the bank on general deposits. Corwin *v.* Urbana, etc., Ins. Co., 14 O. 7; State *v.* Buttles, 10 West. L. J. 309, 1 O. Dec. 520.

Texas.—A general deposit creates an indebtedness on the part of the bank and a liability to pay back the money without interest. Duncan *v.* Magette, 25 Tex. 245.

West Virginia. — Parkersburg Nat. Bank *v.* Als, 5 W. Va. 50.

Running check account.—A deposit in a bank under a running check account, with the privilege to the depositor to withdraw all or any part thereof at any time, either in person or by check, creates a contract for the payment of money on demand without interest. Forschirm *v.* Mechanics', etc., Bank, 137 App. Div. 149, 122 N. Y. S. 168.

A bank is not chargeable with interest on sums deposited to the credit of customers to be drawn against by check, until payment be demanded, unless upon special contract. Parkersburg Nat. Bank *v.* Als, 5 W. Va. 50.

Draft deposited for collection.—Plaintiff having received a draft in 1883 payable to her order, indorsed it in blank and delivered it to her husband, who deposited it in a bank to which defendant succeeded; the next indorsement after plaintiff's being an indorsement of the bank directing the drawee to pay another bank for the indorsing bank's account. Held that, in the absence of any other evidence of a contract, the bank receiving the draft from plaintiff's husband received it for collection only, such bank acquired absolute title to the draft, and on collection became liable as plaintiff's debtor only to pay the amount of the draft to her on demand in 1902 without interest. Hilburn *v.* Mercantile Nat. Bank, 39 Colo. 189, 89 Pac. 45.

24. *West Virginia.*—Parkersburg Nat. Bank *v.* Als, 5 W. Va. 50.

Where a majority of the stockholders of a bank sold to the others their interest in the capital according to a certain statement of assets, with a stipulation that, if any debt not

has the money of another person lawfully in its possession, otherwise than upon general deposit, and uses it as it would its own, it is chargeable with interest for the use. It has used the property to which another was entitled, not as a gift of the use, but as a matter of right, and, by the principles of right, should pay interest for the use.[25]

Refusal to Pay on Demand.—A bank is entitled to retain money upon general deposit without liability to pay interest thereon, until it is placed in default by demand made for payment and wrongful refusal to pay. If after demand there is unreasonable or vexatious delay of payment, interest may be recovered.[26]

Defending Suit.—The defending in good faith of a suit brought to recover the money is not a vexatious delay.[27]

included therein should thereafter be paid to the bank, the purchasers should "forthwith" pay to the sellers their proportion thereof, deducting expenses, held, that the ordinary rule of nonpayment of interest on deposits did not apply to such collections when made, but not forthwith paid over to the sellers. Parsons *v.* Treadwell, 50 N. H. 356.

25. Certain funds of an insolvent, which were claimed by several creditors, one of them a bank, were, by an order of the court, which was made by the consent of all the parties in interest, paid to the bank; it agreeing to pay them over to the court's order if it was finally decided that the bank was not entitled to them. Meantime the bank used the funds as its own. Held, where the funds were afterwards ordered to be paid over, that the bank was liable for interest thereon for the time it held and used them. Kenton Ins. Co. *v.* First Nat. Bank, 93 Ky. 129, 14 Ky. L. Rep. 32, 19 S. W. 185.

In a suit against the bank by the parties entitled to such interest, they were not estopped by reason of the fact that they had consented to the original order made by the court directing the funds to be paid to the bank. Kenton Ins. Co. *v.* First Nat. Bank, 93 Ky. 129, 14 Ky. L. Rep. 32, 19 S. W. 185.

26. **Refusal to pay on demand.**—First Nat. Bank *v.* Coleman, 11 Ill. App. 508.

Where money is deposited in a bank to be paid to plaintiff on a check indorsed by T. and P., and they refuse to indorse the check, in an action to compel them to indorse the check and the bank to pay the same, plaintiff could not recover interest, as against the bank, from the time of his demand on the bank, as it was not in default until the check was presented duly indorsed by P. and T. Cooper *v.* Townsend, 59 Hun 624, 13 N. Y. S. 760, 31 N. Y. St. Rep. 122.

27. **Defending suit.**—A bank received certain deposits from a customer, a married woman, and gave therefor certificates payable at future dates. The money was afterwards drawn out on checks signed by the husband as agent without authority. In a suit by the wife, long afterwards, against the bank, held, that no interest was recoverable, as the bank had done nothing to hinder or delay the depositor in obtaining her money as it supposed that it had once paid out her money upon her check. First Nat. Bank *v.* Coleman, 11 Ill. App. 508.

Where a deposit in the name of one as agent is garnished for the debt of the principal, who is unknown to the bank, the bank does not, by defending the suit, lay itself liable to interest on the fund. Jones *v.* Manufacturers' Bank (Pa.), 10 Wkly. Notes Cas. 102.

Where money had been deposited with Bank A. by the cashier of Bank B., who took certificates of deposit in his own name, and attachment suits were afterwards brought against Bank B., and Bank A. was garnished for the funds so deposited, and at the same time the holders of the certificates of deposit instituted suits for the recovery of the money deposited, it was held that, by defending the garnishment, and calling upon the attaching creditors to show to whom it should pay, Bank A. did not become liable for interest on the deposit. Cohen *v.* St. Louis Perpetual Ins. Co., 11 Mo. 374.

As to suit equivalent to a demand.—See post, "Time When Interest Begins to Run and Duration," § 132 (2).

The pendency of an appeal from an order to pay over money deposited in bank by order of court is a reasonable excuse for not paying it upon demand and in such case the bank is not liable for interest.[28]

Where a bank suspends payment depositors are entitled to interest from the date of suspension as damages for breach of the contract to pay his checks on presentation.[29]

In case of a temporary receivership of a solvent bank at the instigation of the attorney general to sue for dissolution, the bank is not liable for interest to its depositors.[30]

Payment of Forged Check.—When a fund on deposit is reduced by the wrongful payment of a forged check, the depositor is entitled to interest on the amount so paid out from the time of its payment,[31] aliter in Georgia.[32]

§ 132 (1b) Under Agreement to Pay Interest.—Where a bank's contract with a depositor is express it may be an agreement to pay with or without interest.[33]

28. Where the Vermont Central Railroad had, under the statute (Comp. St., p. 196), upon petition to the chancellor, deposited in the bank the amount of land damages, and upon petition subsequently the chancellor had ordered the money to be paid to the plaintiff, and the railroad had appealed from the order, and the appeal was dismissed, no right of appeal existing in such case, it was held that the plaintiff could not recover interest of the bank for the money so deposited, as the bank was a mere depositary, and that the pendency of the appeal was a reasonable excuse for not paying over the money, even if demanded. Haswell *v.* Farmers', etc., Bank, 26 Vt. 100.

29. Thurston *v.* Wolfbough Bank, 18 N. H. 391, 45 Am. Dec. 382; Sickles *v.* Herold, 149 N. Y. 332, 43 N. E. 852; Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788; Ex parte Stockman, 70 S. C. 31, 48 S. E. 736, 106 Am. St. Rep. 741.

When a pass book is balanced, and the bank then suspends business, and refuses to pay its depositors, it detains moneys received to their use, within Civ. Code, § 1917, providing that interest is payable on moneys received to the use of another and detained from him. McGowan *v.* McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149.

30. A temporary receivership.—Where a solvent bank, able to pay on demand deposits due on demand without interest, was placed in the hands of a temporary receiver at the instigation of the superintendent of banks, causing the attorney general to sue for the dissolution of the corporation, and the suit was subsequently dismissed by the attorney general and the receiver discharged, the bank was not liable for interest on a deposit, payable on demand without interest, in absence of a demand or some act of the bank excusing a demand. Forschirm *v.* Mechanics', etc., Bank, 137 App. Div. 149, 122 N. Y. S. 168.

31. Payment of forged check.—German Sav. Bank *v.* Citizens' Nat. Bank, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399, citing Corn Exch. Bank *v.* Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655.

32. In an action against a bank to recover the amount of a forged check paid by said bank out of plaintiff's deposit, held that, as the fund against which the check was drawn was a general deposit, the drawer was not entitled to interest. Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96.

33. The agreement to refund may be express or implied; and, if it is express, it may be to refund with or without interest according to the terms of the agreement. Where the agreement is to pay interest, the agreement is obligatory; but the fact that the depositary agreed to pay interest affords very strong evidence that the title to the money deposited passed out of the depositor by the act of making the deposit. Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483.

What Constitutes.—The fact that the money is made payable at a future day does not make the deposit bear interest.[34]

A printed paragraph on the back of a demand certificate of deposit, purporting to be an "interest agreement," and signed by the printed signatures of the depositary bank and two other banks, to the effect that 3 per cent interest would be allowed on deposits left undrawn for six months, there being no agreement or suggestion as to time of payment or interest expressed on the face of the certificate, was not, as a matter of law, a part of the agreement between the depositor and the bank.[35]

Legality and Retroactive Effect of Statutes.—Contracts by banks to pay interest are valid in the absence of a statutory prohibition;[36] and a statute enacting "that no bank shall pay any interest or other compensation in consideration of deposits" can not be construed to have a retrospective effect.[37]

As to Time and Amounts.—A bank, if it pays interest to its depositors, may agree with them at what time and in what amounts it would pay interest.[38]

Issuance of Certificate Illegal.—Where a bank verbally agrees to pay interest on a deposit, the issuing of a certificate of deposit as evidence of such agreement, even if illegal under a statute forbidding banks to issue any bill or note unless the same shall be payable on demand without interest, will not prevent the depositor from suing on the original agreement for the recovery of the amount deposited, with interest from the time of the deposit.[39]

§ 132 (2) Time When Interest Begins to Run and Duration.—Interest on a demand deposit, in the absence of any agreement as to interest, should be computed from the time payment was demanded and refused,[40] and, in case no demand has been made, then from the date of the

34. What constitutes.—First Nat. Bank *v.* Coleman, 11 Ill. App. 508.

35. Printed paragraph on back of certificate.—Anderson *v.* First Nat. Bank, 144 Iowa 251, 122 N. W. 918.

36. Legality and retroactive effect of statutes.—Hannum *v.* Bank, 41 Tenn. (1 Coldw.) 398.

37. The Act of 1858, ch. 25, § 1 (Code, § 1816), provides that no bank shall pay any interest or other compensation in consideration of deposits. Before this act, a bank agreed with one of its depositors to pay interest on money deposited, and did not signify any intention to cease paying interest after its passage (at time of deposit the contract was one sanctioned by the existing law.) Held, the statute had no application to contracts made before its passage, and by implication of law the contract was a binding one as long as the bank retained the deposit, or until notice was given of its determination to end the agreement. Hannum *v.* Bank, 41 Tenn. (1 Coldw.) 398.

38. As to time and amounts.—Dottenheim *v.* Union Sav. Bank, etc., Co., 114 Ga. 788, 40 S. E. 825.

39. Issuance of certificate illegal.—Pelham *v.* Adams (N. Y.), 17 Barb. 384.

40. Time when interest begins to run and duration.—Morse *v.* Rice, 36 Neb. 212, 54 N. W. 308.

In an action to recover on a lost certificate of deposit, payment on which has been refused by the bank, interest should be allowed the depositor from the date of the bank's refusal to pay the deposit. Citizens' Nat. Bank *v.* Brown, 45 O. St. 39, 11 N. E. 799, 4 Am. St. Rep. 526.

commencement of the action.[41] The bringing of an action to recover a deposit is, in effect, a demand of payment,[42] and the interposing of a counterclaim by way of answer, by analogy, is of the same effect,[43] entitling the depositor to interest from that date, although the bank is afterwards restrained from transacting business and its property placed in the hands of a receiver.[44]

Duration.—A certificate of deposit payable at a fixed time after date, with interest at a specified rate, continues to bear that rate of interest after maturity, although not presented for payment at maturity.[45]

Conversion of Principals' Money Wrongfully Drawn against by Agent.—Interest should be given from the date of the conversion, by a bank, being conusant of the facts, of money of a principal, wrongfully deposited and drawn against by his agent, and not merely from the date of a demand upon the bank by the principal.[46]

False Entry to Defraud Depositor's Representative.—Where a bank agreed to pay a depositor interest on a certain portion of his deposit, and after his death made a false entry for the purpose of defrauding his representatives, the bank was charged with interest from the time the fraud was committed until the money was paid.[47]

§ 132 (3) Rate.—In an action on a demand deposit, in the absence of an agreement as to interest, it should be computed at the rate prescribed by statute.[48] If a bank agrees to pay interest on a deposit at a rate less than that prescribed by statute, in an action to recover the deposit interest is to be computed at that rate to the date of the judgment.[49]

Where a bank suspends payment it is liable for interest at the rate pre-

41. Morse *v.* Rice, 36 Neb. 212, 54 N. W. 308.

42. **Institution of suit.**—In an action against a bank to recover deposits, the balance found due plaintiff should bear interest from the institution of his action. Bobb *v.* Savings Bank, 23 Ky. L. Rep. 817, 64 S. W. 494.

Defending suit not a vexatious delay.—See ante, "In the Absence of Contract," § 132 (1a).

43. **Counterclaim.**—In an action by the temporary receiver of a bank against a depositor on a note payable to the bank, the interposing of a counterclaim, in which it is sought to have the amount of defendant's non-interest drawing deposit applied as a set-off, is equivalent to a demand, and in allowing such set-off defendant will be entitled to interest on his deposit from the time his answer was served. Sickles *v.* Herold, 149 N. Y. 332, 43 N. E. 852, reversing 15 Misc. Rep. 116, 36 N. Y. 488.

44. In a suit on a demand due from a bank, the plaintiff is entitled to recover interest thereon from the time of action brought, although the bank is afterwards restrained, by injunction, from proceeding in its business, and its property is put into the hands of receivers. Watson *v.* Phœnix Bank (Mass.), 8 Metc. 217, 41 Am. Dec. 500.

45. **Duration.**—Cordell *v.* First Nat. Bank, 64 Mo. 600.

A banker's certificate of deposit, payable on presentation sixty days after date, with interest, carries interest till presented and paid. Payne *v.* Clark, 23 Mo. 259.

46. **Conversion of principals' money wrongfully drawn against by agent.**—Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

47. **False entry to defraud depositor's representative.**—Leake, etc., Orphan House *v.* Lawrence (N. Y.), 11 Paige 80.

48. **Rate.**—Morse *v.* Rice, 36 Neb. 212, 54 N. W. 308.

49. Schmidt *v.* People's Nat. Bank, 153 Mass. 550, 27 N. E. 595.

scribed by statute to general depositors from the date of suspension without presentation of checks or refusal to pay deposits, and the fact that under special contracts with it certain deposits draw a lower rate is immaterial.[50]

§ 132 (4) Recovery.—Pleading and Proof.—In an action against a banker to recover money deposited with him, to be paid out for certain purposes, which it is alleged he paid out for unauthorized purposes, in the absence of an averment that defendant had promised to pay plaintiff interest on the amount of the deposit, evidence to that effect was properly excluded.[51]

Admissibility.—On the question whether a bank agreed to pay a depositor interest, evidence that he had accounts in other banks on which he was paid interest is admissible.[52]

Weight and Sufficiency.—The preponderance of evidence rule governs in determining whether the evidence is sufficient to show a contract to pay interest or not, in actions in which it is sought to recover interest on deposits by virtue of an agreement on part of the bank to pay interest.[53]

§ 133. Repayment in General.—The fact that there are several entries in the books of a bank and in the pass book of a depositor of allowance of interest on his account is not sufficient to prove a contract by the bank to pay interest while the deposit should remain, where it is proven

50. Ex parte Stockman, 70 S. C. 31, 48 S. E. 736, 106 Am. St. Rep. 741; Hays *v.* City Bank, 70 S. C. 31, 48 S. E. 736, 106 Am. St. Rep. 741.

51. Recovery, pleading and proof.—Cotter *v.* Parks, 80 Tex. 539, 16 S. W. 307.

52. Admissibility.—McLoghlin *v.* National Mohawk Valley Bank, 139 N. Y. 514, 34 N. E. 1095.

53. Weight and sufficiency.—In an action to recover interest on a bank deposit, evidence held to show that defendant bank's president agreed to pay interest. Boyd *v.* First Nat. Bank, 128 Ky. 468, 108 S. W. 360.

A deed of assignment for the benefit of creditors provided that C., the assignee, might appoint R., one of the grantors in the deed, his agent to aid him in any or all the duties under the assignment, which C. did. The trust fund was deposited in a bank of which R. was the cashier, and in making up the account from time to time the clerk in the bank, by the direction of R., credited the account with interest until July 1, 1878, after which R. directed that interest be no longer allowed. At that date a dividend was declared, and checks made out by R., payable to creditors for their respective shares, and sent to C. to be signed, which was done, and the checks returned to R., who delivered some of them, but others were never delivered, and were found among his papers after his death in 1885. It is evident that this dividend was declared upon the basis of the principal fund, the interest not being taken into account, and that the checks drawn were intended to cover that fund, leaving the interest untouched. In October, 1886, the balance of the fund, as shown by the books of the bank, including the amount of the checks drawn in July, 1878, and never delivered, was paid to appellee, the successor of C., as trustee, and this action was afterwards brought by appellee to recover interest on the fund deposited from the time of its deposit. Held, that the evidence was not sufficient to show a contract to pay interest beyond the time it was actually paid by placing it to the credit of the fund, and notice to R. that no interest would be allowed after July 1, 1878, was the same as notice to C.; nor is the bank chargeable with laches by reason of R.'s failure to deliver to creditors the checks drawn on the fund in July, 1878. Marion Nat. Bank *v.* Fidelity Trust Co., 10 Ky. L. Rep. 775.

that, after the entries were made, the officers of the bank on several occasions told the depositor that it was against their rules to pay interest, and that they would not pay it, and that he apparently acquiesced.[54]

§ 133 (1) Obligation of Bank to Pay[54a]—§ 133 (1a) In General.—Where a bank receives money[55] or property[56] upon deposit, unless some agreement has been made with reference to its payment there results an implied contract that it will return it to the depositor upon demand,[57] but the agreement to refund may be either express or implied.[58] As the result of a deposit made with it, the bank becomes liable for its amount as a debt, which can only be discharged by a legal payment of the amount to be paid to the depositor, or his order, and to or for his use or account. The bank assumes the duty of seeing that it is so paid. If it pays out the money otherwise, it is liable to the depositor to the amount of such payment.[59] A depositor has a debt against the bank payable on demand,[60] upon the presenta-

54. McLoghlin *v.* National Mohawk Valley, 139 N. Y. 514, 34 N. E. 1095.

54a. Deposit as due without demand when bank becomes insolvent, see ante, "Insolvency and Its Effect in General," § 73.

Liability of stockholders, see ante, "Nature and Extent," § 47.

Pass books and accounts, see post, "Depositors' Pass Books and Accounts," § 151.

Payment of checks, see post, "Mode and Sufficiency," § 141.

55. Obligation of bank to pay.—A deposit of money with a bank raises an implied promise to repay the same. Anderson *v.* Bank, 4 Cal. App. 427, 88 Pac. 379.

Indiana.—McEwen *v.* Davis, 39 Ind. 109.

Illinois.—Ward *v.* Johnson, 95 Ill. 215.

Iowa.—A bank receiving a deposit of money assumes no further obligation than to pay the amount received when demanded at its banking house. Elliott *v.* Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 1 L. R. A., N. S., 1130, 111 Am. St. Rep. 198.

56. Property.—Bates *v.* Capital State Bank, 18 Idaho 429, 110 Pac. 277.

57. Bates *v.* Capital State Bank, 18 Idaho 429, 110 Pac. 277.

58. Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483.

State statute construed.—Where the act incorporating a bank contained a provision, by which it is enacted, that the bank shall receive money on deposit, without being required to give an obligation, under seal, to repay it, this enactment must be construed with regard to the practice of banking, and the general understanding of mankind; and must create a liability to the depositor, by the simple act of depositing, that is, an assumpsit in law, implied from an act in pais. Bank *v.* Wister (U. S.), 2 Pet. 318, 7 L. Ed. 437.

59. Liability to repay.—Thompson *v.* Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704; Bank *v.* Wister (U. S.), 2 Pet. 318, 7 L. Ed. 437; Leather Mfgrs. Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 32 L. Ed. 342, 9 S. Ct. 3; Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96; O'Neil *v.* New England Trust Co., 28 R. I. 311, 67 Atl. 63; Tolman *v.* American Nat. Bank, 22 R. I. 462, 48 Atl. 480, 52 L. R. A. 877, 84 Am. St. Rep. 850. See post, "Payment to Wrong Person," § 133 (3f).

Where one deposits money in a bank on general deposit, the bank undertakes, impliedly, to pay that money either to the depositor or to some person to whom he directs it paid, and in order to discharge itself from the liability to the depositor, the bank must pay the money to the depositor or as directed by him. The liability can not be discharged in any other way. Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96.

The obligation of a bank to a general depositor is to pay the deposit upon proper demand therefor. Aurora Nat. Bank *v.* Dils, 18 Ind. App. 319, 48 N. E. 19.

60. Spain *v.* Beach & Son, 52 Ga. 494; Davenport *v.* State Banking Co., 126 Ga. 136, 54 S. E. 977; Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350,

tion and surrender of the draft or order, addressed to and directing the bank, in unequivocal terms, to pay the amount of such draft to the person therein named, or to bearer. This order is commonly known in commercial and banking parlance as a check.[61] A depositor has a claim against the bank, not for a particular fund, but merely for a like amount of money.[62] There is an implied obligation on the part of the bank to honor and pay on presentation the checks and drafts of the customer until his deposits are exhausted; and also repay, on the demand of the depositor, any balance which may be due on the settlement of the deposit account. The deposit creates a debt, and the payment of the checks of the customer discharges such debt pro tanto.[63] The liability is implied by law from the fact of the deposit of money.[64] An irregular deposit of a customer,[65] a deposit un-

10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669.

Banking business is founded on the idea of immediate availability of the funds deposited. One who deposits money in bank considers that he has that much as available as if it were cash in his pocket. Nolting v. National Bank, 99 Va. 54, 37 S. E. 804, sequel to National Bank v. Nolting, 94 Va. 263, 26 S. E. 826.

The tendency of courts is in favor of enforcing the contract made by the bank with the depositor. Nolting v. National Bank, 99 Va. 54, 37 S. E. 804, sequal to National Bank v. Nolting, 94 Va. 263, 26 S. E. 826.

61. Grisson v. Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669. See post, "Payment of Checks," § 137.

The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. National Bank v. Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897; New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. Ed. 380, 24 S. Ct. 199.

The deposit of money by a customer with his banker is one of loan, with a superadded obligation that the money is to be paid when demanded by a check. Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483; Marine Bank v. Fulton County Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785; Davis v. Elmira Sav. Bank, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502; New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. Ed. 380, 24 S. Ct. 199.

62. Union Sav. Bank, etc., Co. v. Indianapolis Lounge Co., 20 Ind. App. 325, 47 N. E. 846; Neely v. Rood, 54 Mich. 134, 19 N. W. 920, 52 Am. Rep. 802; People v. Wadsworth, 63 Mich. 500, 30 N. W. 99.

The bank is not bound to keep the particular money on hand, and does not contract to return the identical fund, or to retain any particular fund for the benefit of the depositor, but only to repay to him, when demanded, a sum equivalent to that paid into his hands. Treasurer v. People's, etc., Bank, 47 O. St. 503, 25 N. E. 697, 10 L. R. A. 196; Bank v. Windischmuhlhauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660; Covert v. Rhodes, 48 O. St. 66, 27 N. E. 94.

Application of scaling ordinance to deposits.—The relation between a bank and its depositors, so far as it concerns the liability of the former to the latter for deposits made within the civil war period, is controlled by the scaling ordinance of 1865, regulating the construction of all contracts made during the civil war. Georgia R., etc., Co. v. Dabney, 52 Ga. 515.

63. Boyden v. Bank, 65 N. C. 13. See post, "Payment of Checks," § 137.

64. Thompson v. Riggs (U. S.), 6 D. C. 99.

"The receipt of the money is the fact, from which the law implies the contract of the bank, which is substantially, that the bank will be responsible for the sum deposited, and pay the same amount of money when so ordered by the depositor." Weisinger v. Bank, 78 Tenn. (10 Lea) 330.

65. Irregular deposits.—The irregular deposit of a customer with a bank is subject to the implied condition that it will be payable on demand only. Brown v. Pike, 34 La. Ann. 576.

66. Deposit payable at future date.—Where a bank accepts a deposit, agreeing to pay the same at a certain

lawfully made payable at a future date,[66] and deposits which the bank was not authorized to accept are each subject to this implied condition and payable on demand.[67]

Illegal Deposits.—Illegal deposits furnish no ground for a recovery thereon but the bank is bound to restore the fund upon demand.[68]

Unauthorized Promise of Usurious Interest.—The fact that the cashier of a bank, on receiving a deposit, makes an unauthorized promise of interest at a usurious rate, does not relieve the bank from the obligation to return to the depositor the amount actually received from him.[69]

Deposit Used to Pay "Counter Tickets."—Where money deposited by one in a bank is used by the latter in payment of notes issued by it, and commonly called "counter tickets," the bank is liable, to the depositor for the full amount deposited.[70]

§ 133 (1b) Private Bankers.—Where one opens a bank as a private banker and receives deposits, he assumes a personal obligation to repay to each depositor or his order on demand the amount deposited by him. This obligation gives each depositor a right of action against him for the amount deposited, on his failure to pay the same on demand.[71] The personal obligation of one opening a bank as a private banker to repay to the depositors the sums deposited does not cease by his making a bona fide sale of the bank and deposits, but he remains liable to each depositor to the amount of the deposits thereafter made in ignorance of the transfer, without negligence in failing to discover the transfer.[72]

future date, contrary to Rev. St., c. 36, § 57, prohibiting such agreements, the depositor may recover upon the implied promise to repay. White *v.* Franklin Bank (Mass.), 22 Pick. 181.

67. **Deposit bank not authorized to accept.**—Act Jan. 10, 1855, § 1, provides that any bank which may desire to close the business of circulating its bills may file a certificate of the fact with the auditor. Section 4 provides that after filing such certificate the bank shall cease to do any banking business, or to have any banking powers except to wind up its concerns, collect and pay debts, and to sue and be sued for such debts. Held, that where a bank, after filing such certificate, accepts a deposit from one who has no notice of the certificate, such depositor's right to recover against the bank is not affected by § 4. Northern Bank *v.* Zepp, 28 Ill. 180.

68. **Illegal deposit.**—By the third section of an act to punish the embezzlement and use of public moneys (2 Curw. 1286), a contract made by the plaintiff with the defendants, by which the latter agreed, in consideration of the deposit with them of public moneys held by the plaintiff in his official capacity, as treasurer of a township, to repay the same on demand, with interest, at the rate of six per cent per annum, is void; and no recovery can be had thereon, either by the plaintiff or the township in its corporate capacity. Pollock *v.* Hatch, 2 Disn. 181, 13 O. Dec. 111.

But the defendants acquired no title to the funds, and as bailee are bound to restore them to the township on demand; and the plaintiff, as a trustee of the money, has a right to maintain an action in his own name for its recovery, and is entitled to judgment for the amount received, and lawful interest from the time of the demand. Pollock *v.* Hatch, 2 Disn. 181, 13 O. Dec. 111.

69. **Unauthorized promise of usurious interest.**—Hanson *v.* Heard, 69 N. H. 190, 38 Atl. 788.

70. **Deposit used to pay "counter tickets."**—City Bank *v.* Bateman (Md.), 7 Har. & J. 104.

71. **Private bankers.**—Johnson *v.* Shuey, 40 Wash. 22, 82 Pac. 123.

72. Johnson *v.* Shuey, 40 Wash. 22, 82 Pac. 123.

Defendant opened a bank as a private banker. After several persons

§ 133 (1c) Source from Which Funds Deposited Derived.—A deposit of the proceeds of usurious loans,[73] a deposit of the proceeds of a check the drawer of which indorsed the payer's name there without authority;[74] a deposit of the proceeds of bonds in the negotiation of which the bank acted beyond the scope of its authority;[75] are each subject to the implied condition that it will be payable on demand.

Money Subject to Lien.—Where a bank receives money on deposit without notice of any lien on the money deposited, it is bound to pay checks drawn on it by the depositor, and it is not liable to a person holding a lien upon the money for so doing.[76]

Deposit of Proceeds of Property Subject to Liens.—A bank need not apply proceeds of the sale of personal property, which are deposited in it by the owner, to the discharge of known liens held by others on such property, but may pay it out in due course of business on the checks of the owners.[77]

§ 133 (1d) Effect of Outstanding Checks.—Until the acceptance of a check, the drawer may withdraw his deposit.[78]

had made deposits, he transferred the bank and deposits to a third person. Subsequently a receiver was appointed for the property of the third person, and the depositors presented claims to the receiver, and received a part of their deposits. Held that, though the third person on purchasing the bank's property agreed to pay the depositors, defendant was not relieved from his personal obligation to repay them; the promise as between defendant and the third person being to make the latter the principal debtor and defendant a surety, and giving the depositors a joint or several action against both. Johnson *v.* Shuey, 40 Wash. 22, 82 Pac. 123.

Defendant opened a bank without capital. For the purpose of inducing persons to make deposits therein, he fraudulently pretended that it was incorporated, with a capital stock of $25,000. On the faith of such representations persons made deposits. Subsequently he pretended to sell the bank to a third person, for the purpose of defrauding the depositors, and put an incompetent person in charge thereof, who mismanaged it, causing a loss to the depositors. Held, that the depositors were entitled to recover from defendant for the loss sustained. Johnson *v.* Shuey, 40 Wash. 22, 82 Pac. 123.

73. Proceeds of usurious loans.—It is no defense to an action against a bank for a deposit that it is the proceeds of usurious loans made for the depositor by the officers of the bank. Porter *v.* Sherman County Banking Co., 40 Neb. 274, 58 N. W. 721.

74. Where one draws his check for an incorrect amount, but before delivering it to the payee discovers the error, and, to correct it, deposits the check to his own credit, indorsing the payee's name thereon, and pays the correct amount of money to the payee, the depository who subsequently collected the proceeds can not defend against his depositor on the ground that the payee may claim the money on the theory that his indorsement was forged. Bendit *v.* Carr, 3 N. Y. St. Rep. 263.

75. A plaintiff's bonds were negotiated by a bank, the money thus obtained being deposited to the credit of W., plaintiff's agent. Held, that the balance to W.'s credit should be paid to plaintiff, though the bank, in negotiating the bonds, acted beyond the scope of its authority. Smith *v.* Philadelphia Nat. Bank (Pa.), 34 Leg. Int. 86.

76. Money subject to lien.—Merchants', etc., Bank *v.* Meyer, 56 Ark. 499, 20 S. W. 406.

77. Deposit of proceeds of property subject to liens.—Cox *v.* Beck, 83 Fed. 269.

78. Effect of outstanding check.—Imboden *v.* Perrie, 81 Tenn. (13 Lea) 504.

A check drawn by a depositor, but

§ 133 (1e) Effect of Receipt of Depositor's Note for Collection.—The receipt by a bank of a depositor's note for collection does not destroy the right of the depositor to withdraw his deposit or render the bank liable to the note holder for its amount until there has been an appropriation of the money on deposit to the payment of the note.[79]

§ 133 (1f) Effect of Notice to Depositor to Withdraw Deposit.—A notice given in 1862, by a bank to its depositors, to withdraw their deposits, though repeated in February, 1864, with the further notice, that on failing to withdraw, the deposits would be sealed up in packages and held at their risk, without proof of any further action on the part, either of the bank or its customers, in relation to such deposits, does not in law under the ordinance of 1865, discharge the bank from all liability, on account of the total failure of Confederate money. Such facts are proper for the consideration of the jury in adjusting the equities between the parties.[80]

§ 133 (1g) Loss or Theft of Deposit.—If general deposits be lost, destroyed or stolen, the bank is responsible, though guilty of no negligence.[81]

§ 133 (2) Accrual of Right to Repayment—§ 133 (2a) Demand and Refusal.—A bank is not liable for money deposited with it until there has been a demand for its payment by the depositor and a refusal to pay by

never accepted by the bank, is no defense to a suit for the deposit, though the check was unaccounted for. Jackson Ins. Co *v.* Cross, 56 Tenn. (9 Heisk.) 283.

It was no defense to an action by the treasurer of the board of trustees of the Central Hospital for the Insane to recover the amount of moneys received from the state treasurer by his predecessor in office and deposited in the defendant bank, that the preceding treasurer had drawn checks against the deposit, where the bank had refused to pay the checks. Meridian Nat. Bank *v.* Hauser, 145 Ind. 496, 42 N. E. 753.

79. **Effect of receipt of depositor's note for collection.**—B., of Philadelphia, sent a note on K., of Arkansas, to C. & Co., of Memphis, for collection, K., having funds on deposit with them. April 15, 1861, C. & Co. wrote to B. that they had been unable to obtain exchange on New York or Philadelphia, but that they had the money to pay the note, and that B. might draw on them at sight for the amount, "payable in our money," K.'s instructions being to pay no exchange or interest. There was no further communication, and K withdrew his deposit from C. & Co. The suit was brought in 1866, to recover the amount of the note from N., one of the firm of C. & Co. Held, that C. & Co. had been the agents of B. and of K., and that K. had the right to withdraw his deposit at any time until an actual appropriation of the money to the payment of the note; that there had been no such appropriation, and that therefore the defendant was not liable. Bellows *v.* Norton, 59 Tenn. (12 Heisk.) 319.

80. **Effect of notice to depositor to withdraw deposits.**—Georgia R., etc., Co. *v.* Dabney, 52 Ga. 515.

81. **Loss or theft of deposit.**—Bank *v.* Windischmuhlhauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660.

In care of a general deposit.—The object of the depositor is the safekeeping of the money; and the consideration upon which it is received by the bank is, that it may be used until needed. It loses its character of bailment and becomes a loan. The bank is liable for the money absolutely, however it may have been lost. And this is the ordinary mode of safekeeping by a bank. Duncan *v.* Magette, 25 Tex. 245.

the bank,[82] although the deposit is of public funds.[83] The engagement of a bank with its depositors is not to pay absolutely and immediately, but when payment shall be required at the banking house; and therefore it is not in default or liable to respond in damages until demand and refusal.[84]

Stipulation Not Absolute Requirement.—A condition attached to a deposit in a bank requiring a demand on the part of the depositor "if the same may be deemed advisable" is not an absolute requirement that such demand shall be made.[85]

Necessity for Demand.—A bank can not defend against claims for deposits on the ground that no demand has been made for them within six years.[86]

Waiver of Requirement of Demand—Suspending Business.—Where a bank discontinues banking operations, it waives any demand on the part of its depositors which, under the terms of the deposit, was necessary for a withdrawal of the funds deposited.[87]

§ 133 (2b) Right to Written Demand or Order of Payment.—Under the usages of banking, a bank is not required to pay a deposit on an oral demand, but is entitled to some written evidence of the order for the money,[88] unless it has denied all liability for the money.[89]

82. **Demand and refusal.**—*Arkansas.*—Winter *v.* Epping, 43 Ga. 593; Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896.

Upon demand, the depositor is entitled to repayment. Corwin *v.* Urbana, etc., Ins. Co., 14 O. 7; Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 O. St. 60, 42 N. E. 700, 31 L. R. A. 653, 56 Am. St. Rep. 700; S. C., 27 Wkly. L. Bull. 105, 11 O. Dec. 469; Treasurer *v.* People's, etc., Bank, 47 O. St. 503, 25 N. E. 697, 10 L. R. A. 196.

83. **Public funds.**—Where the statute did not prescribe that the title to the public funds deposited in an incorporated bank should be retained in the officer intrusted with such funds, or that the identical money deposited should be returned, but only that the money should be paid upon demand, the liability was made to arise from failure to make payment, not upon the failure to return the identical coin or currency deposited. Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896.

84. *Pennsylvania.*—Girard Bank *v.* Bank, 39 Pa. 92, 80 Am. Dec. 507.

85. **Requirement.**—Arnold *v.* Hart, 176 Ill. 442, 52 N. E. 936.

86. **Necessity for demand.**—Girard Bank *v.* Bank, 39 Pa. 92, 80 Am. Dec. 507.

87. **Waiver of requirement of demand—Suspending business.**—Arnold *v.* Hart, 176 Ill. 442, 52 N. E. 936.

88. **Right to written demand or order payment.**—*Indiana.*—First Nat. Bank *v.* Stapf, 165 Ind. 162, 74 N. E. 987, 112 Am. St. Rep. 214.

When money is deposited with a banker, it is payable on demand at the bank, unless some other agreement has been made with reference to its payment. The banker may pay the money upon an oral order, or transfer it from one account to another, and such oral order will be a sufficient authority and justification for so doing, but the banker is under no obligation to act upon such oral direction. By the usages of the banking business, he is entitled to some written evidence of the order for money upon payment thereof. McEwen *v.* Davis, 39 Ind. 109.

A banker is not bound to pay money held for one on deposit, on a note held by a third person, upon the oral request of the depositor, when there is no proposal to surrender the note to the banker, or to give any other evidence of the payment of the money. McEwen *v.* Davis, 39 Ind. 109.

89. The denial by a bank of all liability for money deposited with it excuses the depositor from drawing a check as a condition of his right to withdraw the deposit, even if the bank would not ordinarily be liable until a check had been drawn. Coleman *v.* First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938, affirmed in 94 Tex. 605.

§ 133 (2c) Right of Bank to Indemnity.—A bank holding a deposit which is claimed by different parties has a right, on demand by one of them for payment, to require indemnity from a demand by the other.[90]

§ 133 (3) Mode, Sufficiency and Medium of Payment—§ 133 (3a) What Constitutes Payment.—Where the relation between parties is that of depositor and banker, the bank being debtor to the depositor for the amount of the deposit, the liability can be discharged only by payment of the debt.[91] Ordinarily this can be done in either of two ways; the depositor may come in person and demand and receive over the counter the money, or he can draw his check on the bank for a part or the whole of the sum, and if the banker pay it to him or to a person lawfully presenting the check signed by him, the indebtedness will be discharged.[92]

Acceptance of Check Payment Pro Tanto.—The acceptance by a bank over its counter of the checks or drafts of a depositor discharges the deposit to the amount of the check or draft,[93] whether the bank pay the amount thereof over the counter, or pass it to the credit of the payee.[94]

The certification of a check or draft does not discharge the bank from its obligation to pay a deposit.[95]

Issuance of a letter of credit to a depositor does not of itself constitute payment of his deposit so as to discharge the bank.[96]

90. Right of bank to indemnity.—Stair *v.* York Nat. Bank, 55 Pa. 364, 93 Am. Dec. 759.

91. What constitutes payment.—Heath *v.* New Bedford, etc., Trust Co., 184 Mass. 481, 69 N. E. 215.

92. Heath *v.* New Bedford, etc., Trust Co., 184 Mass. 481, 69 N. E. 215, Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6.

And the bank can not discharge its liability to account with the depositor to the extent of the deposit, except by payment to him, or to the holder of a written order from him, usually in the form of a check. Leather Mfgrs. Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 32 L. Ed. 342, 9 S. Ct. 3.

93. Acceptance of check payment pro tanto.—Mayer *v.* Heidelbach, 123 N. Y. 332, 25 N. E. 416, 9 L. R. A. 850.

94. Since an order on a bank to deliver negotiable securities to a person on his order, with a direction to "give him the cash" if they have been collected, is equivalent to a draft payable to himself or order, it authorizes the bank to pass the amount of the cash to the payee's credit in deposit, and pay out the amount on his checks. Weedsport Bank *v.* Park Bank, 41 N. Y. 561, 4 Abb. Dec. 545.

95. A depositor drew for a certain amount, and received therefor the bank's check, drawn on another bank, payable to a third person on demand. On the same day the check was presented to the drawee for certification, and on the next day it was paid on a forged indorsement, the check never having been delivered to the payee. The drawee charged the same to the drawer, and returned the check as a voucher in the usual way. The fraud was not discovered until nearly seven years thereafter, and the depositor thereupon brought suit to open his account, and recover the amount of the check. The defendant set up the certification of the check by the drawee as a defense. Held, that the mere fact of certification does not discharge the drawer; and, the check having been returned to the drawer without delay, and without having been delivered to the payee, the plaintiff was entitled to recover. Thompson *v.* British North American Bank, 45 N. Y. Super. Ct. 1.

96. A bank issued a letter, advising another bank that its account had been credited with a certain amount deposited for the use of the holder of the letter. Before the letter was presented for payment, the bank to which it was directed suspended. Held, that the parties depositing the fund could recover of the bank issuing the letter. Cutler *v.* American Exch. Nat. Bank, 53 N. Y. Super. Ct. 163, affirmed in 113 N. Y. 593, 21 N. E. 710, 4 L. R. A. 328.

Issuance of Bill of Exchange.—In the absence of fraud, a depositor of an insolvent bank can not claim to rescind a contract, evidenced by a bill of exchange drawn in his favor by the bank on a business correspondent, with whom it has funds on deposit, because such bill has been dishonored on presentation in consequence of the bank's subsequent assignment.[97]

Deposit a Device to Place Money in Control of Bank President.—Where a deposit is simply a device to place the money under the control of the president of the bank to use for speculative purpose, the fact that it has been so used constitutes a substantial repayment.[98]

Money Confiscated as Property of Enemy.—Money on deposit in bank belonging to a depositor who joined the rebellion, which was seized by a military order issued by a commandant of the military forces of the United States and paid into the hands of the quartermaster of the army, can not be recovered of the bank by the depositor. The bank is not responsible for the loss sustained thereby.[99]

§ 133 (3b) Payment to Agents—§ 133 (3ba) In General.—Money paid by a bank to an agent, which the latter delivered to his principal or retained with his principal's consent or disposed of with his principal's approbation, would be a credit to the bank on the deposit account.[1]

§ 133 (3bb) Unauthorized Payment—Payment to Agent or Correspondent Making Deposit.—That one is an agent for the purpose of depositing his principle's money in bank does not give him authority to take the deposit out, and his act in doing so, if not within the scope of his authority, does not bind his principle.[2] That a bank became dissatisfied by the delay of a depositor in returning a signature card, and by the fact that the deposit was to be immediately withdrawn, could not change the nature of its contract with the depositor, or discharge it from liability for returning the deposit to a person unauthorized to receive the same.[3]

Authority to Sign Withdrawal Check.—A bank, in paying money to a depositor's correspondent, who deposited the same, does so at its peril, and takes the chance of the correspondent's authority to sign the with-

97. **Issuance of bill of exchange.**—Ex parte Jones, 77 Ala. 330.

98. **Deposit a device to place money in control of bank president.**—In an action on a certificate of deposit by administrators against a bank, the bank alleged that one of the administrators and the president of the bank had agreed that the latter might use the funds for speculative purposes, that it had been so used, and that, therefore the bank had substantially repaid the deposit. Held, that he should recover on the certificate, it not being certain that the deposit was simply a device to place the money under the control of the president of the bank, to be used for speculative purposes. Bingham *v.* Marine Nat. Bank, 41 Hun 377, 17 Abb. N. C. 431, 2 N. Y. St. Rep. 638.

99. **Money confiscated as property of enemy.**—Grivot *v.* Louisiana State Bank, 24 La. Ann. 265.

1. **Payment to agents.**—City Bank *v.* Kent, 57 Ga. 283.

2. **Payment to agent or correspondent making deposit.**—Heath *v.* New Bedford, etc., Trust Co., 184 Mass. 481, 69 N. E. 215.

3. Heath *v.* New Bedford, etc., Trust Co., 184 Mass. 481, 69 N. E. 215.

drawal check on the depositor's behalf.[4]

Authority a Question of Fact.—It is a question of fact whether the agent was authorized by a bank depositor to make a settlement with a correspondent, and whether that settlement included the amount of the deposit drawn by such correspondent.[5]

§ 133 (3c) Partnership Deposits.—A bank which has paid money deposited by a firm, to one of the partners having authority to withdraw it, is not liable for the amount, though the payment was made without any check, order, or receipt.[6]

§ 133 (3d) Joint Deposits.—On the wrongful payment by a bank of a joint deposit to one of the two joint depositors, the other may recover of the bank the amount of his actual interest therein at the time of such payment, though it be greater than at the time of deposit.[7]

§ 133 (3e) Payment Pursuant to Execution and Garnishment.—Payment by a bank on demand of the sheriff, pursuant to execution against a depositor having funds on deposit, is in law a voluntary payment, unless made by the previous consent or subsequent ratification of the depositor.[8]

Garnishment of Public Money Deposit as Private Funds.—Where money belonging to the county, deposited generally by the treasurer in a bank, is garnished for the private debt of the treasurer, neither the bank nor the treasurer can be heard to claim that the money is public funds, in the face of a public law forbidding the depositing of public funds.[9]

§ 133 (3f) Payment to Wrong Person.—While a bank is not an insurer that it will never pay a deposit to the wrong person, it is bound to exercise reasonable care under the circumstances, notwithstanding any of its own rules to the contrary; and reasonable care on the part of a bank is a very high degree of care.[10] Whether, the pass book having been stolen, the payment of the deposit to another constituted negligence on the part of the bank, is a question to be determined by the jury under all the circumstances of the case.[11]

4. **Authority to sign withdrawal check.**—Heath *v.* New Bedford, etc., Trust Co., 184 Mass. 481, 69 N. E. 215.

5. **Authority a question of fact.**—Heath *v.* New Bedford, etc., Trust Co., 184 Mass. 481, 69 N. E. 215.

6. **Partnership deposits.**—Rice *v.* Bank, 5 Idaho 39, 47 Pac. 856.

7. **Joint deposits.**—Neiman *v.* Beacon Trust Co., 170 Mass. 452, 49 N. E. 748, 64 Am. St. Rep. 315.

8. National Bank *v.* Young, 125 Ill. App. 139.

9. **Garnishment of public money deposited as private funds.**—First Nat. Bank *v.* Gandy, 11 Neb. 431, 9 N. W. 566.

10. **Payment to wrong person.**—Anderson *v.* Hough Ave. Sav., etc., Co., 4 N. P., N. S., 22, 16 O. D. N. P. 490, affirmed in 9 O. C. C., N. S., 13, 19-29 O. C. D. 107. See ante, "In General," § 133 (1a).

11. Anderson *v.* Hough Ave. Sav., etc., Co., 4 N. P., N. S., 22, 16 O. D. N. P. 490, affirmed in 9 O. C. C., N. S., 13, 19-29 O. C. D. 107.

§ 133 (3g) Remitting Through Mails.—One requesting a bank to remit to him, by draft to his address, money which he has on deposit therein, and which, by its rules, is payable only at its counter, is responsible for the safe arrival of the draft, and the proper delivery of the letter inclosing it.[12]

§ 133 (3h) Amount—§ 133 (3ha) In General.—A bank can at any time tender the full balance due to a general depositor, but can not compel him to receive less,[13] in the absence of proof of any set off.[14]

§ 133 (3hb) Account Stated.—Where the conduct of a depositor tends to show acquiescence in an account stated between him and the bank, the burden of impeaching it is on him.[15] The fact that a pass book containing an entry of debits and a balance struck thereon has been retained by the depositor for many months without objection, and that the precise balance has been withdrawn, is clear evidence of a stated and settled account.[16]

§ 133 (3i) Place of Payment.—Money deposited in a bank without stipulation as to place of payment is payable to the depositor at the banking house.[17]

§ 133 (3j) Medium of Payment—§ 133 (3ja) Return of Identical Funds.—Where money is placed in the bank on general deposit or in the usual course of business, the depositor has no right to the particular

12. **Remitting through mails.**—Jung *v.* Second Ward Sav. Bank, 55 Wis. 364, 13 N. W. 235, 42 Am. Rep. 719.

13. **Amount.**—Coots *v.* McConnell, 39 Mich. 742.

14. The obligation to repay is subject to the right of set-off. Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483.

Plaintiff sold live stock to a financially irresponsible person at an agreed price for shipment to commission merchants. As payment the purchaser in defendants' bank drew a draft on the consignee, payable to plaintiff's order, and, at the request of the cashier, plaintiff indorsed the draft and defendants took the draft, and paid the money to plaintiff by placing it to his credit. Thereafter, on another sale of stock, the same transactions occurred, but prior thereto the consignees had given a letter of credit to the purchaser, addressed to defendants, of which plaintiff was not advised. The consignees having paid only a portion of the drafts, plaintiff sued defendant to recover the difference between the amount placed to his credit and the amount actually paid to him by defendants on account of the drafts. Held, that defendants having received more than they had paid to plaintiff, in the absence of proof of any charges as a set-off, plaintiff was entitled to recover such difference, and this regardless of the letter of credit. McLean *v.* Lowe, 126 Ind. 449, 26 N. E. 398. See post, "Application of Deposits to Debts Due Bank or Set-Off by Bank," § 134.

15. Plaintiff, whose practice was to deposit money with defendant bank, and soon after to check it all out, was notified that there was a balance to his credit, when he supposed that he had exhausted his account. He thereupon drew out such balance, but made no inquiry or objection until nearly two years afterwards, when he sued defendant for an alleged balance, including sums which had been paid out on checks signed by another in his name. Held, that plaintiff's conduct tended to show acquiescence in an account stated, and the burden of impeaching it was on him. American Nat. Bank *v.* Bushey, 45 Mich. 135, 7 N. W. 725.

16. Clark *v.* Mechanic's Nat. Bank (N. Y.), 11 Daly 239.

17. **Place of payment.**—McBee *v.* Purcell Nat. Bank, 1 Indian T. 288, 37 S. W. 55; Elliott *v.* Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 1 L. R. A., N. S., 1130, 111 Am. St. Rep. 198.

money deposited, as in the case of a special deposit, but only a sum of money equal to that which he had deposited when it was demanded.[18]

§ 133 (3jb) Funds Treated as Money by the Parties—Depreciated Currency.—Where a depositor deposits what is considered between him and the bank as money and accepted as such, the bank must pay or return the amount of the deposit in specie or current or par funds dollar for dollar.[19] Where it appears that a bank received for a customer, by collection or by receipt of deposits, funds, which were current, and passed as money in general business transactions, without directions to hold the identical funds, it will have to account to the owner for the sums so received, without diminution or discount, notwithstanding the bills received by the bank were at the time depreciated.[20]

United States Treasury Notes.—The legal-tender act and relative acts (Acts Cong. Feb. 25, 1862, et al.) apply to ordinary bank deposits; and hence a bank's tender of treasury notes in payment of a check drawn by a depositor, whose only deposits had been made in specie, before the legal-

18. **Return of identical funds.**—Ruffin *v.* Orange, 69 N. C. 498; Lilly *v.* Cumberland, 69 N. C. 300; Duncan *v.* Mayette, 25 Tex. 245; Hoskins *v.* Velasco Nat. Bank, 48 Tex. Civ. App. 246, 107 S. W. 598. See, also, Templeman *v.* Hutchings, 24 Tex. Civ. App. 1, 57 S. W. 868, affirmed in 93 Tex. 650, no op., citing Van Winkle Gin, etc., Co. *v.* Citizens' Bank, 89 Tex. 147, 33 S. W. 862; Zinn *v.* Mendel, 9 W. Va. 580.

Where the deposit is general, there is an implied undertaking on the part of the bank to return, not the same funds, but an equivalent sum, whenever it shall be demanded. Ward *v.* Johnson, 95 Ill. 215.

When B., in the ordinary way, deposits money in the Velasco National Bank, the assets of the bank and not the deposit of B. itself, were turned over by the bank to H. under an agreement that H. would pay its debts, the agreement was to pay the debt of B. out of the assets received by H., not that H. would return to B. the deposit made by him in the Velasco Nat. Bank. Hoskins *v.* Velasco Nat. Bank, 48 Tex. Civ. App. 246, 107 S. W. 598. See, also, Templeman *v.* Hutchings, 24 Tex. Civ. App. 1, 57 S. W. 868, affirmed in 93 Tex. 650, no op., citing Van Winkle Gin, etc., Co. *v.* Citizens' Bank, 89 Tex. 147, 33 S. W. 862.

19. **Funds treated as money by the parties depreciated currency.**—The drawer of a check had been for several years a depositor in the drawee bank, and had deposited what was considered between him and the bank as money, and accepted as such. The check was less than the balance to the drawer's credit. Held, that the bank was bound to pay the check in current funds, dollar for dollar. Willetts *v.* Paine, 43 Ill. 432.

Where the deposit is general, and there is no special agreement proved, the title of the money deposited, whatever it may be, passes to the bank, the transaction is unaffected by the character of the money in which the deposit was made, and the bank becomes liable for the amount as a debt, which can only be discharged by such money as is by law a legal tender. Thompson *v.* Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704.

Checks payable in currency.—By § 44, art. 1, Act March 2, 1857, concerning banks, all checks drawn on bankers, payable in currency, were made payable in gold and silver, or the notes of specie-paying banks. Morrison *v.* McCartney, 30 Mo. 183.

20. Where banks, as in Illinois in 1861, are receiving and paying out depreciated paper, and two bankers have mutual accounts growing out of collections and remittances, so that the funds of either may be withdrawn at pleasure, the holder of the deposits, in the absence of any arrangement between them on the subject, is bound to pay or return in current or par funds. Cushman *v.* Carver, 51 Ill. 509.

A depositor of current funds has a right to draw for current funds, though after the deposit they had depreciated. Otherwise as to a deposit of depreciated paper. Willetts *v.* Paine, 43 Ill. 432.

tender legislation, is sufficient, though its prior custom had been to pay such checks in specie.[21]

§ 133 (3jc) Deposit of Depreciated Bills of Bank.—See ante, "Medium of Payment," § 133 (3j). Where a deposit was made in depreciated bank bills or notes,[22] or bills which have since depreciated in value,[23]

21. United States treasury notes.—Thompson *v.* Riggs (U. S.), 6 D. C. 99.

Treasury notes.—Congress has the power to authorize the issue of treasury notes to circulate as money; also, to make the same lawful money, and a legal tender in payment of public and private debts. Hague *v.* Powers (N. Y.), 39 Barb. 427, 25 How. Prac. 17.

The act of congress making treasury notes a legal tender is within the constitution, and valid; and hence the state banks, by redeeming in treasury notes, do not expose their franchises to forfeiture under charter provisions that they shall not at any time suspend or refuse payment in gold or silver of their obligations or moneys received on deposit. Reynolds *v.* Bank, 18 Ind. 467.

22. Deposit of depreciated bills of bank.—Marine Bank *v.* Chandler, 27 Ill. 525, 81 Am. Dec. 249; Marine Bank *v.* Birney, 28 Ill. 90; Marine Bank *v.* Rushmore, 28 Ill. 463.

On a deposit of its own bills in the Kentucky Bank, the cashier gave a certificate that there had been deposited to the credit of W. $7,000, subject to his order on presentation of the certificate. The bills deposited were, at the time of the deposit, and also at the time when payment was demanded, passing at fifty per cent discount. On W.'s presenting the certificate the cashier offered payment in the bills of the bank, which W. refused. Held, that W. was entitled to gold or silver, the certificate expressing a general, and not a specific, deposit. The transaction was held to be equivalent to receiving and depositing specie, and, if the bank had not so understood it, they might have refused to receive the deposit, and then W. would have recovered specie to the nominal amount of the bills. Bank *v.* Wister (U. S.), 2 Pet. 318, 7 L. Ed. 437.

Upon the deposit being made, the cashier gave, under his hand, a certificate that there had been "deposited to the credit of the plaintiffs below, $7,730.81, which is subject to their order, on presentation of the certificate;" the deposit was made in the notes of the bank, and when the same were deposited, and when the demand of payment was made, the notes were passing at one-half their nominal value; when the certificate was presented to the bank, the cashier offered to pay the amount in the notes of the bank, but they refused to receive payment in anything but gold or silver. The language of the certificate is expressive of a general, not a specific deposit, and the act of incorporation is express, that the bank shall pay and redeem its bills in gold or silver; the transaction, then, was equivalent to receiving and depositing the gold or silver; if the bank did not so understand it, it might have refused to receive it; and the plaintiffs would certainly have recovered the gold and silver, to the amount upon the face of the bills. Bank *v.* Wister (U. S.), 2 Pet. 318, 7 L. Ed. 437.

Check unnecessary.—The bank having offered to pay the amount of the certificate in its bills, put its own construction on the same, and can not afterwards say, that the plaintiffs below should have accompanied the certificate with a check. Bank *v.* Wister (U. S.), 2 Pet. 318, 7 L. Ed. 437.

23. Marine Bank *v.* Chandler, 27 Ill. 525, 81 Am. Dec. 249; Marine Bank *v.* Birney, 28 Ill. 90; Marine Bank *v.* Rushmore, 28 Ill. 463.

Where a deposit is made of the notes of another bank, which are received as cash, and carried to the general credit of the depositor as cash, the bank can not afterwards treat it as a special deposit, but make the notes their own, and must bear the loss of them. Corbit *v.* Bank (Del.), 2 Har. 235, 30 Am. Dec. 635.

The plaintiff made deposits with a banking company until they had accumulated. It was then agreed that he should receive and pay out Illinois bank paper on his deposits. This bank paper depreciated until it ceased to circulate. The bank owing the plaintiff under the agreement about $100, he sued, and recovered the specie value of deposits made previous to the agreement, and the current value of those made afterwards. Held, that the verdict was correct. Chicago Marine, etc., Ins. Co. *v.* Carpenter, 28 Ill. 360.

A bank which, in 1860, gave to a depositor a certificate setting forth that

which were received as money, the depositor is entitled to the whole amount of his deposit in specie and the bank must bear the loss. The true measure of damages in an action of assumpsit upon a certificate of deposit of "current bank notes," which is to be paid "in like funds," is the number of dollars specified as having been received.[24]

§ 133 (3jd) Deposit of Confederate Currency.—A depositor of Confederate currency is only entitled to receive in good money the value of the Confederate money at the time of the deposit.[25]

§ 133 (3je) Deposit of Gold.—A person who deposits gold with a banker is only entitled to recover the amount in dollars and cents in the circulating medium of the country.[26]

§ 133 (3jf) Special Contracts as to Medium.—When the banker specially agrees with his customer to pay in bullion or in coin, he must do so or answer in damages for its value, and so if one agrees to pay in depreciated paper, the tender of that paper is a good tender, and in default of payment the promissee can recover only its market and not its nominal value.[27]

Special Contracts Where Charter Requires Specie Payment.—Though a bank receive deposits under a special contract with the depositor to receive payment in current bank notes, the bank must pay in specie, where its charter does not authorize it to make such a contract.[28]

Provision in Pass Book as to Payment.—A provision in a bank pass book that all payments to persons producing the pass book shall be valid payments to discharge the bank is of no legal effect except in the case of savings banks, and then only if prescribed by the board of trustees, as authorized by Banking Law, § 143 (Consol. Laws, c. 2).[29] A provision printed in English in a bank pass book authorizing payment to any person

he had deposited a certain sum "in current notes of the different banks of the state," and that the sum deposited is "payable in like current notes to the depositor, or to his order, on return of the certificate," is liable for the whole amount, with interest from the date of the demand, in currency of the United States. Fort *v.* Bank, 61 N. C. 417.

24. Osgood *v.* McConnell, 32 Ill. 74.

25. **Deposits of confederate currency.**—Dabney, etc., Co. *v.* Bank, 3 S. C. 124.

Where Confederate treasury notes were deposited in bank, during the time that such notes were bankable funds, the depositor can not recover the amount as deposited in money. Foster *v.* Bank, 21 La. Ann. 338.

Payment may be in such currency as was deposited.—A bank with which the drawer of a check has funds on deposit is only bound to pay such check in such currency as the depositor has in the bank; hence where a depositor had on deposit no other funds except confederate treasury notes, a refusal of the bank to pay his check in other than confederate currency is not such a wanton and fraudulent refusal by the bank as would render it liable to the holder of the check. Lester *v.* Georgia R., etc., Co., 42 Ga. 244.

26. **Deposit of gold.**—Gumbel *v.* Abrams, 20 La. Ann. 568, 96 Am. Dec. 426.

27. Thompson *v.* Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704.

28. **Special contracts where charter requires specie payment.**—Wildman *v.* Bank, 1 O. Dec. 29.

29. **Provision in pass book as to payment.**—Newman *v.* State Bank, 68 Misc. Rep. 316, 123 N. Y. S. 926.

producing the pass book, to which a depositor did not assent, not being able to read English, and the provision not being called to her attention, was not evidence of an agreement to that effect.[30]

§ 133 (3jg) Customs and Usage.—Entry Importing Agreement to Pay Coin.—Evidence is admissible to prove that, according to the general and well-known usage of the banks existing in a particular locality before and at the time of the deposit in question and ever since, an entry in a depositors bank book of the date then the words: "cash (coin)" followed by the amount offered in evidence, imported an agreement on the part of the bank to return the deposit in kind, and that by usage the striking of balances, subsequently to such entry, did not work any change in the character of the particular deposit, where the balances were always more than the amount of the deposit.[31]

Payment of Coin.—A well-known usage or customs of banks in a particular locality in all cases where the deposit was in coins to pay in coin instead of treasury notes if requested can not confer a right of action to recover the market value of the coin drawn for when the bank has tendered treasury notes, and evidence of such custom should be excluded.[32]

Payment of Depreciated Paper.—The special custom of bankers in a particular locality can not change values as fixed by law, and, if some persons have been in the habit of receiving depreciated paper in payment of dues, the right to enforce payments in such paper does not exist. Such a right can only arise by contract.[33]

§ 133 (4) Payment in Violation of Injunction.—Where a bank is enjoined from paying a sum deposited with it either to the depositor or to his endorsee or assignee, it is its duty to obey the mandate of the court, and not to pay out the funds deposited with it until the party claiming the same can have an opportunity to contest, by interpleader or otherwise, the good faith of the assignment. If the bank in violation of the injunction pays

30. Newman *v.* State Bank, 68 Misc. Rep. 316, 123 N. Y. S. 926.

31. **Entry importing agreement to pay coin.**—It was so held in an action to recover from a bank in B. a sum of money in gold deposited in the bank, in which the plaintiff introduced in evidence an entry in his bank book as follows: "1861 Dec. 30 cash (coin) $3.000." Chesapeake Bank *v.* Swain, 29 Md. 483.

32. **Payment of coin.**—A Washington banker received deposits from a customer, partly in "coin" and partly in "treasury notes," at a time when both were looked upon as currency; and the depositor, after the passage of The Legal-Tender Act, drew for "coin" for a portion of his deposit exceeding the coin deposited after the passage of that act, and the check was paid in coin. He afterwards drew for "coin"—the balance of his coin deposited before the Legal-Tender Act—and coin was refused, and notes, made legal tender by act of congress, tendered him instead. Suit was brought to recover the market value of the coin drawn for, and the plaintiff offered evidence to show "that the usage and mode of dealing uniformly used and practiced by all the banks and bankers of the District of Columbia was in all cases, when the deposit was made in coin, to pay checks in coin, if requested; otherwise in currency." Held, that such evidence was rightly excluded. Thompson *v.* Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704.

33. **Payment of depreciated paper.**—Marine Bank *v.* Chandler, 27 Ill. 525, 81 Am. Dec. 249.

out the funds in its possession either inadvertently or willfully, it acts at its peril and the funds will be treated as still in the possession of the bank.[34]

§ 133 (5) Indemnity Bond to Procure Deposit of Public Funds.—An indemnity bond executed in order to induce a county treasurer to deposit the funds of the county with a certain banker, is valid and enforceable in case of the failure of the bank.[35]

§ 133 (6) Liability of Bank for Interest.—See ante, "Liability of Bank for Interest," § 132 (1).

§ 133 (7) Liability of Stockholders.—See ante, "Liability for Debts and Acts of Bank," § 46; "Nature and Extent," § 47; "Effect of Transfer of Stock," § 48; "Actions and Proceedings to Enforce," § 49.

§ 133 (8) Bank Accepting Assignment of Property of Another and Assuming All Its Debts.—Where one bank assigns to another all its property, on condition of assuming all the debts and liabilities, the bank accepting the assignment assumes toward the depositors of the assignor the precise relation which the assignor bore to them, in respect to their deposits.[36]

§ 133 (9) Effect of Sale of Private Bank.—When a depositor learned of the sale of a private bank he could either refuse to accept the purchasers as his debtors or could affirm the sale, and look to the purchasers for payment.[37]

§ 134. Application of Deposits to Debts Due Bank or Set Off by Bank[38]—§ 134 (1) Right to Make Application in General—§ 134 (1a) General Rule.—The rule that a bank has a general lien upon or

34. **Payment in violation of injunction.**—Springfield Marine, etc., Ins. Co. *v.* Peck, 102 Ill. 265.

Paying money in violation of injunction.—A bank, in violation of an injunction granted in a suit for separating maintenance, ordering it not to pay out any money of defendant on deposit, paid out such money to an indorsee of a certificate of deposit. Held, that it would be compelled to comply with a decree ordering the payment of such an amount of money to the wife. Springfield Marine, etc., Ins. Co. *v.* Peck, 102 Ill. 265.

35. **Indemnity bonds to procure deposit of public funds.**—Weddington *v.* Jones, 41 Tex. Civ. App. 463, 91 S. W. 818, affirmed in 101 Tex. 665, no op.

36. **Bank accepting assignment of property of another and assuming all its debts.**—Green *v.* Odd Fellows' Sav., etc., Bank, 65 Cal. 71, 2 Pac. 887.

A bank in which plaintiff was a depositor assigned all its assets to defendant bank in consideration of defendant's assuming all liabilities, including plaintiff's claim. Held, that plaintiff is entitled to all the rights and privileges of a depositor in defendant bank, and hence his claim for deposits can not be barred by limitations. Green *v.* Odd Fellows' Sav., etc., Bank, 65 Cal. 71, 2 Pac. 887.

37. **Effect of sale of private bank.**—Gillett *v.* Ivory (Mich.), 139 N. W. 53.

38. Application of deposit to pay overdrafts, see post, "Overdrafts," § 150.

As against payee or holder of check, see post, "Setting Off Debts Owing to Bank by Drawer," § 140 (6).

Lien of bank on deposits, see post, "Lien of Bank on Deposit," § 136.

Set-off by depositor, see post, "Set-Off by Depositor," § 135.

Right of assignee of bank for benefit of creditors, to set off deposits

right of set off against all moneys or funds in its possession belonging to a depositor to secure the payment of the depositor's indebtedness is a part of the law merchant and well established in commercial transactions.[39] The rule may be broadly stated that the bank has a general lien on all moneys and funds of a depositor in its possession for the balance of the general account, though the lien is only for accounts that are at the time due and payable.[40] It rests upon the principle that as the depositor is indebted to the bank upon a demand which is due, the funds in its possession may properly and justly be applied in payment of such debt, and it has therefore a right to retain such funds until payment is actually made.[41] The right to make applications of such funds also arises from the contract implied to exist from the relation of the parties and by operation of law.[42] This right may be set up as a defense to an action to recover the deposit.[43]

§ 134 (1b) Nature as Set-Off or Lien.—The right of a bank to apply the deposit of the debtor to the payment of his matured indebtedness

against debts due bank, see ante, "Assignments for Benefit of Creditors," § 78.

39. General rule.—National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Meyers *v.* New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. Supp. 504; Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 319; Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145.

There is a general rule, subject to some exceptions, that a bank has a lien on all moneys and funds of a depositor in its possession, to secure any balance due the bank by such depositor. First Nat. Bank *v.* De Morse (Tex. Civ. App.), 26 S. W. 417, citing Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

A debt due a bank from a depositor, and the claim of the depositor against the bank, based on his deposit, may be set off as against each other. Hall *v.* Burrell (Colo. App.), 124 Pac. 751; Hall *v.* McIntosh (Colo. App.), 124 Pac. 753; Hall *v.* Hardy (Colo. App.), 124 Pac. 753; Hall *v.* Rocky Ford Trading Co. (Colo. App.), 124 Pac. 754.

40. National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Meyers *v.* New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. Supp. 504; Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 319; Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145; Dawson *v.* Real Estate Bank, 5 Ark. 283; McDowell *v.* Bank (Del.), 1 Har. 369; Commercial Bank *v.* Hughes (N. Y.), 17 Wend. 94.

"'The bank holds a lien on the deposits in its hands to secure the repayment of the depositor's indebtedness, and may enforce that lien as the debts mature by applying the depositor's deposits upon them, thus setting the two off against each other.' 3 Am. & Eng. Ency. of Law (2d Ed.), p. 835." Wagner *v.* Citizens' Bank, etc., Co., 122 Tenn. 164, 122 S. W. 245.

41. Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 319; Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145.

42. Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 319; Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145.

"'The right of the bank to apply deposits to the extinguishment of the depositor's debts as they mature grows out of the doctrine that the relationship between the bank and the depositor is that of debtor and creditor.' 3 Am. & Eng. Ency. of Law (2d Ed.), p. 835." Wagner *v.* Citizens' Bank, etc., Co., 122 Tenn. 164, 122 S. W. 245.

43. A bank which has credited a depositor with the amount of a note discounted by it upon his fraudulent representations, and has paid his checks to that amount, can set up the fraud in defense of an action by him to recover subsequent deposits to an equal amount, unless it had adopted the contract of the note by its subsequent action. Andrews *v.* Artisans' Bank, 26 N. Y. 298.

is not a lien or a right in the nature of a lien,[44] but a right of set-off,[45] or of an application of payments.[46] The right of the bank does not depend on the existence of a lien in its favor on the deposited funds, but on the principle that the balance due between the parties is thus ascertained.[47]

Independent of Statute.—The right of the bank to offset its indebtedness to the depositor against the indebtedness of the latter to it is of an equitable nature intended for its protection, and does not depend upon any statute in relation to offsets.[48]

§ 134 (1c) Conditions Precedent and Accrual of Right—§ 134 (1ca) Maturity Debt.—A bank to which a depositor owes a matured debt may set off or apply such depositor's general deposit to the discharge of such debt. Mere possession, however, is not of itself sufficient to maintain the lien or set-off; the debt to the bank must have matured,[49] and then

44. A set-off and not a lien.—Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227; National Mahaiwe Bank *v.* Peck, 127 Mass. 298, 301, 34 Am. Rep. 368; Nolting *v.* National Bank, 99 Va. 54, 60, 37 S. E. 804; Ford *v.* Thornton, 30 Va. (3 Leigh) 695.

The word "lien" is inaptly applied to a general deposit in a bank, which is the property of the bank itself. Tallapoosa County Bank *v.* Wynn, 173 Ala. 272, 55 So. 1011.

In Nolting *v.* National Bank, 99 Va. 60, 37 S. E. 804, it is said: "The banker's lien (which, where it relates to balances due on accounts, is a right to set-off rather than a lien. Ford *v.* Thornton, 3 Leigh 695) is defined in 1 Morse on Banks and Banking, as 'a mere right of the bank to retain in its own possession, property, the title of which (absolute or special), is, or in the case of negotiable paper purports to be, in one against whom the bank has some demand, until that demand is satisfied.'"

The right of a bank holding notes of a depositor which are due to charge the same to the depositor's account is not strictly a lien, within the meaning of the bankruptcy law. Irish *v.* Citizens' Trust Co., 163 Fed. 880.

45. National Mahaiwe Bank *v.* Peck, 127 Mass. 298, 34 Am. Rep. 368; Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227; Irish *v.* Citizens' Trust Co., 163 Fed. 880.

Tennessee.—Bank *v.* Turney (Tenn.), 52 S. W. 762; Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804; Ford *v.* Thornton, 30 Va. (3 Leigh) 695.

The lien of a bank upon moneys deposited with it—involving the right of the bank to charge the overdue debt of its depositor against his deposit—is based upon the right of set-off, and is co-extensive with it. Gibsonburg Banking Co. *v.* Wakeman Bank Co., 20 O. C. C. 591, 10 O. C. D. 754.

"Though this right is called a lien, strictly it is not, when applied to a general deposit; for a person can not have a lien upon his own property, but only on that of another; and, as * * * the funds on general deposit in a bank are the property of the bank. Properly speaking, the right, in such case, is that of set-off, arising from the existence of mutual demands. The practical effect, however, is the same. The cross demands are satisfied so far as they are equal, leaving whatever balance that may be due on either, as the true amount of the indebtedness from the one party to the other. * * * The rule results from the legal relation of the bank to its general depositors." Bank *v.* Windischmuhlhauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660.

46. Application of payment.—Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227; Bank *v.* Turney (Tenn.), 52 S. W. 762.

47. Templeman *v.* Hutchings, 24 Tex. Civ. App. 1, 57 S. W. 868, affirmed in 93 Tex. 650, no op.

48. Not statutory.—Van Winkle Gin, etc., Co. *v.* Citizens' Bank, 89 Tex. 147, 33 S. W. 862.

It is independent of the statutes of the statutes by set-off. Bank *v.* Armstrong, 15 N. C. 519.

49. Maturity of debt.—*Arkansas.*—Dawson *v.* Real Estate Bank, 5 Ark. 283.

Delaware.—McDowell *v.* Bank, 1 Har. 369.

Georgia.—A bank has the right to set off against the amount of a general deposit belonging to a customer,

each may counterclaim, set-off, or recoup the same as any other debtor.[50]

§ 134 (1cb) Mutuality of Obligation—§ 134 (1cba) In General.—The right of a bank to apply a deposit to the payment of a debt due and payable from the depositor to the bank can only exist where each occupies the relation of debtor and creditor, and where there exist mutual demands. Mutuality is essential to the validity of a set-off, and in order that the demand of the bank may be set off against that of the depositor, both must mutually exist between the same parties in the same capacity or right. In other words, there must be a mutuality between the debtor and the creditor and between the debt and the fund deposited.[51]

§ 134 (1cbb) Deposits Made and Debts Owed in Different Capacities or by Different Persons.—The debts must be between the same

a matured claim due by the customer to it. Bank *v.* Rockmore & Co., 129 Ga. 582, 59 S. E. 291.

Illinois.—Where a depositor is indebted to a bank, the bank may set off a matured indebtedness of the depositor to it, against his deposit, remaining in its hands undisposed of. Home Nat. Bank *v.* Newton, 8 Ill. App. 563; Hayden *v.* Alton Nat. Bank, 29 Ill. App. 458; Aurora Nat. Bank *v.* Dils, 18 Ind. App. 319, 48 N. E. 19.

In Second Nat. Bank *v.* Hill, 76 Ind. 223, 40 Am. Rep. 239, the court, quoting Morse, in speaking of general deposits, says: "'So soon as the money has been handed over to the bank, and the credit given to the payer, it is at once the proper money of the bank. It enters into the general fund and capital, and is undistinguishable therefrom. Thereafter the depositor, has only a debt owing him from the bank; a chose in action, not any specific money, or a right to any specific money.' Against the debt thus due the depositor, the bank may set off any debt due from the depositor to it. Morse on Banking, pp. 30 and 42; Commercial Bank *v.* Hughes (N. Y.), 17 Wend. 94; Beckwith *v.* Union Bank, 6 N. Y. Super. Ct. 604." Smith *v.* Sanborn State Bank, 147 Iowa 640, 126 N. W. 779; Garnett Bank *v.* Bowers, 21 Kan. 354; Farmers' Nat. Bank *v.* McFerran, 11 Ky. L. Rep. 183; Records *v.* McKim, 115 Md. 299, 80 Atl. 968; Clark *v.* Northampton Nat. Bank, 160 Mass. 26, 35 N. E. 108; Stetson *v.* Exchange Bank (Mass.), 7 Gray 425; Demmon *v.* Boylston (Mass.), 5 Cush. 194; Citizens' Sav. Bank *v.* Vaughan, 115 Mich. 156, 73 N. W. 143; Douglas *v.* First Nat. Bank, 17 Minn. 35 (Gil. 18); Union Bank *v.* Tutt, 5 Mo. App. 342; Muench *v.* Valley Nat. Bank, 11 Mo. App. 144; Ehlermann *v.* St. Louis Nat. Bank, 14 Mo. App. 591, Camden Nat. Bank *v.* Green, 45 N. J. Eq. 546, 17 Atl. 689; Green *v.* Camden Nat. Bank, 46 N. J. Eq. 607, 22 Atl. 56; People's Bank, etc., Co. *v.* Tuits, 59 N. J. L. 380, 35 Atl. 792; Hodgin *v.* Peoples' Nat. Bank, 125 N. C. 503, 34 S. E. 709, reversing 124 N. C. 540, 32 S. E. 887, on another point; Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 319; Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145, reversing 21 Hun 450; Smith *v.* Eighth Ward Bank, 31 App. Div. 6, 52 N. Y. S. 290; Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; National Bank *v.* Smith, 66 N. Y. 271, 23 Am. Rep. 48; Straus *v.* Tradesmen's Nat. Bank, 122 N. Y. 379, 25 N. E. 372; Wagner *v.* Citizens' Bank, etc., Co., 122 Tenn. 164, 122 S. W. 245; Bank *v.* Turney (Tenn.), 52 S. W. 762; Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669; Schoelkopf *v.* Phillips, 88 Tex. 31, 29 S. W. 645; Durkee *v.* National Bank, 102 Fed. 845, 42 C. C. A. 674; Irish *v.* Citizens' Trust Co., 163 Fed. 880; Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

50. Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 319; Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145, reversing 21 Hun 450.

51. Mutuality of obligation.—Harrison *v.* Harrison, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111; Hodgin *v.* People's Nat. Bank, 125 N. C. 503, 34 S. E. 709, reversing 124 N. C. 540, 32 S. E. 887; Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145; Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 319.

parties, and in the same right. It is not necessary that the claims should run between the nominal parties to the suit, if they are really due to and from the same funds on both sides.[52] It is only where the depositor stands in the same relation to the bank as debtor, and deposits funds that belong to him and are held by him in the same right as to debtor that the bank has a right to appropriate and apply the deposits to the payment of a debt due to it.[53]

Deposit by Public Officer.—A deposit made by a public officer in his official capacity can not be set off against his individual debt to the bank; as, for instance, a deposit by a justice of the peace,[54] or by a postmaster.[55]

Deposit by Executor or Administrator.—A deposit by an executor or administrator in his official capacity can not be offset against the debt of his testator or decedent to the bank.[56]

Deposit by Assignee for Benefit of Creditors.—A deposit by an assignee for benefit of creditors in his official capacity can not be offset against the assignor's debt to the bank.[57]

Deposit by Agent in Which He Has a Beneficial Interest.—Where a bank has received money on deposit for an agent, who has a beneficial interest therein, the bank has no lien on the fund for a debt due it by the principal.[58]

52. **Deposits made and debts owing in different capacities or by different persons.**—Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804; sequel to National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826.

53. Shepard *v.* Meridian Nat. Bank, 149 Ind. 532, 48 N. E. 346; Lamb *v.* Morris, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111; Hodgin *v.* People's Nat. Bank, 125 N. C. 503, 34 S. E. 709, reversing 124 N. C. 540, 32 S. E. 887.

54. **Justice of peace.**—A bank has no right to credit on a note in its hands a fund deposited by the maker to his account as a justice of the peace. McDowell *v.* Bank, 2 Del. Ch. 1.

55. **Postmaster.**—A national bank, not designated as a depository of public moneys, which receives, under the permissive authority of law and the regulations of the post-office department, deposit of moneys made by postmasters in their official capacity, thereby assumes a fiduciary relation to the government, and becomes a bailee of the government, so as to become directly responsible to it for any moneys which it knowingly or negligently allows the postmaster to withdraw by private check, or otherwise appropriate to his own use; and where, after the removal of the postmaster, he deposits a sum to make good a shortage in his balance, the bank can not apply it in discharge of a debt due it from him personally. United States *v.* National Bank, 73 Fed. 379.

56. **Deposit of executor debt of testator.**—In an action by executors against a bank to recover a deposit which stood to the credit of their testator at the time of his decease, but was subsequently transferred by the bank to the credit of the executors, held, that the bank could not be allowed to set off a debt due to itself from the testator, it having no lien on the deposit. Tobey *v.* Manufacturers' Nat. Bank, 9 R. I. 236.

57. **Debt of insolvent, deposit of assignee.**—In a suit against a bank to recover certain moneys deposited to the plaintiff's credit as assignee of certain insolvent debtors, it was held that the bank could not set up as a defense by way of counterclaim that it had a right to retain the moneys, and apply them to the payment of a judgment recovered by the bank against the plaintiff's assignors. Lawrence *v.* Bank, 35 N. Y. 320, 31 How. Prac. 502.

58. **Deposit by agent in which he has beneficial interest.**—Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804, sequel to National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826.

The rule that a bank which has received money on deposit for an agent, who has a beneficial interest therein,

Deposit of Husband against Note of Husband and Wife.—A note due a bank, executed by a depositor and his wife, may be set off against an individual deposit of his.[59]

Receiver.—The right of a bank to charge to the account of a general depositor the amount of notes of such depositor held by it which are due is not affected by the fact that the depositor is the receiver of a railroad, and as such made the deposits, where he also executed the notes in the same capacity.[60]

§ 134 (1cc) Consent of Depositor.—A bank may apply a deposit to any debt owed to it by the depositor with or without his direction or consent.[61]

Louisiana.—A bank is not authorized to apply the funds on deposit in its hands to the payment of the debts of the depositor, except there is a special mandate from the depositor, or a course of dealing which will justify such application of the funds.[62]

can not disregard that interest and apply the money to a debt due it from the agent principal, is not affected by the addition of the word "cashier" to the depositor's name. If the rule were otherwise, no attorneys, trustees or fiduciaries of any character, who have liens on the funds which they handle for their fees or for advances, could afford to deposit in banks without disclosing the details of their business. This would deter such persons from depositing and would be disastrous to the banks. Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804, sequel to National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826.

59. Deposit of husband against note of husband and wife.—Hayden *v.* Alton Nat. Bank, 29 Ill. App. 458.

60. Receiver.—Durkee *v.* National Bank, 42 C. C. A. 674, 102 Fed. 845.

61. Consent of depositor.—Knapp *v.* Cowell, 77 Iowa 528, 42 N. W. 434; Second Nat. Bank *v.* Hill, 76 Ind. 223, 40 Am. Rep. 239; Bank *v.* Windischmuhlhauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660; Contra In re Warner, Fed. Cas. No. 17,177; Scott *v.* Shirk, 60 Ind. 160.

A debtor of a bank, having made deposits therein, the bank may, with or without the consent of the debtor, apply such deposits on the debt. Second Nat. Bank *v.* Hill, 76 Ind. 223, 40 Am. Rep. 239.

The consent of the depositor is not essential to the validity of an application of general deposits to debts due from the depositor to the bank. Bank *v.* Windischmuhlhauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660.

62. *Louisiana.*—Morgan *v.* Lathrop, 12 La. Ann. 257.

A bank may attribute money on deposit to the payment of the debt to itself by its depositor, where it holds from the depositor a special mandate to that effect. Gragard *v.* Metropolitan Bank, 106 La. 298, 30 So. 885.

A depositary can not retain the object deposited as an offset to a claim against depositor. Amelung *v.* Bank (La.), 1 Mart., O. S., 321.

Compensation does not take place in the confidential contracts arising from irregular deposits of money with a banker, and the depositary is not authorized to apply the funds in his hands to the payment of the depositor's debts, without a special mandate from the depositor. Hancock *v.* Citizens' Bank, 32 La. Ann. 590.

The defendant, who was a private banker, being sued for a cash deposit made with him by the plaintiff, pleaded, by way of reconvention, that he had credited the amount on a protested draft of the plaintiff in his favor for a larger amount. Held, that plaintiff and defendant, being both residents of New Orleans, and the reconventional demand not being connected with plaintiff's original demand, proof of the reconventional demand was properly rejected. Morgan *v.* Lathrop, 12 La. Ann. 257.

Conceding the answer to be equivalent to a plea in compensation, the defense could not be sustained, because, under our jurisprudence, as now set-

In South Carolina a bank can not apply a depositor's balance to the payment of his indebtedness to it without his consent or previous notice to him.[63]

§ 134 (1cd) Notice to Depositor.—Where a bank refused to pay a check drawn by a depositor in favor of a third party in absence of notice to the depositor that the bank had applied the fund on deposit in extinguishment of past-due claims held against him by the bank, when he had deposited with the bank a sum sufficient to make payment of the check, the bank was liable to the depositor for the resulting damages.[64]

§ 134 (1ce) Insolvency of Depositor.—Under ordinary circumstances a bank has the right to apply the deposit of an insolvent debtor to the payment of its claims against him.[65]

tled by frequent decisions, compensation does not take place in the confidential contracts arising from irregular deposits of this nature. Morgan *v.* Lathrop, 12 La. Ann. 257.

Where a bank, by maturity of a note it holds, becomes a creditor of its depositor, the debts extinguish each other to the amount of the smaller. Bank *v.* Fowler (La.), 10 Rob. 196.

63. *South Carolina.*—Simmons Hardware Co. *v.* Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700; Callahan *v.* Bank, 69 S. C. 374, 48 S. E. 293.

64. Notice to depositor.—Callahan *v.* Bank, 69 S. C. 374, 48 S. E. 293, following Simmons Hardware Co. *v.* Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700.

65. Insolvency of depositor.—Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227; Wiley *v.* Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655; Clark *v.* Northampton Nat. Bank, 160 Mass. 26, 35 N. E. 108; Wood *v.* Boylston Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366; Demmon *v.* Boylston Bank (Mass.), 5 Cush. 194.

If the maker of a promissory note, which has been discounted at a bank, becomes insolvent, having money on deposit in such bank, the amount of the note may be set off against the amount of the deposit, and the balance only of the latter paid to the assignees, provided the note is due absolutely, without condition or contingency although not payable until afterwards. Demmon *v.* Boylson Bank (Mass.), 5 Cush. 194.

March 8th the F. Co. notified defendant bank that it was insolvent. Nearly all the creditors met, defendant being represented; and, the F. Co. books showing assets less than liabilities, a committee was appointed to investigate. Said committee did not take possession of the cash or other property. There were other meetings, but nothing was agreed on, and April 25th the F. Co. filed its petition in insolvency. From March 8th to April 25th deposits were made for the F. Co. in defendant bank of cash received for goods sold. The treasurer drew checks for the help and for other purposes, all of which were paid. No change was made in the F. Co.'s account, nor was anything paid on its debt to the bank until April 25th, when the bank charged the balance on hand against the F. Co.'s overdue notes. Held, that there was no evidence of any change in their contract relations, and the court was justified in finding that the deposits made from March 8th to April 25th did not constitute a preference, transfer, or trust in fraud of the insolvency law, and that said deposits could properly be set off against the notes. Clark *v.* Northampton Nat. Bank, 160 Mass. 26, 35 N. E. 108.

A bank discounted a note of $1,500 for the husband of defendant. The husband gave checks on this fund until it was reduced to $846.06, when he died, defendant being his sole legatee and executrix. She procured this $846.06 and other moneys to be transferred to her individual credit in the same bank. When the $1,500 note fell due there was to the credit of defendant more than the amount of it; nor had the amount of her credit been reduced below the $846.06 at any time. The bank charged the note to her account. Defendant brought an action at law, and recovered judgment for the entire sum due on the account prior to the said charge. Held, it appearing that the

Deposit of Insolvent Bank.—A bank having on deposit the funds of a bank in failing circumstances, and with which it has an open account for previous dealings, may lawfully appropriate such funds, and credit such failing bank with the same, and drawers of checks on such fund by the failing bank acquire no rights, either legal or equitable, which they can enforce to the prejudice of the bank appropriating and crediting such deposit.[66]

Under Bankruptcy Acts.—Under the national bankruptcy act, permitting a set-off of mutual credits and debts existing between the bankrupt and creditor, a deposit in a bank becomes, on the bankruptcy of the depositor, a security for, and payment pro tanto of, his liability to the bank.[67]

Effect of Receivership—Corporation.—Where, at the time of the appointment of a receiver for a corporation, it was indebted to a bank in a sum largely exceeding the amount of the corporation's deposit, the bank was entitled to set off such deposit against the corporation's indebtedness to it.[68] Where at the time of the appointment of a receiver for a firm a bank held matured notes of the firm to an amount greater than that of the deposit, the receiver was not entitled to recover the amount of the deposit.[69]

Contract Right to Declare Unmatured Debt Due and Payable.—The right given to a bank by a contract with a depositing and borrowing corporation to declare any indebtedness of the corporation due and payable at once in case of its insolvency and to apply thereon any money, credits, or other property of the corporation then in the hands of the bank does not create a lien on any such funds or credits, but merely gives the bank an option which can not be exercised after a receiver has been appointed for the corporation in insolvency proceedings.[70]

estate of the husband has been declared to be insolvent, that the bank has an equitable right of set-off against the judgment to the extent of $846.06. Camden Nat. Bank *v.* Green, 45 N. J. Eq. 546, 17 Atl. 689; Green *v.* Camden Nat. Bank, 46 N. J. Eq. 607, 22 Atl. 56.

Where an insolvent debtor has a deposit in a bank to which he is indebted on overdue paper, the bank may appropriate the deposit as a payment on the debt. Winslow *v.* Harriman Iron Co. (Tenn.), 42 S. W. 698.

66. Deposit of insolvent bank.—Ft. Dearborn Nat. Bank *v.* Wyman, 80 Ill. App. 150, reversed Wyman *v.* Fort Dearborn Nat. Bank, 181 Ill. 279, 54 N. E. 946, 48 L. R. A. 565, 72 Am. St. Rep. 259.

67. Under bankruptcy acts.—Ex parte Howard Nat. Bank, Fed. Cas. No. 6,764, 2 Lowell 487.

Under Bankruptcy Act 1867, § 20, permitting mutual debits and credits existing between a bankrupt and his creditor to be set off, a bank may set off the amount of a protested draft of the bankrupt held by it as against the bankrupt's deposit. In re Petrie, Fed. Cas. No. 11,040, 5 Ben. 110.

68. Corporation.—Wheaton *v.* Daily Tel. Co., 59 C. C. A. 427, 124 Fed. 61.

69. A firm having a deposit with a bank which held unmatured notes of the firm to an amount greater than that of the deposit made an assignment for the benefit of creditors, which was afterwards set aside at the suit of a judgment credit, and a receiver appointed. The judgment appointing the receiver was not recovered until after the maturity of the notes. Held, that the receiver was merely subrogated to the rights of the firm as of the date of his appointment, and hence not entitled to recover the amount of the deposit. Delahunty *v.* Central Nat. Bank, 63 App. Div. 177, 71 N. Y. S. 416.

70. Contract right to declare unmatured debt due and payable.—Eastern Mill., etc., Co. *v.* Eastern Mill., etc., Co., 146 Fed. 761, affirmed in Corn Exch. Nat. Bank *v.* Locher, 151 Fed. 764.

§ 134 (1cf) Insolvency of Bank.—A bank may retain a deposit in the bank at the time of its failure as an equitable set-off against the depositor on his paper held by the bank.[71]

§ 134 (1cg) Death of Depositor.—The death of a depositor does not deprive the bank of its right to apply his deposit to the payment of his indebtedness, although there may be debts outstanding against his estate of superior dignity to that due the bank,[72] and it may plead such debts in offset to an action by the administrator.[73]

Items Accruing to Estate after Death of Depositor.—A bank, holding a matured obligation of a depositor, may use the money on deposit to pay the obligation during the lifetime of the depositor, but the death of the depositor closes the accounts, and while the bank may strike the balance as of the date of the depositor's death, and may credit any money then on deposit on any obligation which it then holds against the depositor, it may not take into consideration any items accruing to the estate after the depositor's death.[74] Where money was paid into a bank after the death of the person entitled thereto, or where the money on deposit prior to his death did not become payable to him until after his death, the money was not received by him, but was an asset accruing to the administrator, and the bank could not use the money to pay an obligation which it held against the estate, but it must turn over the money to the administrator and probate its claim against the estate, though such person in his lifetime directed that part of the money, when collected, should be credited on such obligation.[75]

Dividends Accruing after Death of Depositor.—Where a stockholder of a bank was insolvent at the time of his death, the bank has no authority to set off dividends on his stock accrued subsequent to his decease against notes on which he was liable to it as indorser.[76]

71. **Insolvency of bank.**—First Nat. Bank *v.* Williamson (Tenn.), 35 S. W. 573.

72. **Death of depositor.**—A., being debtor to a bank in a note discounted by the bank, before the note became due died, and his estate proved to be insolvent. The bank, at the time of his death, had money of his on deposit. Held, that the bank was entitled to apply such deposit money to the payment of the note, notwithstanding there might be debts outstanding against A.'s estate of superior dignity to that of the note. Ford *v.* Thornton, 30 Va. (3 Leigh) 695.

Maturing day after death of depositor.—Where decedent had money on deposit in a bank at the time of his death, and the bank held a note against him for a less amount, which matured the day after his death, it was entitled to set off the amount of the note against the deposit and pay the decedent's administrator the difference. Little *v.* City Nat. Bank, 115 Ky. 629, 74 S. W. 699.

73. A bank sued an administrator for balance on deposit at death of the depositor may plead in offset a promissory note made by the deceased and owned by the bank at his death. Traders' Nat. Bank *v.* Cresson, 75 Tex. 298, 12 S. W. 819.

74. **Items accruing to estate after death of depositor.**—Padgett *v.* Bank (Mo.), 125 S. W. 219; Knecht *v.* United States Sav. Inst., 2 Mo. App. 563; Union Bank *v.* Tutt, 5 Mo. App. 342.

75. Padgett *v.* Bank (Mo.), 125 S. W. 219; Woodward *v.* McGaugh, 8 Mo. 161.

76. **Dividends accruing after death of depositor.**—Brent *v.* Bank, Fed. Cas. No. 1,834, 2 Cranch, C. C. 517.

Revocation of Power by Death of Depositor.—Where one borrows money of a bank on a note, agrees to deposit money from time to time for its payment, and authorizes the bank to apply the deposits to the discharge of the note before maturity, if the bank so desires, the authority to apply the deposits is a naked power, uncoupled with an interest which ceases at the depositor's death.[77]

Adjusting Claims in Probate Court on Death of Depositor.—Where a bank held a note against a depositor at the time of his death, which was larger in amount than the sum on deposit, the bank could present its claim in the probate court, and have a balance struck between the two demands.[78]

§ 134 (1ch) Time When Right Arises.—As to a general deposit, the bank has the right to set-off as for the balance of the general account of the depositor, and of course so long as that balance is in favor of the depositor the lien or right has neither existence nor validity; but the moment any advance or loan by the bank is made to the depositor—in the form of an overdraft, a discount, acceptance, etc.—then the lien or right is born, and may be applied by the bank (and the bank only) to the payment of such indebtedness till it is fully discharged.[79]

Demand.—A bank has a lien on the money of a customer deposited with it; it at the time holding notes of his for a greater amount payable on demand.[80]

§ 134 (1d) Funds and Deposits Applicable—§ 134 (1da) Right to Apply Entire Deposit.—When payment on any species of advance by a bank to a depositor creates an indebtedness on his part, all the funds which the bank has to his credit may be applied thereon until it is fully discharged.[81]

§ 134 (1db) Deposits in Usual Course of Business.—The right of a bank to apply the deposit of debtor to the payment of its claim against him, attaches upon the securities and money of the customer deposited in the usual course of business for advances which are supposed to be made upon their credit.[82]

77. **Revocation of power by death of depositor.**—Gardner *v.* First Nat. Bank, 10 Mont. 149, 25 Pac. 29, 10 L. R. A. 45.

78. **Adjusting claims in probate court on death of depositor.**—Knecht *v.* United States Sav. Inst., 2 Mo. App. 563.

79. **Time when right arises.**—Tallapoosa County Bank *v.* Wynn, 173 Ala. 272, 55 So. 1011; Leham Bros. *v.* Tallassee Mfg. Co., 64 Ala. 567; Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228; Dean *v.* Allen (N. Y.), 8 Johns 390.

80. **Demand.**—People *v.* St. Nicholas Bank, 44 App. Div. 313, 60 N. Y. S. 719, 30 Civ. Proc. R. 30.

81. **Right to apply entire deposit.**—Union Bank *v.* Tutt, 5 Mo. App. 342.

Where a bank holds a depositor's note, it has a right, at any time during the day on which it falls due, to apply funds in its hands belonging to the maker to the payment of the note, even where nothing will be left to the maker's credit to apply on checks. Schuler *v.* Laclede Bank, 27 Fed. 424.

82. **Deposits in usual course of business.**—Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227; National Bank *v.* Insurance Co., 104 U. S. 54, 71, 26 L. Ed. 693; Reynes *v.* Dumont, 130 U. S. 354, 391, 32 L. Ed. 934, 9 S. Ct. 486.

§ 134 (1dc) Source of Deposit—§ 134 (1dca) In General.—A bank, in its dealing with its customers, has the right to pay a debt due to it out of money in the possession of such bank to the general credit of such customers, whether derived from dividends or any other source.[83]

§ 134 (1dcb) Proceeds of Paper Left for Collection.—A bank has the right to apply to the payment of a depositor's note when it matures, the proceeds of commercial paper owned by him and left with the bank for collection.[84]

§ 134 (1dcc) Proceeds of Note or Draft Discounted.—The proceeds of a note or draft discounted by the bank for the depositor, such proceeds being placed to the latter's general account, may be applied to the resulting indebtedness of the depositor to the bank where such note or draft is not paid, the right to make such application being based upon the implied condition of the discount that the note or draft shall be paid.[85]

§ 134 (1dcd) Notes Which Bank Refused to Discount.—A bank can not set off notes left with them for discount, which they have refused to discount, in an action subsequently brought by the assignees in insolvency of the depositor, on a debt due from the bank to him before his insolvency.[86]

§ 134 (1dd) Deposit after Maturity of Debt.—A bank has the right to apply to the payment of a depositor's note not only all funds in bank when the note matures, but all afterwards received.[87]

83. **Source of deposit.**—First Nat. Bank *v.* De Morse (Tex. Civ. App.), 26 S. W. 417, 419, citing Traders' Nat. Bank *v.* Cresson, 75 Tex. 298, 12 S. W. 819.

84. **Proceeds of paper left for collection.**—Muench *v.* Valley Nat. Bank, 11 Mo. App. 144.

Deposits of notes treated as collateral for depositor's indebtedness.—Where a firm has been in the habit of depositing its customers' notes with a bank for collection, the bank treating the paper as collateral security for the indebtedness of the firm to it, and crediting the proceeds on the firm's account, notes of like character, thereafter deposited by the firm without any express agreement as to the purpose for which they are left, may, as against the firm, be retained and collected, and the proceeds applied to a balance due on the firm's account. Studebaker Bros. Mfg. Co. *v.* First Nat. Bank (Tex. Civ. App.), 42 S. W. 573, citing Bank *v.* New England Bank (U. S.), 1 How. 234, 11 L. Ed. 115; S. C., 6 How. 212, 12 L. Ed. 409; National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693.

85. **Proceeds of note, bill or draft discounted.**—Skunk *v.* Merchant's Nat. Bank, 9 O. Dec. 684, 16 Wkly. L. Bull. 353; Felton *v.* German Nat. Bank, 9 O. Dec. 229, 6 N. P. 136; Jacob *v.* First Nat. Bank, 3 Wkly. L. Bull. 274, 5 O. Dec. 572.

Even though a railroad company was not organized and had no legal directors, when its nominal directors deposited the amount in a bank as a condition precedent to incorporation, if an obligation had been given to the bank in the name of the company, or of the directors, and the same money was deposited in the bank to the credit of the directors, the bank could charge the obligation against the deposit and thus extinguish it; the bank having no knowledge that the deposit was made for the purpose of circumventing the railroad law. Bath, etc., R. Co. *v.* Public Service Comm., 127 App. Div. 480, 112 N. Y. S. 133.

86. **Notes which bank refused to discount.**—Stetson *v.* Exchange Bank (Mass.), 7 Gray 425.

87. **Deposit after maturity of debt.**—Muench *v.* Valley Nat. Bank, 11 Mo. App. 144.

§ 134 (1de) Depositor Having Two Accounts.—Where a depositor in a bank having two accounts in his own right kept separate merely for his own convenience, drew on one of them beyond the amount of his credit, the bank could charge the excess on the other account.[88]

§ 134 (1df) Deposit in Name of Other than Owner.—A bank's liability for the amount of a deposit made with it is to the real owner thereof, regardless of the name under which the deposit was made, and the use of a name other than the true name of the depositor can not prevent the bank from deducting from the amount of the deposit a debt which he owed it, unless the deposit was made for the benefit of some other person.[89] Where one person keeps a deposit account with a bank in the name of another, the fact that the bank supposes the deposits to belong to the latter does not authorize it to pay therewith a note made by the latter, which was taken by the bank, and matured before the account was opened, without the consent of the depositor, unless the bank was misled to its prejudice by his conduct.[90]

Where a deposit belongs to the husband and is fraudulently made in the name of the wife the bank is entitled to apply the deposit to the discharge of the husband's indebtedness.[91]

§ 134 (1dg) Deposits Belonging to Town.—See post, "Town Warrants," § 134 (1eadh).

§ 134 (1e) Debts to Which Application May Be Made—§ 134 (1ea) Debts Due Bank—§ 134 (1eaa) In General.—A bank may apply general deposits to debts due it from a depositor whether such debts consist of a balance on general account or any other indebtedness.[92] Any obligations which a bank voluntarily assumes on the strength of a depositor's ownership, as by certification of checks or otherwise, or any obligation which has been imposed upon it by operation of law, as by process of garnishment, may be secured and discharged by retention in its possession of

88. **Depositor having two accounts.**—Hiller *v.* Bank (S. C.), 75 S. E. 789.

89. **Deposit in name of other than owner.**—Aidala *v.* Savoy Trust Co. (Sup.), 128 N. Y. S. 619; Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145.

90. Douglas *v.* First Nat. Bank, 17 Minn. 35 (Gil. 18).

91. Plaintiff's husband, being insolvent, and indebted to defendant bank, procured a loan from a third person, secured by a mortgage on his homestead, the title to which was in his name, which mortgage plaintiff signed. A large part of the loan was deposited in defendant bank in the name of the wife, a part of which she afterwards checked out, until defendant refused to pay the balance, claiming to offset it against the husband's indebtedness. Held, that under these circumstances the deposit belonged to the husband, and was fraudulently made in the name of the wife, and hence the bank was entitled to the set-off. Garnett Bank *v.* Bowens, 21 Kan. 354.

92. **Debts due bank.**—Bank *v.* Windischmuhlhauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660; Gibsonburg Banking Co. *v.* Wakeman Bank Co., 20 O. C. C. 591, 10 O. C. D. 754, affirmed in 66 O. St. 658, 55 N. E. 1128; German American Sav. Bank Co. *v.* Grossman, 15 O. C. C. 378, 8 O. C. D. 682. Compare Chaffee *v.* Bank, 40 O. St. 1.

Payment on any species of debt or advance by bank.—Union Bank *v.* Tutt, 5 Mo. App. 342.

a sufficient sum from the fund on deposit to meet and acquit the same.[93]

§ 134 (1eab) Unliquidated Claims.—A bank may not set off a claim against a depositor against his deposit unless the claim is certain, definite, and liquidated, or capable of liquidation by calculation without the intervention of a jury to estimate the sum.[94] This is also the law under the bankruptcy act.[95]

§ 134 (1eac) Where Depositor Owes More than One Debt.—Where a customer owes a bank more than one debt, the bank may apply his balance to whichever debt it may see fit.[96]

§ 134 (1ead) Particular Claims or Debts—§ 134 (1eada) Matured Notes.—A bank may apply a depositor's general deposit to the payment of a matured note held against the depositor.[97]

93. McEwen *v.* Davis, 39 Ind. 109.

94. **Unliquidated claims.**—Tallapoosa County Bank *v.* Wynn, 173 Ala. 272, 55 So. 1011.

"Mr. Morse, in his work on Banks and Banking, § 335, speaking of the claims of the bank against the depositor, for which it has a lien upon, or which it may set off with, his funds on deposit, says: 'The claims set off must be certain, i. e., either already reduced to precise figures, or capable of being liquidated by calculation without the intervention of a jury to estimate the sum. And when the claim sought to be used as an off-set requires the decision of a jury on the question of negligence before claim is established, it can not be offset, even though the amount of the judgment is very clear, provided there should be any judgment of the claim. As where a bond deposited as collateral for a note was lost, and in suit by the bank on the note the maker tried to offset the loss of the bond. A judgment, or contract claim, that can be sued in debt, assumpsit, or covenant, may be set off. But a demand that must be sued upon in tort, or by bill in equity, can not be set off.'" Tallapoosa County Bank *v.* Wynn, 173 Ala. 272, 55 So. 1011.

Damages resulting from cashier's negligence.—In proceedings to attach funds on deposit in a bank, an unliquidated claim in favor of the bank, against the person whose account is attached, growing out of his mismanagement while cashier of the bank, can not be offset against a balance to his credit. Irvine *v.* Dean, 93 Tenn. 346, 27 S. W. 666, followed in Tallapoosa County Bank *v.* Wynn, 173 Ala. 272, 55 So. 1011.

95. **Bankruptcy Act.**—Under the national Bankruptcy Act, permitting a set-off of mutual credits and debts existing between a bankrupt and a creditor, if a bank has contingent or unliquidated claims against a bankrupt depositor his deposit may be retained by the bank until it is ascertained what the debt is, and then be set off so far as is necessary. Ex parte Howard Nat. Bank, Fed. Cas. No. 6,764, 2 Lowell 487.

96. **Where depositor owes more than one debt.**—If a dealer with a bank has a balance to his credit on a general account, and dies indebted to the bank on a judgment and also on a simple contract, the bank may, independently of the statute of set-off, apply such balance to whichever debt it may see fit. State Bank *v.* Armstrong, 15 N. C. 519.

Plaintiffs were bankers, and sued defendant, a depositor, for an alleged overdraft. One issue was whether the plaintiffs properly applied part of a deposit to the payment of a note held by them against defendant. The court charged that, if defendant owed the note when the deposit was made, and requested plaintiffs to apply part of his deposit to the note and charge his account therewith, and plaintiffs did so apply it, plaintiffs should be credited with that amount. Held error, as plaintiffs could apply the deposit to any debt owed by defendant, without his direction. Knapp *v.* Cowell, 77 Iowa 528, 42 N. W. 434.

97. **Matured notes.**—Durkee *v.* National Bank, 102 Fed. 845, 42 C. C. A. 674; Irish *v.* Citizens' Trust Co., 163 Fed. 880; Home Nat. Bank *v.* Newton,

§ 134 (1eadb) Demand Notes.—A bank may offset the deposit of a depositor by a demand note due the bank.[98]

§ 134 (1eadc) Indorsed Notes.—A bank holding an indorsed note may offset it against the maker's general deposit account.[99]

§ 134 (1eadd) Joint or Several Notes.—A bank has no right to appropriate to the payment of a joint and several note, made to it by A. as principal and B. and C. as sureties, funds on deposit belonging to A. alone.[1]

§ 134 (1eade) Notes of Firm.—Where a bank held matured notes of a firm exceeding the amount of the firm's deposit, the bank had a lien on the deposit, and was entitled to hold the same until the notes were paid.[2]

§ 134 (1eadf) Liability on Dishonored Paper.—See ante, "Proceeds of Note or Draft Discounted," § 134 (1dee).

§ 134 (1eadg) Insurance Premium.—The amount due on a policy of a fire insurance company, issued to a banker, who is also one of its directors, may be set off against a demand of the company for money deposited with him, bearing interest, and payable on call.[3]

§ 134 (1eadh) Town Warrants.—Where it was arranged between a town and a bank that the town should give the bank its account, and that warrants of the town should be carried as cash, a warrant carried by the bank becoming payable, but the town refusing payment, the bank had the right to apply deposits belonging to the town to the payment of the warrant.[4]

§ 134 (1eadi) Debts Secured by Collateral Security.—A bank can not apply the deposits of the debtor to the payment of his matured indebtedness if that indebtedness is sufficiently protected by other collateral

8 Ill. App. 563; Bank *v.* Turney (Tenn.), 52 S. W. 762; Grisholm *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669.

98. Demand notes.—Citizens' Sav. Bank *v.* Vaughan, 115 Mich. 156, 73 N. W. 143; People *v.* St. Nicholas Bank, 44 App. Div. 313, 60 N. Y. S. 719, 30 Civ. Proc. R. 30.

99. Indorsed notes.—Blair *v.* Allen, Fed. Cas. No. 1,483, 3 Dill. 101.

1. Joint or several note.—Dawson *v.* Real Estate Bank, 5 Ark. 283.

2. Notes of firm.—Delahunty *v.* Central Nat. Bank, 63 App. Div. 177, 71 N. Y. S. 416.

3. Fire insurance premium.—Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483.

A banker, who was a director of an insurance company, can set off against its demand for money it deposited with him, bearing interest and payable on call, the amount due on its policies issued to and held by him. The company having been adjudicated a bankrupt, his right to such a set-off is equally available against its assignee. Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483.

The amount deposited by the company with the complainant, and which he still owes to the company, or to the respondent as assignee, was and is held by him as a private banker, and not as treasurer of the company; and any losses sustained by the complainant, at the time and in the manner alleged, for which the bankrupt corporation were and are liable as insurers, may be set off against that claim of the bankrupt corporation. Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483.

4. Town warrants.—Manitou *v.* First Nat. Bank, 37 Colo. 344, 86 Pac. 75.

securities;[5] but where a depositor agreed with the bank to draw a check upon his account, which should be certified by and returned by the bank as collateral for any debt he might owe,[6] or where a depositor assigned a chose in action to a bank by way of pledge to secure the payment of debt to it,[7] the bank's right of setoff is not affected.

§ 134 (1eadj) Indebtedness Secured by Mortgage.—Where a bank holds a mortgage on the property of a depositor it is authorized by such mortgage to appropriate the deposits to the payment of the notes for which such mortgage is given;[8] but under a statute providing that there can be but one action for the providing of any debt secured by mortgage, the right of a bank to set off a matured indebtedness against the claim of a depositor or his creditor does not permit of an indebtedness secured by a mortgage being so used as an offset.[9]

§ 134 (1eadk) Debt Reduced to Judgment.—When a bank obtains judgment for the full amount of a debt due it from a debtor it may set off such judgment against such debtor's deposit in an action for the recovery of the latter, either by the depositor or by his assignee.[10]

5. Debts secured by collateral security.—Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227; McKean *v.* German-American Sav. Bank, 118 Cal. 334, 50 Pac. 656; Farmers' Nat. Bank *v.* McFerran, 11 Ky. L. Rep. 183.

Where a bank had taken collateral security for the payment of a note which it held against the testator, it had not, for the payment of the note, a lien on funds of the testator on deposit. Farmers' Nat. Bank *v.* McFerran, 11 Ky. L. Rep. 183.

6. Where a depositor agreed with the bank that he would draw a check upon his account, which should be certified by the bank, properly indorsed, and retained by the bank as collateral for any debt he might owe the bank for loans, and the check was certified and immediately charged upon the bank books against the depositor's account, which books were balanced in the depositor's lifetime, showing the charge so made, the executors of the depositor could not recover the amount of such check from the bank as a balance on deposit in the depositor's name. Ingber *v.* Tradesmen's Nat. Bank, 230 Pa. 511, 79 Atl. 751.

7. An assignment by one of several purchasers of real estate conveyed to a trustee with directions to sell and divide the proceeds among the several purchasers of his interest in the trust agreement to a bank in which he is depositor as security for a note is an assignment by way of a pledge of a chose in action constituting personal property within Code Civ. Proc., § 17, and the bank notwithstanding section 726 may off-set its matured claim on the note against the deposit without proceeding to collect the security. Marble Co. *v.* Merchants Nat. Bank, 15 Cal. App. 347, 115 Pa. 59.

8. Indebtedness secured by mortgage.—Merchants', etc., Bank *v.* Meyer, 56 Ark. 499, 20 S. W. 406.

9. So held under Cal. Code Civ. Proc., § 726, in Marble Co. *v.* Merchants' Nat. Bank, 15 Cal. App. 347, 115 Pac. 59..

10. Debt reduced to judgment.—Marsh *v.* Oneida Cent. Bank (N. Y.), 34 Barb. 298.

Effect of bank's obtaining judgment for full amount of debt.—A. owed the defendant. He deposited with the defendant about half the amount of the debt, but neither he nor the defendant appropriated the money as a part payment. Then the defendant obtained judgment for the full debt. Afterwards A. assigned the claim on account of the deposit to the plaintiff. Held, that after that assignment the defendant could set off the judgment against the deposit, even if it could not appropriate the deposit as a part payment. Marsh *v.* Oneida Cent. Bank (N. Y.), 34 Barb. 298.

§ 134 (1eadl) Lien Debt Assumed by Depositor.—A bank may set off the deposit of a depositor against a lien debt due it from a third person, payment of which had been assumed by such depositor.[11]

§ 134 (1eadm) Money Paid on Depositor's Debts.—Where a depositor has not assigned his deposit by check or otherwise, his right to demand the balance is subject to the right of the bank to set off against it any debt due by him to the bank, including money paid out on the depositor's debts, without authority, provided the depositor subsequently ratified the payment.[12]

§ 134 (1eb) Notes and Acceptances Payable at Bank.—Where a depositor makes his paper to third persons payable to bank, as it is a duty of the bank to pay its customers' checks, when in funds, so at least it has authority if it was not under actual obligation to pay his notes and acceptances made payable at the bank, and has the right to apply so much of the depositor's funds to the payment of such papers as may be necessary to satisfy the same. It is a presumption of law that if a customer does so make payable or negotiable at a bank, any of his paper, it is his intent to have the same discharged from his deposit.[13]

§ 134 (1f) Persons against Whom Available.—In General.—The bank's right of set-off attaches to the securities and funds of a depositor in the possession on general deposit, not only against the depositor, but against the unknown equity of others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion.[14]

11. **Lien debt assumed by depositor.**—In an action against a bank to recover $200, which defendant refused to pay on plaintiff's check, defendant averred that the $200 was a part of $1,150 deposited by plaintiff; that defendant had a lien on one W.'s mill, which plaintiff bought, assuming payment of W.'s debt to it; that it agreed to receive such money and apply it on such debt; that it did apply on it all the money deposited; and that $400 was still due. Held that, on the pleadings, defendant was entitled to judgment. Judy *v.* First Nat. Bank, 18 Ky. L. Rep. 880, 38 S. W. 711.

12. **Money paid on depositor's debts.**—Hiller *v.* Bank (S. C.), 75 S. E. 789.

A bank seeking to set off against the balance due a depositor money paid on the depositor's debts without his authority must plead and prove that the depositor ratified such payment by adopting it for his own benefit. Hiller *v.* Bank (S. C.), 75 S. E. 789.

13. **Notes and acceptances payable at bank.**—Home Nat. Bank *v.* Newton, 8 Ill. App. 563.

Where a bank pays a note of a depositor, payable at the bank, it is entitled to hold the note as the equitable owner or purchaser, and to set it off in a suit to recover a balance due the depositor on a general account. Bedford Bank *v.* Acoam, 125 Ind. 584, 25 N. E. 713, 9 L. R. A. 560, 21 Am. St. Rep. 258.

14. **Persons against whom available.**—National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Meyers *v.* New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. Supp. 304.

Where a note was given by one bank to another to secure and protect a credit with the latter bank to the former, there is a perfect defense, as between the parties, to a suit on the note, to the extent of the sum standing to the maker's credit with the payee, and on payment of the difference the former is entitled to the sur-

§ 134 (1fa) Persons Presenting Checks.—The rule that a bank has a right to set off a matured indebtedness of a depositor against his general deposit account, and to decline to pay the depositor's check when there are not sufficient and unincumbered or unappropriated funds of the depositor, is supported by many authorities,[15] but some authorities hold that the deposit account should be exhausted before the check is presented, by charging the account with the depositor's past due indebtedness.[16] If a bank holding an overdue note against a depositor, charge such note up against his deposit accounts before checks drawn, by such depositor are presented for payment, it will be entitled to hold the deposit against any check afterwards presented; but a bank, having on deposit funds sufficient to pay the same, can not refuse to pay a check presented by a bona fide holder, though the maker owes the bank on an overdue note more than the amount of his deposit, unless such note has been charged against such deposit before presentment of the check.[17]

Depositor Himself.—Where a bank holds an overdue note against a depositor for more than the amount of his deposit, it is entitled to refuse payment of the depositor's check, when presented by the depositor himself,

render of the note. Central Trust Co. *v.* First Nat. Bank, 101 U. S. 68, 25 L. Ed. 876.

15. Persons presenting checks.—Harrison *v.* Harrison, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111; Wood *v.* Boylston Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366; Gibbons *v.* Hecox, 105 Mich. 509, 55 Am. St. Rep. 463; Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145, reversing 21 Hun 450; Hodgin *v.* People's Nat. Bank, 124 N. C. 540, 32 S. E. 887; First Nat. Bank *v.* Peltz, 176 Pa. 513, 35 Atl. 218, 36 L. R. A. 832, 53 Am. St. Rep. 686; Slack *v.* Northwestern Nat. Bank, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841; Bank *v.* New England Bank, 1 How. 234, 11 L. Ed. 115.

Ohio.—Where, at the time a check is drawn, or is presented, the drawer is indebted to the bank on past due paper, it may treat the cross demands existing between them as compensated so far as they equal each other, and credit the demands accordingly; and, if there is not then sufficient balance standing to the credit of the drawer, payment of the check may be refused for want of funds. Bank *v.* Windischmuhlhauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am. St Rep. 660.

So, also, when the funds are a credit given on deposits of drafts by the drawer which were not paid and were only realized on by resort to bills of lading attached. If drafts are received as cash, it is on the implied condition that they be paid, and if not paid the right to recall the credit is superior to the right to draw checks. And a check assigns only a present fund, not what may be ultimately due. Jacob *v.* First Nat. Bank, 3 Wkly. L. Bull. 274, 5 O. Dec. 572. Compare Skunk *v.* Merchant's Nat. Bank, 16 Wkly. L. Bull. 353, 9 O. Dec. 684, where it was held that when a depositor in a bank became insolvent, the bank holding notes not yet due, which it had discounted for him, and the proceeds of which notes had gone into his deposit account, the bank could withhold enough of the deposits to protect such notes, as against the insolvent or his general assignee, though not against bona fide holders of checks for value.

Texas.—Where a bank held notes of a depositor which were past due, it had a right to credit the amount with which it stood charged in his favor on the books upon his notes and refuses to honor his check for any amount. Schoelkopf *v.* Phillips, 88 Tex. 31, 29 S. W. 645.

16. Niblack *v.* Parker Nat. Bank, 169 Ill. 517, 48 S. E. 438, 30 L. R. A. 159, 61 Am. St. Rep. 203.

17. Judgment, Park Nat. Bank *v.* Niblack, 67 Ill. App. 583, reversed in Niblack *v.* Park Nat. Bank, 169 Ill. 517, 48 N. E. 438, 39 L. R. A. 159, 61 Am. St. Rep. 203; Bank *v.* Franklin, 90 Ill. App. 91.

and appropriate the deposit to the payment of the note, though it had not charged the note against the deposit account at the time the depositor presented the check for payment.[18]

§ 134 (1fb) Attaching Creditors.—Where one suing a depositor in a bank procures the service of an attachment on the bank, the bank must withhold for the satisfaction of plaintiff's demand sufficient money then owed the depositor if there is such money, but in ascertaining the amount it may deduct any matured indebtedness owing to it by the depositor which it could set up by way of counter-claim in case the depositor had sued for his deposit.[19]

§ 134 (1fc) Executors or Administrators.—See ante, "Death of Depositor," § 134 (1cg); post, "Against Executors or Administrators," § 134 (2e).

§ 134 (1g) When Application Must Be Made—§ 134 (1ga) Day on Which Obligation Matures.—Where a bank holds a depositor's note it has a right, upon the day on which the note comes due and at any time during the day, to apply funds in its hands belonging to the maker, to the payment of the note.[20]

§ 134 (1gb) Application on Last Day of Grace.—Where a bank holds a note of the depositor for a certain sum the bank, could on the morning of the last day of grace upon such note, apply to its payment any money of the depositor then remaining on deposit in such bank.[21]

§ 143 (1gc) Where Check Presented by Another than Depositor.—See ante, "Persons Presenting Checks," § 134 (1fa).

§ 134 (1h) What Constitutes Appropriation—§ 134 (1ha) In General.—See ante, "Persons Presenting Checks," § 134 (1fa).

§ 134 (1hb) Unauthorized Charge by Bank Clerk.—An unauthorized charge by a bank clerk of a note held by the bank against the balance of a depositor, who is liable as endorser of the note, and which was at once corrected, is not in fact payment of the note or an appropriation of the deposit to the payment thereof.[22]

18. **Depositor himself.**—Bank *v.* Franklin, 90 Ill. App. 91.

19. **Attaching creditors.**—Marble Co. *v.* Merchants' Nat. Bank, 15 Cal. App. 347, 115 Pac. 59.

20. **Day on which obligation matures.**—Schuler *v.* Laclede Bank, 27 Fed. 424.

21. **Application on last day of grace.**—Home Nat. Bank *v.* Newton, 8 Ill. App. 563.

22. **Unauthorized change by bank clerk.**—Mechanics', etc., Bank *v.* Seitz, 150 Pa. 632, 24 Atl. 356, 30 Am. St. Rep. 853.

A note was indorsed to a bank for full value, before maturity. It was not paid, and was protested. The indorser to the bank had sufficient money deposited there to pay the note. A clerk of the bank charged the note up to the indorser, but when this became known to the cashier he directed the clerk to correct his act by crediting the indorser with the same amount, so as to leave his account as before. The indorser had not authorized such ap-

§ 134 (1i) Duty or Option of Bank to Avail Itself of Right.—It is optional with a bank whether it will avail itself of the right to apply a deposit to the payment of the indebtedness of the depositor.[23] This bank, though indebted to the maker of a note held by it, is not required to apply such indebtedness to discharge of the note, in the absence of a demand by the maker, at least unless it has, when the note comes due, sufficient funds of the maker to discharge it.[24] Where there was an insufficient amount of money, on deposit in a bank to the credit of a customer, to pay his note to the bank at its maturity, and the customer did not instruct the bank to discharge the note out of moneys subsequently deposited, the bank was not required to apply such deposits to the note, but could sue thereon and recover the reasonable attorney's fees as stipulated therein.[25]

§ 134 (1j) Waiver or Discharge.—The bank may so deal with a depositor as to waive or be estopped to assert the right to set off a depositor's indebtedness to it against his balance, as where the long continued course of dealing between the parties is inconsistent with the assertion by the bank of the right,[26] and the right of a bank to detain the deposits of an insolvent debtor for the general balance of account may be controlled by any special agreement which shows that it was not intended by the parties.[27]

Deposit of Principal's Money in Name of Agent.—See post, "Applying Funds of Principal or Consignor to Debts of Agent, Factor or Broker," § 134 (6).

§ 134 (1k) Enforcement in Equity.—The lien or claim which a bank has on a deposit can not be enforced in equity against the depositor, though in a proper sense it may be declared or recognized.[28]

§ 134 (2) Applying Deposit to Debts Not Matured.—Application to liability as guarantor, see post, "Applying Deposit to Liability as In-

plication of his deposit, but had insisted that the bank proceed against the maker, to which the bank had agreed. Held, that such application of the deposit was not a payment of the note. Mechanics', etc., Bank *v.* Seitz, 30 Wkly. Notes Cas. 261, 150 Pa. 632, 24 Atl. 356, 30 Am. St. Rep. 853.

23. Duty or option of bank to avail itself of right.—Van Winkle Gin, etc., Co. *v.* Citizens' Bank, 89 Tex. 147, 33 S. W. 862.

24. Guernsey *v.* Marks, 55 Ore. 323, 106 Pac. 334.

A banker is not required to apply balance due by him on account current to his depositor to the payment of a liability from his customer to himself on a note. Citizens' Bank *v.* Carson, 32 Mo. 191.

25. Boothe *v.* Farmers', etc., Nat. Bank, 53 Ore. 576, 98 Pac. 509, 101 Pac. 390.

26. Waiver or discharge.—Callaham *v.* Bank, 69 S. C. 374, 48 S. E. 293, disserting opinion of Jones J., citing Simmons Hardware Co. *v.* Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700, as authority.

The right of a bank to apply the deposit of an insolvent debtor towards the payment of its claims against him does not exist where the circumstances or the particular modes of dealing are inconsistent with its existence. Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227.

27. Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227; Neponset Bank *v.* Leland (Mass.), 5 Metc. 259; Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486.

28. Enforcement in equity.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

dorser, Guarantor, or Surety," § 134 (3). Debts not due at time of assignment of deposit, see post, "Application after Assignment of Deposit," § 134 (10).

§ 134 (2a) General Rule.—The general rule is that a bank can not apply a general deposit to an unmatured indebtedness of the depositor,[29] unless it is authorized to do so by contract.[30]

§ 134 (2b) Insolvency of Depositor.—The general rule is that a bank may, on the insolvency of a depositor before the maturity of a debt owed by him to the bank, apply his general deposit to the payment of its debt as against the insolvent or his general assignee. This rule prevails in Georgia,[31] Iowa,[32] Kentucky,[33] Massachusetts,[34] Minnesota,[35] Tennessee,[36] New

29. **General rule.**—Commercial Nat. Bank *v.* Proctor, 98 Ill. 558; Meby's Nat Bank *v.* Jones, 2 Penn. 377. See ante, "Maturity Debt," § 134 (1ca).

A bank has a general lien on all moneys and funds of a depositor in its possession, for the balance of the general account, provided that account is due and payable; but, where a note is discounted by a bank for its depositor, it has no resulting lien upon his funds or property until the note becomes due. Smith *v.* Eighth Ward Bank, 31 App. Div. 6, 52 N. Y. S. 290.

30. A bank has no right to retain the balance of a customer's deposit to apply on an indebtedness of the customer of the bank not yet matured, unless it is authorized to do so by contract. Heidelbach *v.* National Park Bank, 87 Hun 117, 33 N. Y. S. 794, 67 N. Y. St. Rep. 438.

31. **Insolvency of depositor.**—*Georgia.*—On the depositor becoming insolvent, the depositary may apply the deposit to the payment of notes of the depositor made to it, though the notes are not due. Georgia Seed Co. *v.* Talmadge & Co., 96 Ga. 254, 22 S. E. 1001.

32. *Iowa.*—Thomas *v.* Exchange Bank, 99 Iowa 202, 68 N. W. 780, 35 L. R. A. 379.

Under Code 1873, §§ 2087, 2546, an action by the assignee of an open account is subject to all defenses, counterclaims, or cause of action, whether matured or not, if matured when pleaded, existing in favor of the defendant and against the assignor before notice of the assignment; and a bank may set off a note of a depositor in its favor in an action against it on a check or draft drawn by such depositor, of which it had no notice until after it learned of the drawer's insolvency. Thomas *v.* Exchange Bank, 99 Iowa 202, 68 N. W. 780, 35 L. R. A. 379.

33. *Kentucky.*—A bank can set off against deposits made with it by an insolvent before making an assignment for the benefit of creditors a debt due from the insolvent, which, at the time of the assignment, was not yet due. Kentucky Flour Co. *v.* Merchants' Nat. Bank, 90 Ky. 225, 12 Ky. L. Rep. 198, 13 S. W. 910, 9 L. R. A. 108.

34. *Massachusetts.*—Demmon *v.* Boylston Bank (Mass.), 5 Cush. 194.

35. *Minnesota.*—Sweetser *v.* People's Bank, 69 Minn. 196, 71 N. W. 934.

36. *Tennessee.*—Nashville Trust Co. *v.* Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710.

Although the bank's claim against the assignor is not due at the date of the making of an assignment, still the legal right of set-off can be enforced, even where assignor's assets are insufficient to pay all his debts, if, after such claim has fallen due, the assignee sues such creditor for a debt due the assignor's estate. Nashville Trust Co. *v.* Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710.

Insolvency of debtor as ground for application of doctrine. An insolvent mercantile corporation made a general assignment of its assets for the benefit of its creditors. Among these assets was a bank deposit of $5,222.66. The assignor owed this bank $28,000, for which it had given its notes. These notes were not due at the date of the assignment. After the assignment had been perfected the bank, with knowledge of its existence, applied the deposit in its hands on the assignor's notes, claiming payment in full to that extent, and pro rata on remainder of its debt. Held, a proper case for equitable set-off. The application of the deposit by the bank to its notes on the assignor is approved. The fact that the notes were not due is deemed immaterial. Nashville Trust Co. *v.*

Jersey,[37] Ohio,[38] North Carolina,[39] Texas,[40] and in the supreme court of the United States;[41] but in a number of jurisdictions among which are Alabama,[42] Missouri,[43] New York,[44] Pennsylvania,[45] Rhode Island,[46] South

Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710, citing in support of the general rule, Brazelton *v.* Brooks, 39 Tenn. (2 Head.) 194; Hough *v.* Chaffin, 36 Tenn. (4 Sneed) 238; Gregory *v.* Hasbrook, 1 Tenn. 218; Edminson *v.* Baxter, 5 Tenn. (4 Hayw.) 112; Richardson *v.* Parker, 32 Tenn. (2 Swan) 529; Moseby *v.* Williamson, 52 Tenn. (5 Heisk.) 278; Comfort *v.* Patterson, 70 Tenn. (2 Lea) 670; Howe Sewing Mach. Co. *v.* Zachary, 2 Tenn. 478; Catron *v.* Cross, 50 Tenn. (3 Heisk.) 584; Smith *v.* Mosby, 56 Tenn. (9 Heisk.) 501; Fields *v.* Carney, 63 Tenn. (4 Baxt.) 137.

37. *New Jersey.*—3 Zab. 294.

38. *Ohio.*—A bank may apply and set off a deposit, subject to check, of an insolvent debtor, against an indebtedness of such debtor to the bank, although the same is not yet due. German-American Sav. Bank Co. *v.* Grossman, 15 O. C. C. 378, 8 O. C. D. 682.

A fortiori, may the bank make such application of a deposit, when it consists of the proceeds of a draft discounted by the bank for the depositor upon representations of his solvency, and the makers of the notes are also insolvent. Felton *v.* German Nat. Bank, 6 N. P. 136, 9 O. Dec. 229.

Where a depositor becomes insolvent, the bank holding notes not due, which it had discounted for him, and the proceeds of which had gone into his deposit account, the bank can, as against the insolvent or his general assignee, withhold enough of the deposits to protect such notes. Skunk *v.* Merchants' Nat. Bank, 16 Wkly. L. Bull. 353, 9 O. D. 684.

39. *North Carolina.*—Hodgin *v.* People's Nat. Bank, 124 N. C. 540, 32 S. E. 887, reversed on another point in 125 N. C. 503, 34 S. E. 709, 712.

40. *Texas.*—Owen *v.* American Nat. Bank, 36 Tex. Civ. App. 490, 81 S. W. 988; Owen *v.* American Nat. Bank, 36 Tex. Civ. App. 490, 81 S. W. 988, affirmed in 98 Tex. 627, no op., citing Neely *v.* Grayson County Nat. Bank, 25 Tex. Civ. App. 513, 61 S. W. 559; Templeman *v.* Hutchings, 24 Tex. Civ. App. 1, 57 S. W. 868, affirmed in 93 Tex. 650, no op.; Van Winkle Gin, etc., Co. *v.* Citizens' Bank, 89 Tex. 147, 33 S. W. 862; First Nat. Bank *v.* De Morse (Tex. Civ. App.), 26 S. W. 417; Traders' Nat. Bank *v.* Cresson, 75 Tex. 298, 12 S. W. 819.

41. Supreme court of United States.—Thomas *v.* Exchange Bank, 99 Iowa 202, 68 N. W. 780, 35 L. R. A. 379, citing Scott *v.* Armstrong, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148; Schuler *v.* Israel, 120 U. S. 506, 30 L. Ed. 707, 7 S. Ct. 648.

42. *Alabama.* — Birmingham Nat. Bank *v.* Mayer, 104 Ala. 634, 16 So. 520.

43. *Missouri.*—Homer *v.* National Bank, 140 Mo. 225, 41 S. W. 790; Roe *v.* Bank, 167 Mo. 406, 67 S. W. 303.

Where an assignment for the benefit of creditors is made by a depositor in a bank, the bank is not entitled to set off, against its indebtedness for the funds on deposit, a debt owing it by the assignor, but not yet due. Kortjohn *v.* Continental Nat. Bank, 63 Mo. App. 166.

44. *New York.*—Heidelbach *v.* National Park Bank, 87 Hun 117, 33 N. Y. S. 794, 67 N. Y. St. Rep. 438; Smith *v.* Eighth Ward Bank, 31 App. Div. 6, 52 N. Y. S. 290; Beckwith *v.* Union Bank, 6 N. Y. Super. Ct. 604; Irish *v.* Citizens' Trust Co., 163 Fed. 880.

As against liability of a bank to an insolvent for deposits, it can not set off a note of the depositor not yet due, under Mills' Ann. St. Colo., § 187 (part of an act for administration of insolvent estates, providing: "Debts not due may be claimed, but if the same are not bearing interest a suitable rebate shall be made. Interest shall be computed to date of the assignment and not afterwards"); the claims not due being merely placed on an equality, for the purpose of distribution, with those due. Bradley *v.* Seaboard Nat. Bank, 46 App. Div. 550, 62 N. Y. S. 51, judgment reversed in 167 N. Y. 427, 60 N. E. 771.

45. *Pennsylvania.* — Manufacturers' Nat. Bank *v.* Jones (Pa.), 2 Penn. 377; Manufacturers' Nat. Bank *v.* Jones (Pa.), 2 Penn. 377. But see contra, Stewart *v.* National Security Bank, 6 Wkly. Notes Cas. 399, holding that where a bank depositor makes an assignment for the benefit of creditors, the bank may set off unmatured notes of the assignor. Chipman *v.* Ninth Nat. Bank (Pa.), 21 Wkly. Notes Cas. 184; Greene *v.* National Security Bank (Pa.), 13 Phila. 146

46. *Rhode Island.*—Where a bank depositor made an assignment, having at the time a considerable deposit in

Carolina,[47] and Wisconsin,[48] a bank can not apply the deposit of a customer to the payment of an indebtedness owing to it by him which has not matured, though he be insolvent, unless it is authorized to do so by contract.[49]

Allowance of Set-Off Not in Conflict with Equal Distribution.—The allowance of the set-off in such case is not in conflict with the principle of equal and ratable distribution of the assignor's assets. The balance due constitutes the assets for distribution.[50]

§ 134 (2c) Contracts Conferring Right.—Contracts conferring on a bank the right to apply a customer's deposit to the discharge of an unmatured debt owing to it by him are void if without consideration.[51]

What Constitutes a Contract for Right of Set-Off.—Where the maker of a note to a bank agreed that deposits thereafter made by him might be applied on the note, though it was not due when such deposits were made, and directed the cashier to so apply the deposits, he is estopped from claiming such deposits as subject to his checks.[52] Where a bank informed a depositor that, unless his account was more satisfactory, it would discontinue discounting and loaning to him, and he promised to keep a fair balance to justify the credit extended, an agreement that in case of his insolvency the bank might apply his deposit to payment of its unmatured demand against him could not be implied.[53]

§ 134 (2d) Against Attaching Creditors.—The right of a bank to set off the deposit of an insolvent customer against his unmatured indebtedness to it takes priority over the lien of an attaching creditor;[54] aliter in

the bank, which held three of its notes, two of which had matured and had not been paid, the bank could only retain from the deposit a sum sufficient to pay the two notes matured at the time of the assignment; the unmatured note not being a set-off under Gen. Laws, c. 239, § 11, providing that a set-off must be a demand which existed at the time of the commencement of the action. Ellis *v.* First Nat. Bank, 22 R. I. 565, 48 Atl. 936.

47. *South Carolina.*—Bank *v.* Mahon, 78 S. C. 408, 59 S. E. 31; Forgarties *v.* State Bank, 12 Rich. L. 518, 78 Am. Dec. 468; Callaham *v.* Bank, 69 S. C. 374, 48 S. E. 293.

48. *Wisconsin.*—Oatman *v.* Batavian Bank, 77 Wis. 501, 46 N. W. 881, 20 Am. St. Rep. 136.

49. Heidelbach *v.* National Park Bank, 87 Hun 117, 33 N. Y. S. 794, 67 N. Y. St. Rep. 438. See, also, Bank *v.* Mahon, 78 S. C. 408, 59 S. E. 31.

50. Allowance of set-off not in conflict with equal distribution.—Nashville Trust Co. *v.* Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710, citing, generally, Richardson *v.* Parker, 32 Tenn. (2 Swan) 529; Moseby *v.* Williamson, 52 Tenn. (5 Heisk.) 278; Comfort *v.* Patterson, 70 Tenn. (2 Lea) 670; Smith *v.* Mosby, 56 Tenn. (9 Heisk.) 501; McKenzie *v.* Shaffner, 67 Tenn. (8 Baxt.) 408.

51. Consideration.—Where an agreement of a firm to sell its assets and apply the proceeds to certain notes held by the bank, indorsed by M., and to prorate the surplus between an unsecured overdraft and a personal debt to M., was without consideration, the proceeds, on being deposited in the bank to the credit of the firm's general account, were subject to check and were not assets under the control of the bank, which it could apply without the firm's consent in accordance with the agreement. Bank *v.* Mahon, 78 S. C. 408, 59 S. E. 31.

52. What constitutes a contract for right of set-off.—Roe *v.* Bank, 167 Mo. 406, 67 S. W. 303.

53. Homer *v.* National Bank, 140 Mo. 225, 41 S. W. 790.

54. Against attaching creditor.—Where a bank held two notes of a depositor, secured by personal indorse-

Alabama,[55] and Pennsylvania.[56]

§ 134 (2e) Against Executors or Administrators.—In an action against a bank by an administrator to recover a balance of decedent's deposit account standing to his credit at the time of his death, defendant can not, as a matter of law, set off a claim against decedent on a note which did not mature until after his decease.[57]

§ 134 (3) Applying Deposit to Liability as Indorser, Guarantor or Surety—§ 134 (3a) Depositor Liable as Guarantor, etc., to Bank —§ 134 (3aa) Right of Bank in General.—In absence of a contract a bank has no right, without a depositor's consent, to apply his deposit to the payment of an obligation for which he is liable as a guarantor,[58] indorser, or surety, as, for instance, a bill of exchange indorsed by such depositor and discounted by the bank;[59] a check of a third person guaranteed by him;[60] or a note, payment of which he has guaranteed,[61] or on

ment, and such depositor became insolvent prior to service on the bank of a garnishment in a suit against him, which service was before maturity of the notes, the bank was entitled to set off such notes against the deposit. Neely *v.* Grayson County Nat. Bank, 25 Tex. Civ. App. 513, 61 S. W. 559. But see Presnall *v.* Stock Yards Nat. Bank (Tex.), 151 S. W. 873, holding that a garnishee bank holding a balance to the credit of a debtor's general account is not entitled to credit the same against the debtor's unmatured notes to the bank as against plaintiff in garnishment.

55. *Alabama.*—Where a bank, on being garnished, answers that it has paid the debtor's claim by giving him credit on his note for the amount on deposit, and the evidence shows that the note was not due at the time the garnishment was levied, a judgment for plaintiff is proper. Birmingham Nat. Bank *v.* Mayer, 104 Ala. 634, 16 So. 520.

56. *Pennsylvania.*—A bank has no lien on money standing to the credit of a depositor, to the amount of a note of such depositor, discounted by the bank, but which has not yet matured. The mere insolvency of the depositor intervening can not affect the question as against a creditor attaching the fund. Manufacturers' Nat. Bank *v.* Jones (Pa.), 2 Penny. 377.

Deposit as "Agent" against debt as individual.—A deposit in the name of one as "agent" was garnished for the debt of the principal, who was unknown to the bank. Against this deposit the bank claimed the right to set off certain notes indorsed by said agent, and discounted by it, which notes were unmatured at the time of the garnishment. Held, that it was not entitled to the set off. Jones *v.* Manufacturers' Bank (Pa.), 10 Wkly. Notes Cas. 102.

57. Against executor or administrator.—Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 319.

58. Right of bank in general.—An insolvent bank was guarantor of two notes of $5,000 each, which it had discounted at another bank, and for which it had been given credit on account. At the same time such other bank was indebted to the insolvent bank $4,000 on account. Held, that it was not entitled to treat the amount as an equitable set-off. Mechanics' Bank *v.* Stone, 115 Mich. 648, 74 N. W. 204.

59. Bill of exchange.—A bank has no lien upon money standing to the credit of one of its depositors, for the amount of a bill of exchange indorsed by such depositor, and discounted by the bank, but which bill has not yet matured. Beckwith *v.* Union Bank, 6 N. Y. Super. Ct. 604.

60. Check of third person.—A bank has no right, without a depositor's consent, to apply his deposit to the payment of the check of a third person, drawn in favor of a fourth, and guarantied by the depositor. O'Grady *v.* Stotts City Bank, 106 Mo. App. 366, 80 S. W. 696.

61. Guarantor of note.—A bank has no power to retain the money of a depositor to meet a note, the payment of which the depositor has guarantied, which is not due at the time. Commercial Nat. Bank *v.* Proctor, 98 Ill. 558.

which he is liable as indorser[62] or surety.[63] The right may exist, under certain circumstances, even where the depositor is not primarily liable on the notes, as where the makers of the notes are insolvent and it appears that it was the intention of the party that their claims should be mutual credits.[64]

Liability Fixed by Nonpayment and Protest.—As soon as the liability of the indorser of a note or bill held by a bank is fixed by the nonpayment and protest, and at any time thereafter during the continuance of such liability, the indorsee bank has the right to apply any moneys coming into its hands in due course of business belonging to such indorser to the payment of the indorser's liability upon such contract, and the indorser has no right in law or equity to compel the bank to proceed against the maker, but upon payment of the note or bill he would have had the right to its surrender, whereupon he might have proceeded against the maker.[65]

Death of Indorser, etc.—A bank can not charge a note against the deposit of an indorser, where he dies insolvent before it becomes due.[66]

§ 134 (3ab) Under Bankruptcy Act.—Under the national bankruptcy act, permitting a set-off of mutual credits and debts existing between a bankrupt and a creditor, if a bank depositor is indebted to the bank on notes, both as maker and indorser, his deposit may be set off against the aggregate amount of the notes on which he is liable as maker and the notes upon which he is liable as indorser, and the makers of which are insolvent.[67]

§ 134 (3ac) Right of Maker to Have Deposit Applied.—The maker of a note can not compel a bank, the holder of the note, to apply the deposit of an indorser to its payment.[68]

§ 134 (3b) Bank Liable as Indorser, etc., for Depositor.—A garnishment against a bank will not be discharged because the bank is liable

62. **Indorser of note.**—After the protest, by a bank, of a note, one of two joint indorsers, for whose accommodation the note was made, made deposits at the bank on his separate account. Held, that the bank could not apply such deposits to the note, without the assent of the deposit. Long Island Bank *v.* Townsend (N. Y.), Hill & D. Supp. 204.

63. **Surety on note.**—In the absence of a contract giving it the right to do so, a bank can not apply money due a depositor to the payment of a note on which he is a surety. Lamb *v.* Morris, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111.

64. Felton *v.* German Nat. Bank, 6 N. P. 136, 9 O. Dec. 229.

65. **Liability fixed by nonpayment and protest.**—Van Winkle Gin, etc., Co. *v.* Citizens' Bank, 89 Tex. 147, 33 S. W. 862.

66. **Death of indorser, etc.**—National Bank *v.* Gormley (Pa.), 2 Walk. 493.

A deceased insolvent was indorser on notes discounted at a bank for his benefit. The notes became due and were protested after his death. Held, that the bank was not entitled to retain a deposit of money standing on their books to his credit at the time of his death, but that they must pay over the deposit to his executor, and take a dividend from his estate on their claim with the other creditors. Appeal of Farmers', etc., Bank, 48 Pa. 57.

67. **Under the bankruptcy act.**—Ex parte Howard Nat. Bank, Fed. Cas. No. 6,764, 2 Low. 487.

68. **Right of maker of note to have deposit by indorser applied.**—Mechanics', etc., Bank *v.* Seitz, 150 Pa. 632, 24 Atl. 356, 30 Am. St. Rep. 853, 155 Pa. 191, 26 Atl. 209.

as indorser on defendant's note in a sum greater than the amount standing to his credit.[69] Where at the time of service of the writ of garnishment, the bank's liability on the note it had indorsed was fixed, by reason of the protest thereof, and also by reason of the insolvency of the maker, it had the right to retain out of the deposit due the maker sufficient to secure it against loss, and it was responsible on the writ of garnishment only for the balance remaining in its hands after the payment by it of the said note.[70]

Recovery of Surety from Principal.—An insolvent bank holds judgments against principal and surety, and deposits of surety, on which it pays sixty per cent., but which third party had contracted to take at par. Surety pays judgments with his deposits, under agreement with principal to repay the face value of the deposits so used; held, surety is entitled to receive face value of the deposits, though the general rule is that if surety discharges the debt for less than its full amount, he can only claim against principal the sum paid.[71] Where surety pays part of such judgment with his deposits, principal, compromising balance, may have the judgment assigned to surety for fifty cents on the dollar of the amount paid by him, though the bank pays less dividend. Such agreement between surety and principal, held, not to be usurious.[72] The fact that the bank refused to transfer surety's deposits to a purchaser thereof until the judgments were paid does not make the principal's agreement to repay the amount at its face value without consideration.[73]

§ 134 (4) Deposits Made for Special Purposes.—It is a general rule that funds deposited in a bank for a special purpose, known to the bank, or under a special agreement can not be withheld from that purpose, to the end that they may be set off by the bank against a debt due to it from the depositor.[74]

69. Bank liable as indorser, etc., for depositor.—Newbold *v.* Patrick (Pa.), 42 Pittsb. Leg. J., O. S., 299, 25 Pittsb. Leg. J., N. S., 299.

70. Rosenberg *v.* First Nat. Bank (Tex. Civ. App.), 27 S. W. 897, citing Burrow *v.* Zapp, 69 Tex. 474, 6 S. W. 783; Traders' Nat. Bank *v.* Cresson, 75 Tex. 298, 12 S. W. 819.

71 Recovery of surety from principal.—Southall *v.* Farish, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641; Kendrick *v.* Forney, 63 Va. (22 Gratt.) 748.

72. Southall *v.* Farish, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641.

73. Southall *v.* Farish, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641.

74. Deposits made for special purposes.—Van Zandt *v.* Hanover Nat. Bank, 149 Fed. 127; Wilson *v.* Dawson, 52 Ind. 513; Wagner *v.* Citizens' Bank, etc., Co., 122 Tenn. 164, 122 S. W. 245. See to the same effect, Lynam *v.* Belfast Nat. Bank, 98 Me. 448, 57 Atl. 799.

A bank has no general lien on securities deposited with it for a special purpose. Van Zandt *v.* Hanover Nat. Bank, 149 Fed. 127.

Indiana.—Where one indebted to a bank made a deposit with an agreement that it should be subject to the depositor's order, for a specific purpose, the bank can not in violation of such order apply such deposit in payment of the depositor's debt. Carter *v.* Martin, 22 Ind. App. 445, 53 N. E. 1066.

Iowa.—A bank with which a deposit is made for a special purpose or under a special agreement can not apply the deposit to the discharge of the depositor's matured indebtedness to it. Smith *v.* Sanborn State Bank, 147 Iowa 640, 126 N. W. 779.

Where plaintiff placed with a bank a check under an express agreement that after paying certain specifically named debts, the remainder would be

A custom among banks to apply deposits for special purposes to debts due the bank from the depositor does not authorize such application.[75]

Deposit to Pay Designated Debts.—A bank does not have a lien upon special deposits or moneys deposited for the payment of a particular or designated debt.[76]

Deposit to Meet Outstanding Checks.—A bank receiving a deposit with notice that it is made to meet outstanding checks may not charge the depositor's account with a debt due it from him.[77]

repaid to plaintiff, whenever called for, for a special purpose, the bank could not appropriate the same to the discharge of other debts due to it from plaintiff. Smith *v.* Sanborn State Bank, 147 Iowa 640, 126 N. W. 779.

Massachusetts.—Furber *v.* Dane, 203 Mass. 108, 87 S. E. 227.

New York.—Where a deposit was made with a bank for a special purpose, of which notice was given to the bank at the time, the bank was liable for applying the fund contrary to the direction. Straus *v.* Tradesmen's Nat. Bank, 47 Hun 633, 13 N. Y. St. Rep. 407.

Tennessee.—A bank does not have a lien upon special deposit or money deposited for a specific purpose. Wagner *v.* Citizens' Bank, etc., Co., 122 Tenn. 164, 122 S. W. 245.

75. Custom.—Plaintiff deposited in defendant bank a special deposit in coin. Soon after, the bank suspended specie payment, but entered into an agreement with plaintiff that, as soon as the bank resumed specie payment, it would return the special deposit in coin. The parties had subsequent transactions predicated upon Confederate money as bankable funds. In an action brought to enforce payment of the special deposit, the bank pleaded that the depositor had, since the deposit, incurred an indebtedness to the bank, which, by custom among bankers, had been extinguished in part by crediting the amount of the special deposit on such indebtedness. Held that, in the absence of a special mandate from the depositor, such application was not authorized, even if the custom existed. Murdock *v.* Citizens' Bank, 23 La. Ann. 113.

76. Deposit to pay designated debts.—Wagner *v.* Citizens' Bank, etc., Co., 122 Tenn. 164, 122 S. W. 245.

A bank which receives a deposit to apply to a designated debt can not apply it to another debt. Judy *v.* Farmers', etc., Bank, 81 Mo. 404.

The principle that a bank has the right to apply the amount of a deposit of one of its customers in payment of his indebtedness to the bank has no application where the deposit was received under an agreement to apply it in payment of another creditor of the depositor. Deal *v.* Mississippi County Bank, 79 Mo. App. 262.

Where funds were deposited at a bank to the credit of a special fund for the purpose of paying certain obligations of the depositor as they became due, of which the bank had notice, it can not refuse to apply them to the payment of such obligations, when presented for payment by the holder, on the ground that the depositor is indebted to it in another account to an amount exceeding the special deposit. Bank *v.* Macalester, 9 Pa. 475.

77. Deposit to meet outstanding checks.—First Nat. Bank *v.* Barger (Ky.), 115 S. W. 726.

Balance of a bank deposit made to pay certain outstanding checks held a special deposit, which the bank was not entitled to apply to general indebtedness to it. Continental, etc., Sav. Bank *v.* Chicago, etc., Trust Co., 199 Fed. 704.

Checks for purchase price of cattle.—A person who was indebted as principal upon a promissory note to a banking firm, after the maturity thereof, deposited in the bank of said firm, where said note was payable, and checked out, sums amounting to more than said indebtedness, under a special agreement between the depositor and the bank that the former should buy cattle, and give the seller's checks, payable or to be presented after the buyer had sold the cattle, and deposited the proceeds in the bank; and that the bank should apply the money so deposited to the payment of such checks exclusively. Held, that the money so deposited could not have been applied by the bank to the payment of said note, and that a surety thereon, who was not a party to said agreement, was not released by the failure of the bank to so apply said deposits. Wilson *v.* Dawson, 52 Ind. 513.

Allegations not sufficient to charge

Deposit to Meet Check of Third Person.—A bank receiving a check deposited there to take up the check of another person can not apply it in payment of a debt due the bank from the depositor.[78]

Pledge to Secure Special Demand.—A bank can not hold special deposits, or moneys deposited, or securities pledged as collateral to secure a special demand, for other demands though against the same debtor.[79]

Abandonment of Special Enterprise for Which Deposit Made.—Where a bank received deposits from a depositor indebted to it under a special arrangement that checks thereon should only be paid where they were drawn for the purpose of a special enterprise, and no checks having been drawn, and the enterprise having been abandoned, the bank was entitled to appropriate the deposit to the payment of the depositor's debt to it.[80]

Money Deposited in Part Performance of a Contract of Purchase.—Where the purchaser in the performance of his part of the contract, deposited money in a bank to the credit of the seller and the bank, with the seller's consent, applied the deposit to the seller's debt to itself, the bank is not liable to the purchaser, for the conversion of the amount deposited by him, in his suit to rescind the contract and recover back the money.[81]

§ 134 (5) Deposits Belonging to Third Persons—§ 134 (5a) In General.—The rule that a bank may set off a depositor's balance against a matured debt due to the bank does not interfere with the right of third parties, whose moneys have become mingled with those belonging to the depositor, to assert and maintain a claim to the same while in possession of the bank, and by an action recover the amount thus deposited.[82] It must be made clear that the moneys deposited actually belong to the person from

bank as trustee.—In a suit against a bank for the amount of certain checks drawn by a firm of millers in plaintiff's favor, and which, although there were moneys to the drawer's credit, were refused payment because the bank retained such moneys for the discharge of a debt about to fall due to itself, an allegation that such moneys were the proceeds of wheat sold to the drawers by plaintiff, and were deposited for the payment of such checks, and for no other purpose, was not sufficient to charge the bank as a trustee, in the absence of an averment that it was a party to the agreement, or had notice thereof. Boettcher *v.* Colorado Nat. Bank, 15 Colo. 16, 24 Pac. 582.

78. **Deposit to meet check of third person.**—Straus *v.* Tradesmen's Nat. Bank (N. Y.), 36 Hun 451.

A bank, in which a certified check is deposited by one to the credit of another for the special purpose, of which the bank has notice, of meeting a check drawn by the latter in favor of the depositor of the certified check, and indorsed by such depositor, has no right to apply any part of the amount of the certified check to a debt due it from the person to whose credit it is deposited. Straus *v.* Tradesmen's Nat. Bank, 122 N. Y. 379, 25 N. E. 372.

79. **Pledge to secure special demand.**—Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227; Hathaway *v.* Fall River Nat. Bank, 131 Mass. 14; Brown *v.* New Bedford Inst., 137 Mass. 262; Wagner *v.* Citizens' Bank, etc., Co., 122 Tenn. 164, 122 S. W. 245.

80. **Abandonment of special enterprise for which deposit made.**—Bank *v.* Franklin, 90 Ill. App. 91.

81. **Money deposited in part performance of a contract of purchase.**—Blair *v.* Baird, 43 Tex. Civ. App. 134, 94 S. W. 116, affirmed in 101 Tex. 629, no op.

82. **Deposit belonging to third person.**—Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145, reversing 21 Hun 450; Van Alen *v.* American Nat. Bank, 52 N. Y. 1.

whom the account is due to entitle the bank to apply them in payment of its demand. Conceding that the moneys are applicable, even although they are deposited by and in the name of another, the same as if in the name of the actual owner, the fact of ownership must be made to appear and it must be shown satisfactorily that such owner is the person indebted to the bank and really entitled to the funds deposited.[83]

Consent of Depositor.—Where the money does not belong to the depositor, the bank can not, even with the depositor's consent, apply it to its own claims.[84]

In Absence of Fraud or Gross Negligence on Part of Owner of Funds.—The indebtedness of a bank to its depositor that becomes subject to its right of lien or set off must have arisen from the deposit of moneys or funds that belong to the depositor himself. As against the money of third parties obtained by or intrusted to the care of a depositor, a bank has no higher right or better title than the depositor himself, in absence of fraud or gross negligence on the part of such third party, by which such bank has been induced to part with value, or change its position to its prejudice.[85]

83. Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145, reversing 21 Hun 450.

84. Consent of depositor.—McMillan *v.* Boyd, 40 O. St. 35; Gibsonburg Banking Co. *v.* Wakeman Bank Co., 10 O. C. D. 754, 20 O. C. C. 591, affirmed in 66 O. St. 658, 55 N. E. 1128.

85. Deposit must belong to depositor in absence of fraud or gross negligence.—Gibsonburg Banking Co. *v.* Wakeman Banking Co., 10 O. C. D. 754, 20 O. C. C. 591, affirmed in 66 O. St. 658, 55 N. E. 1128.

Plaintiff gave H. two checks to take up two notes on which he and H. were liable. H. deposited the checks with defendant, and part of the proceeds was used to pay an overdraft of H. Thereafter H. made an assignment, and defendant, after notice from plaintiff of his ownership of the checks, paid the amount thereof, less the portion applied on H.'s debt, to the assignee. Held, that defendant was liable for the amount of the checks, less the dividend received by plaintiff on the distribution of H.'s estate. Anderson *v.* Market Nat. Bank, 48 Hun 620, 1 N. Y. S. 136, 16 N. Y. St. Rep. 98.

Where a bank had moneys on deposit in one account to the credit of S., and in another account to the credit of S. as sheriff, and, after the expiration of the term of office of S., transferred the moneys standing to his credit, as sheriff, to his private account, and afterwards, with the assent of S., applied the moneys thus transferred to the payment of the private debt of S. to the bank, in an action by the bank upon the official bond of S., as sheriff, for moneys of the bank, received by him in his official capacity, it was held that such transfer and application of the funds of S., as sheriff, to the amount for which such transfer was made, was a defense for the sureties on the official bond of S. McMillan *v.* Boyd, 40 O. St. 35.

The proceeds of a sale of cattle belonging to plaintiff, and shipped to commission merchants in the name of H., were remitted in H.'s name to defendant bank, and it applied part thereof to extinguish a debt due it from him. Held, that defendant was liable to plaintiff for the amount so converted, irrespective of the question of notice as to the ownership of the funds, in the absence of evidence that by reason of the transaction it lost its debt due from H. Davis *v.* Panhandle Nat. Bank (Tex. Civ. App.), 29 S. W. 926.

Banks impliedly consented to verbal directions to remit.—L. sold a consignment of fresh meat for plaintiff, and deposited the proceeds in bank in his own name. L. testified that he informed the cashier that the money belonged to plaintiff, and directed him to remit the same to plaintiff, and that the cashier wrote the word "meat" opposite the entry in L.'s pass book, to show the character of the deposit. The bank applied the deposit to L.'s over-

§ 134 (5b) Notice to Bank of Adverse Claim.—Where a bank applies a deposit to the payment of the depositor's debt, at his request, and without notice of any adverse claims of ownership of the fund, the payment will be a valid defense against the adverse claimant.[86] But it can not be permitted to prevail against the equity of the beneficial owner, of which the bank has notice, either actual or constructive.[87]

drafts. Held, in an action against the bank to recover the deposit, that the court erred in instructing the jury to find for defendant. Armour-Cudahy Packing Co. *v.* First Nat. Bank, 69 Miss. 700, 11 So. 28.

The bank, having impliedly consented to L.'s verbal direction to remit the deposit to plaintiff by making an appropriate entry in his pass book, could not raise the objection that it could only be required to follow written directions for payment of the deposit. Armour-Cudahy Packing Co. *v.* First Nat. Bank, 69 Miss. 700, 11 So. 28.

Funds furnished by dormant partner.—In an action to recover the balance on an account, the evidence showed that the defendant had entered into partnership with B. for the purpose of continuing, in B.'s name only, the business in which the latter was already engaged; that plaintiff, at whose bank the firm account was kept, was not informed of the existence of the partnership; that before its formation B. drew out of the bank $6,000, and the firm afterwards deposited in the name of B. $10,000. Held that, as plaintiff had no knowledge of the existence of the firm, the deposits were properly regarded as the money of B., to be applied in the satisfaction of his indebtedness to plaintiff. Allen *v.* Brown, 39 Iowa 330.

Money procured by pledge of property of a third person.—Where a debtor wrongfully pledges to a third person property of plaintiff in order to obtain a loan, and deposits the money loaned in defendant bank, which afterwards applies the balance remaining to the debtor's credit in satisfaction of his notes held by defendant, plaintiff can not recover from the bank the value of the property so pledged by the debtor, as the money deposited was not the proceeds of such property. Hatch *v.* Fourth Nat. Bank, 82 Hun 515, 31 N. Y. S. 530, 64 N. Y. St. Rep. 207, judgment affirmed in 147 N. Y. 184, 41 N. E. 403; distinguishing Hutchinson *v.* Manhattan Co., 9 Misc. Rep. 343, 29 N. Y. S. 1103, 60 N. Y. St. Rep. 612.

86. Notice to bank of adverse claim.—McEwen *v.* Davis, 39 Ind. 109; Meyers *v.* New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. S. 504.

Where a bank appropriated a deposit to satisfy a claim of its own against the depositor, in accordance with an agreement with him, without notice of an equitable claim of a third person to the fund, it is equivalent to a payment to it by the depositor's check, and can not be recovered. London, etc., Bank *v.* Hanover Nat. Bank, 36 App. Div. 187, 55 N. Y. S. 941; Meyers *v.* New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. S. 504; Hatch *v.* Fourth Nat. Bank, 147 N. Y. 184, 41 N. E. 403; Justh *v.* National Bank, 56 N. Y. 478.

In a number of cases it has been held that the right of a banker to set off the balance due a depositor on his account, against a debt of the depositor to the bank, is superior to the equities of third parties to whom the fund really belongs, unless the bank had notice of such equities. The reason is that the bank is presumed to have made advances to the depositor, on the faith of the deposit account. Those cases do not apply to the case in hand. They were all contests between creditors of the depositor—the bank on the one hand, and the equitable claimant of the fund on the other. The depositor owed the money to one or the other. The courts protected the bank's legal possession, unless notice of the other's rights created a superior equity. Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

87. Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486; Jamison *v.* Howard Lockwood & Co., 26 Misc. Rep. 730, 56 N. Y. S. 1085; Meyers *v.* New York County Nat. Bank, 36 Am. Div. 482, 55 N. Y. S. 504.

Where an account was opened and kept by depositor in his name as general agent, with all the presumptions properly arising upon it, and other facts proven on the hearing justify and require the conclusion that the bank had full knowledge of the sources of the deposits made in this account, and

§ 134 (5c) Money Placed to Credit of Debtor Through Mistake.—The rule that the funds of a depositor may be applied to discharge his indebtedness to the bank has no application where the bank did not acquire the funds as a deposit in the course of business with the depositor, but through a mistake and without laches on part of the owner which both the depositor and the true owner of the funds asked the bank to correct.[88]

§ 134 (5d) Application of Special Deposit by Agent to Debts of Third Persons.—Where a bank receives securities upon a special deposit from an agent charged with the management of the fund, it can not, without express authority from the principal, or that which may be necessarily implied from the particular facts concerning the agency, apply the proceeds to a debt due to itself from a third person. The authority will not be implied because the agent had control for the purposes of investment, and the principal had consented to other investments from the funds in the hands of the agent in loans to the third person.[89]

§ 134 (6) Applying Funds of Principal or Consignor to Debt of Agent, Factor or Broker—§ 134 (6a) Application to Debt of Agent.—When the debt created by a deposit belongs to the principal instead of the agent, who made it in his own name, the depositary, with notice

of depositor's duty to remit and account for them as agent, it is consequently chargeable with notice of the equities of the principal. Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Central Nat. Bank *v.* Royal Ins. Co., 103 U. S. 783, 26 L. Ed. 459.

88. **Money placed to credit of debtor through mistake.**—Mingus *v.* Bank, 136 Mo. App. 407, 117 S. W. 653.

B. was a stock buyer and W. his agent, who purchased on commission. W. purchased hogs, and B. paid for them, but as a full car load had not been purchased, and as B. was absent and W. without funds, it was arranged between W. and M., the cashier of a bank, that M. should furnish the funds necessary to make up a car load, on condition that the hogs were to belong to M.; W. to have no interest in the hogs except his commission. W. purchased enough hogs to make up a car load, drawing checks on the bank, but the checks were not entered on the books. W., without the knowledge of B. or M., sent the hogs to commission merchants with whom W. had previously done business; the shipment being made in the name of W. through mistake of the railroad agent. The commission merchants, in accord with a previous custom, deposited the proceeds of the hogs in a bank to the credit of the bank of which M. was cashier, and on receipt of an "advice" of the deposit the latter bank credited the amount on notes of W. held by it. Held, that B. and M. were entitled to recover the proceeds from the bank. McLennan *v.* Farmers' Sav. Bank, 131 Iowa 696, 109 N. W. 291.

Proceeds of note placed by mistake to credit of surety.—A borrower of money gave as security therefor a note signed by himself as principal and another as surety. Through mistake of the lender, the money was placed in a bank to the credit of the surety, and the bank applied the same on the latter's overdue note. Held, that on being notified of the mistake, and demand of the proper person entitled thereto, the bank should have paid the money to the principal. Armstrong *v.* National Bank, 53 Iowa 752, 5 N. W. 742.

The fact that they did not receive any further instruction from their correspondent at the place where the loan was negotiated, through whom the money was transmitted, was no excuse. Armstrong *v.* National Bank, 53 Iowa 752, 5 N. W. 742.

89. **Application of special deposit by agent to debts of third person.**—Walker *v.* Manhattan Bank, 25 Fed. 247.

of the facts, must recognize the actual rather than the nominal depositor.[90] A bank which applies money deposited by an agent to the payment of his personal debts, knowing or having reason to know that it is the money of his principal, is liable therefor to the principal.[91]

Bank without Notice of the Agency.—Where a bank receives from an agent for deposit in his own name the money of his principal without notice of the agency, it is protected if it applies it to a past-due debt of the depositor; the authority so to do ordinarily arises from the making of a deposit, without other directions, where the debt is an overdraft;[92] as, for instance, where the proceeds of a draft indorsed generally to a broker for collection,[93] or where the proceeds of a note delivered to an attorney for collection;[94] are deposited by him in his own name.

90. Application to debt of agent.—O'Conner *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816; Jamison *v.* Howard Lockwood & Co., 26 Misc. Rep. 730, 56 N. Y. S. 1085.

91. Union Stock Yards Nat. Bank *v.* Moore, 25 C. C. A. 150, 79 Fed. 705.

Where a bank, knowing that money deposited with it was the proceeds of insurance on plaintiff's property, accepted checks against such deposit, drawn by the president of plaintiff company payable to his order, and applied the proceeds to the payment of individual notes of such president held by it, plaintiff was entitled to recover such money, since, as defendant took the notes with knowledge of the facts, it was bound to know that no part of such funds could be properly applied to the private debts of the president. James Reynolds Elevator Co. *v.* Merchants' Nat. Bank, 55 App. Div. 1, 67 N. Y. S. 397.

Money of employee deposited by employer as security against employer's dishonesty.—Where a bank declined to receive from an employee a deposit made to secure his employer against the employer's dishonesty, but suggested that the employee hand the amount to the employer, who could deposit it in his open account, the bank is liable as for conversion, if it applies the deposit on the employer's debt. Jamison *v.* Howard Lockwood & Co., 26 Misc. Rep. 730, 56 N. Y. S. 1085.

Account as "Gen'l Ag't," in name of insurance agent.—Where an insurance agent kept a bank account in his name as "Gen'l Ag't" on which he deposited premiums collected for the company and also some private funds, and against which he drew checks signed by himself as "Gen'l Ag't," and the bank knew that his principal business was as agent of said company, held, that the bank must be presumed to know that the account was of a fiduciary nature, and that it could not charge against it the amount of a private loan to said agent. Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693.

92. Bank without notice of the agency.—Kimmel *v.* Bean, 68 Kan. 598, 75 Pac. 1118, 64 L. R. A. 785, 104 Am. St. Rep. 415.

93. Drafts indorsed generally to banks for collection.—Plaintiff indorsed a draft generally to a firm of brokers for collection. They indorsed it for deposit to their own credit with defendant bank, where they kept their account. Defendant forwarded it to another bank for collection, and it was paid the next day. On the day such payment was made, defendant made a loan to the brokers, with an agreement that their deposit was to stand as security therefor. The same day the brokers made a general assignment. On the succeeding day defendant received the proceeds of the draft from its agent, credited it to the account of the brokers, and applied it on their indebtedness. Later on the same day defendant was notified by plaintiff that he was the owner of the draft, and had deposited it with the brokers for collection only. Held, that the title to the proceeds of the draft vested in defendant on payment being made to its agent, and it then became accountable therefor to the brokers, against whom it had the right to hold such proceeds, and the plaintiff could not recover therefor. 9 Misc. Rep. 343, 29 N. Y. S. 1103, reversed in Hutchinson *v.* Manhattan Co., 150 N. Y. 250, 44 N. E. 775.

94. Note delivered to attorney for collection.—Where the owner of a note

Deposit Followed by Word "Agent."—A bank receiving a deposit credited to the depositor, followed after the name by the word "agent," must treat the depositor as the owner of the funds and honor checks properly drawn without concerning itself as to the application made or to be made of the money drawn out; but the bank may not apply the funds to its own benefit under his authority when it belongs to others, and it is accountable to them because the form in which the deposit is made is sufficient to incite inquiry.[95]

Deposit Made without Principal's Authority.—Where an agent or trustee deposited his principal's money in a bank to which he was himself indebted, to his own credit, without authority, the bank can not apply the deposit to the payment of the agent's debt after his death, nor prevent the principal from recovering it, if it can be identified.[96]

Debt to Which Specific Money Only Was to Be Applied.—Where an agent deposits his principal's money, and the bank without his knowledge or authority applies it on a debt owing by him to it, the principal is not declared from recovering from the bank, where the facts showed the debt grew out of a private business contract between them, under which specific moneys only were to be applied, and the funds in question were not within this class.[97]

§ 134 (6b) Application to Debt of Factor or Commission Merchant.—Where depositors are known to the bank to be in the commission business, and not buyers and sellers, but factors—agents to sell, presumably—moneys deposited by them are proceeds of goods consigned to them for sale. Their business being known to the bank, such presumption goes with their deposits; and while not of itself notice, is a circumstance to compel inquiry on the part of the bank in respect to any particular deposit; but this does not imply that a bank receiving deposits from one whom it knows to be in the commission business receives as deposits in trust for an unknown principal. It is not ordinarily bound to inquire whence the depositor received the moneys deposited, or what obligation such depositor is under to the parties. It is only where there gather around any particular deposit, or line of deposits, circumstances of a peculiar nature, which individualize that deposit, or line of deposits, and inform the bank of peculiar facts of equitable cognizance that it is debarred treating the deposit as that of money

delivers it for collection to his attorney, who deposits it in the bank with which he has an account, the bank, having no knowledge of the real owner's claim, may apply the proceeds in discharge of the general balance due on the account. Wood *v.* Boylston Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366.

95. Deposit followed by word "agent."—Silsbee State Bank *v.* French Market Grocery Co., 103 Tex. 629, 132 S. W. 465; Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885; Coleman *v.* First Nat. Bank, 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871.

96. Deposit made without principal's authority.—Burtnett *v.* First Nat. Bank, 38 Mich. 630.

97. Debts to which specific moneys only were to be applied.—Shawnee Nat. Bank *v.* Wooten, 24 Okl. 425, 103 Pac. 714.

belonging absolutely to the depositor. The knowledge which peculiar circumstances casts upon a bank in respect to particular deposits is not limited to the character of the business of the depositor, that of commission merchant, but extends to its results.[98] A bank which takes from a factor, in payment of his individual debt, moneys which it knows equitably belong

98. Application to debt of factor or commission merchant.—Union Stock Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 34 L. Ed. 724, 11 S. Ct. 118. See Armour Cudahy Packing Co. *v.* First Nat. Bank, 69 Miss. 700, 11 So. 28.

Knowledge that funds belong to factor's principal.—Where a bank permitted a factor who deposited with it to overdraw his account, and, after he became insolvent, applied to the payment of his debt to it funds which the bank knew belonged to the factor's principal, it was liable to the principal to the extent of the funds so applied. Judgment (Civ. App.) 77 S. W. 44, reversed. Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885.

In Davis *v.* Panhandle Nat. Bank (Tex. Civ. App.), 29 S. W. 926, the bank was held liable for trust funds applied in payment of the indebtedness of the depositing factor. Interstate Nat. Bank *v.* Claxton (Tex. Civ. App.), 77 S. W. 44, reversed in 97 Tex. 569.

Where a factor has been allowed by a bank to overdraw his account as a method of gaining a line of credit the proceeds of goods consigned to the factor and sold by him and deposited in the bank can not be applied to the payment of such overdraft if the factor be at the time insolvent—the knowledge or want of knowledge on the part of the bank of the factor's insolvency is immaterial. It is the fact of the insolvency, and that the shipper by such application of the deposit must lose his property that determines the right of the consignor to treat the bank as a trustee holding his money for him. Neither is it material that the bank does not certainly know at the time the deposit is made that the money belongs to the consignor and not to the factor. Sutliff *v.* National City Bank, 6 N. P., N. S., 177, 18 O. D. N. P. 354.

In an action by the consignors of stock against a bank for the proceeds of the sales of stock deposited in defendants' bank by factors who had become insolvent, the bank is not liable for the payment in good faith of checks drawn on the account unless it knew or ought to have known that such deposits were the proceeds of the sales of the stock, and the fact that the bank knew that the greater portion of the deposits made by the factors were derived from sales made for their customers will not charge them with notice as to these particular deposits. Smith *v.* City Hall Bank, 13 O. C. C., N. S., 122.

A bank will be charged with constructive notice that deposits made by a firm engaged in selling live stock on commission are proceeds from the sale of stock for their customers; and where it was known that the firm began business without capital, and the failing character of the business is written in the books of the bank in the form of overdrafts of increasing amounts, notice of the insolvency of the firm must be presumed. But it is the fact of the broker's insolvency, rather than knowledge or want of knowledge on the part of the bank, that is material and determines the right of the consignor to treat the bank as a trustee of the proceeds from the sale of his stock deposited by the broker; and where such proceeds are credited by the bank on the overdrafts of the broker, an action for their recovery with interest will lie on the part of the consignor. Sutliff *v.* National City Bank, 6 N. P., N. S., 177, 18 O. D. N. P. 354.

The proceeds of three cars of calves, the property of plaintiff, shipped to commission merchants in Chicago in the name of H., was by them deposited in defendant bank to H.'s credit. H. had an open account with the bank and was indebted to it and the bank applied part of this deposit to the payment of his indebtedness. It was held, irrespective of the question of notice that the money belonged to plaintiff, the bank had no right to appropriate the money to the satisfaction of H.'s debt, in the absence of evidence that the bank had lost its debt due from H. by reason of this transaction. Davis *v.* Panhandle Nat. Bank (Tex. Civ. App.), 29 S. W. 926.

General usage of trade.—"The general usage of trade between banks and cotton factors at St. Louis can not aid

to that factor's consignor and principal, is accountable to the consignor,[99] so long as the money can be traced and identified in the original or in a substituted form.[1]

Deposit as Agent, Bank Having Notice.—Where consignees to whom goods have been sent for sale are insolvent, and deposit the amount due their consignors on such goods in bank, in their own name, adding "Agents," and intend the deposit as a trust fund, with the knowledge of the bank, and draw a check in settlement of the balance due the consignor on cash sales

the plaintiff; because the usage attempted to be set up was not shown to have been known to the defendants or to other owners of cotton; and because it was contrary to law, in that it undertook to alter the nature of the contract between the factors and their principals, which authorizes them to sell, but not to pledge, and in that it would sustain a pledge by a factor of the goods of several principals to secure the payment of his own general balance of account to a third person." Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 30 L. Ed. 573, 7 S. Ct. 460.

99. Union Stock Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 34 L. Ed. 724, 11 S. Ct. 118.

For nine months a Kansas City dealer consigned cattle to a commission merchant in Chicago, and drew for the proceeds through the factor's Chicago bank. The factor's bank account showed steadily increasing overdrafts, notwithstanding which, upon inquiry by the principal's Kansas City banker, his bank stated that he was in good financial standing, and had $50,000 worth of outside property. Thereafter several shipments were made, and the draft for the first car load, having arrived on the same day with it, was presented for payment, which was refused; but the bank failed to notify its Kansas City correspondent thereof for three days, during which time the other consignments were received, sold, and the proceeds deposited, which the bank applied to the payment of the factor's overdrafts. Held, the circumstances were sufficient to notify the bank of the principal's interest in the funds, and it was therefore liable in equity to him for the amount of such deposits. Gillespie *v.* Union Stock Yards Nat. Bank, 41 Fed. 231; Union Stock Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 34 L. Ed. 724, 11 S. Ct. 118.

"The circumstances surrounding the deposits, and the relations between the depositor and the bank, were such as to impart notice to the bank that the beneficial ownership was outside of the legal title. With that notice, it had no right to appropriate the deposits to pay the obligations of the depositor to the bank, but it was properly adjudged liable in a suit in equity, and in that alone, to the claims of the beneficial owner." Union Stock Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 422, 34 L. Ed. 724, 11 S. Ct. 118.

"Although the general relation of a bank to its depositor is that of debtor and creditor, yet when, as in this case, a factor, holding property in trust for his principal, transfers it to a bank which has notice of the capacity in which he holds it, the principal may assert his right in the property against the bank, either by independent suit, or by way of defense to an action by the bank against him. The defendants in this case were therefore entitled to have the proceeds of their property, so received by the plaintiff, applied to the payment of the note in suit. Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693." Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 40, 30 L. Ed. 573, 7 S. Ct. 460.

1. When a commission merchant deposits in a bank money realized from the sale of live stock consigned to him, at a time when his account at the bank is overdrawn, the bank is accountable to the consignor, regardless of the question of notice, and accordingly can not apply the deposit in satisfaction of the merchant's indebtedness. Cady *v.* South Omaha Nat. Bank, 49 Neb. 125, 68 N. W. 358; Cady *v.* South Omaha Nat. Bank, 46 Neb. 756, 65 N. W. 906.

Where factors deposit in bank money received from the sales of their customers' goods, and the factors subsequently become insolvent, the customers may recover from the bank such deposits if they are still in the possession of the bank and they are able to trace and identify them. Smith *v.* City Hall Bank, 15 O. C. C., N. S., 122.

made, the bank must honor the check, and can not appropriate the funds to the individual debt of the consignee, even with their consent; nor does it matter that the money deposited was not the specific proceeds of sale but an amount made up by the consignee and deposited in the trust fund to be substituted for the original proceeds.[2] Nor will it avail the bank at a defense to an action by the consignors, on refusal to pay the check, that the account represented not only the proceeds of plaintiff's goods, but of other persons not before the court.[3]

§ 134 (6c) Funds Deposited by Agent or Broker in Name of Third Person.—Where brokers cause moneys received by them as agents to be deposited with a bank in the name of the third persons, to protect such funds for their principals, the bank is not entitled to set off the amount of the brokers' indebtedness to it against the deposits.[4] It is immaterial that none of the parties entitled to the deposits had claimed them or that the bank was not notified that the depositor held the funds in trust.[5] The discharge of the brokers in bankruptcy does not affect the right of the principal.[6]

2. Deposit as agent bank having notice.—Baker *v.* New York Nat. Exch. Bank, 100 N. Y. 31, 2 N. E. 452, 16 Abb. N. C. 458, 53 Am. Rep. 150, distinguishing in O'Connor *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816.

3. Baker *v.* New York Nat. Exch. Bank, 100 N. Y. 31, 2 N. E. 452, 16 Abb. N. C. 458, 53 Am. Rep. 150.

4. Funds deposited by agent or broker in name of third person.—Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145, reversing 21 Hun 450.

Ship brokers, desiring to protect the freight moneys to be collected by them, caused F., their bookkeeper, to open an account in his own name with the bank in which the same were deposited. Meanwhile the bank received and discounted in the regular course of business a note made by the brokers, charging the amount to said account, and offering to pay over the balance of the account to F. Held, in an action by F.'s administratrix against the bank to recover the whole deposit, that the bank was not entitled to set off the amount due on the note. Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145, reversing 21 Hun 450.

The rule that when moneys held in trust have been mingled with other moneys of the trustee, so as to be indistinguishable, the cestui que trust can not claim a special lien upon the property or funds has no application when the money is held in trust to pay certain creditors, and can not be invoked to uphold the bank's claim to the funds in question in the case at bar, as these moneys have never lost their original character, and have never been mingled with the moneys of the brokers, but on the contrary were specially deposited and set apart in the name of the third persons for a specific purpose, and therefore can not be regarded in any respect as moneys of the brokers by whom they were originally received. Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145, reversing 21 Hun 450.

5. Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145, reversing 21 Hun 450.

A firm of ship brokers, being embarrassed, caused moneys received by them as agents for others to be deposited in a bank in the name of A., their bookkeeper, in order to protect such moneys for those entitled to them. The bank discounted a note for the firm, and upon its becoming due charged it to A.'s account, and refused to pay its amount to him. Held, that A. could maintain an action, and that it was immaterial that none of the parties entitled to the deposits had claimed them, or that the bank had not been notified that A. held the moneys in trust. Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145, reversing 21 Hun 450.

6. Falkland *v.* National Bank, 84 N. Y. 145, reversing 21 Hun 450.

Where a firm deposits in a bank money held by it as agent, in the name of a third person, the discharge of the firm in bankruptcy does not enable the

§ 134 (6d) Funds Placed by Mistake to Credit of Local Dealer.—Where the proceeds of stock shipped by the owner, a local dealer, to a broker are erroneously placed to the credit of a bank for the use of such local dealer, the bank can not apply the same on a previous overdraft by him.[7]

§ 134 (6½) Applying Funds of Agent to Debt of Principal.—A bank which has received money on deposit for an agent, who has a beneficial interest therein, can not disregard that interest and apply the money to a debt due it from the agent's principal.[8]

§ 134 (7) Application of Funds Deposited by One as Trustee—§ 134 (7a) Application to Debts of Trustee.—A bank, dealing with a depositor as trustee, and recognizing funds standing in his name as trust funds, and knowing them to be such, can not appropriate the same to the payment of an individual debt to the bank, as there is no lien for the trustee's personal debts.[9] The only case in which a bank can appropriate the funds of a depositor to a debt due from him in his individual capacity is where it

bank to retain the deposit, and apply the same on an indebtedness due by the firm. Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145.

7. First Nat. Bank *v.* Belt, 29 Ill. App. 194.

M. made an arrangement with C. & Co., a commission firm, by which the net proceeds of all hogs shipped by him were to be deposited in a certain bank for advice and credit of defendant bank. Cattle were thereupon shipped to C. & Co., in the name of plaintiff "per" M., and M. telegraphed C. & Co. in plaintiff's name to "give hog market, and, if cattle sold, give net proceeds," and they replied by telegram to plaintiff, stating the net proceeds. Notwithstanding this notice, C. & Co. deposited the proceeds to the credit of defendant, for the use of M., and defendant, although notified of the error almost as soon as of the deposit, placed the money to the credit of M.'s overdrawn account with it. Held, that defendant was liable to plaintiff for the proceeds in an action for money had and received. First Nat. Bank *v.* Belt, 29 Ill. App. 194.

8. **Applying funds of agent to debt of principal.**—Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804, sequel to National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826.

A bank can not be said to be indebted to a principal on account of money deposited by an agent in his own name, when the circumstances are such that the principal could not recover the amount by action at law, or suit in equity. It is a debt due the agent, and the bank can not set off against such deposit a debt due to it by the principal. Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804, sequel to National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826.

9. **Application to debt of trustee.**—Wagner *v.* Citizens' Bank, etc., Co., 122 Tenn. 164, 122 S. W. 245, following State Bank *v.* McCabe, 135 Mich. 479, 98 N. E. 20, and In re Davis, 119 Fed. 950; and distinguishing the cases of New York County Nat. Bank *v.* Massey, 192 U. S. 138, 48 L. Ed. 380, 24 S. Ct. 199; Clark *v.* Northampton Nat. Bank, 160 Mass. 26, 35 N. E. 108; Lowell *v.* International Trust Co., 158 Fed. 781.

Alabama.—Sayre *v.* Weil, 94 Ala. 466, 10 So. 546, 15 L. R. A. 544.

Arkansas.—Carroll County Bank *v.* Rhodes, 69 Ark. 43, 63 S. W. 68; Boone County Bank *v.* Byrum, 68 Ark. 71, 56 S. W. 532.

Georgia.—American Trust, etc., Co. *v.* Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167.

Illinois.—Where a bank knows that money deposited with it to the general credit of a depositor is held in trust by such depositor, the bank has no right to apply such deposit to the payment of a note due to it from the depositor. Clemmer *v.* Drovers' Nat. Bank, 157 Ill. 206, 41 N. E. 728.

Indiana.—Bundy *v.* Monticello, 84 Ind. 119.

Iowa.—Smith *v.* Des Moines Nat. Bank, 107 Iowa 620, 78 N. W. 238.

Kentucky.—First Nat. Bank *v.* Greene (Ky.), 114 S. W. 322.

Michigan.—Where a bank deals with

does not know that it is a trust fund,[9a] and respectable authorities have

a depositor as a trustee, and recognizes funds standing in his name as trust funds, knowing them to be such, it can not appropriate them to the payment of the trustee's individual indebtedness to the bank. State Bank *v.* McCabe, 135 Mich. 479, 98 N. W. 20.

Missouri.—A bank can not use a deposit to pay the individual debt of a depositor due to it, where it has knowledge that the deposit is held in a fiduciary capacity. Mayer *v.* Citizens' Bank, 86 Mo. App. 422; Moore *v.* First Nat. Bank (Kan.), 135 S. W. 1005; Eyerman *v.* Second Nat. Bank, 84 Mo. 408; Johnson *v.* Payne, etc., Bank, 56 Mo. App. 257; Clark *v.* First Nat. Bank, 57 Mo. App. 277; Payne *v.* First Nat. Bank, 43 Mo. App. 377.

Nebraska.—Globe Sav. Bank *v.* National Bank, 64 Neb. 413, 89 N. W. 1030; Nehawka Bank *v.* Ingersoll, 2 Neb. 617, 89 N. W. 618.

New York.—Meyers *v.* New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. S. 504.

North Carolina.—Hodgin *v.* People's Nat. Bank, 125 N. C. 503, 34 S. E. 709, reversing 124 N. C. 540, 32 S. E. 887; Bank *v.* Clapp, 76 N. C. 482.

Pennsylvania.—First Nat. Bank *v.* Peisert (Pa.), 2 Penn. 277, followed in State Bank *v.* McCabe, 135 Mich. 479, 98 N. W. 20, and In re Davis, 119 Fed. 950.

Tennessee.—Wagner *v.* Citizens' Bank, etc., Co., 122 Tenn. 164, 122 S. W. 245.

United States supreme court.—When a bank has notice of the trust character of a deposit with it, it may not, as against the true owner, appropriate or claim a lien on the deposit for a personal obligation of the trustee depositor to the bank. Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 30 L. Ed. 573, 7 S. Ct. 460; Union Stock Yards Bank *v.* Gillespie, 137 U. S. 411, 34 L. Ed. 724, 11 S. Ct. 118.

Where an account was opened in a depositor's name as the general agent, in which from time to time were deposited funds received by him under such agency, it being known to the bank that he was such agent and that much the larger part of the deposit was collected by him and was deposited for remission to his principal, an insurance company, being so remitted periodically, and that such was the purpose of the account, although he also deposited in the same account from time to time various sums of money received from other sources and drew checks thereon for money applied and paid to his own use, it was held that the bank was chargeable with notice of the equity of the beneficial owner, which can be enforced by bill in equity against the claim of the bank to a lien thereon for an individual debt of the depositor to itself. Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693, followed in Union Stock Yards Bank *v.* Gillespie, 137 U. S. 411, 421, 34 L. Ed. 724.

And when, against a bank account, designated as one kept by the depositor in a fiduciary character, the bank seeks to assert its lien as a banker for a personal obligation of the depositor, known to have been contracted for his private benefit, it must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it is shown to consist, in whole or in part, of funds held by him in a trust relation. Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693.

9a. *Iowa.*—A bank is not liable to the beneficial owner of trust funds deposited with it by the trustee as his own, which it, with the trustee's consent, and without notice of the character of the fund, apply in payment of an individual note of the trustee. Smith *v.* Des Moines Nat. Bank, 107 Iowa 620, 78 N. W. 238.

Trust funds deposited with a bank were by it applied on a matured note of the depositor. An officer of the depositor testified that, before making the deposit, he told the bank's president that the company was collecting money for many people, and must not be placed in the attitude of paying its debts with money of others, specifically mentioning a certain transaction which he wished to protect. The bank president testified that he knew that a part of the company's deposit belonged to others, but that he had no knowledge that any of it, except such part, was not the company's money, nor did he know that any of it belonged to plaintiff. Held, that the bank had no notice that plaintiff had any interest in the funds applied on the note. Smith *v.* Des Moines Nat. Bank, 107 Iowa 620, 78 N. W. 238.

Nebraska.—Globe Sav. Bank *v.* Na-

strongly denied the right to do this.[10]

Title and Character of Funds Not Changed by Deposit.—The character of money deposited in a bank which was held by the depositor in a fiduciary capacity is not changed by being placed to his credit in his bank account. So long as such funds can be traced and distinguished in the hands of the trustee or his assigns they remain subject to the trust.[11]

Deposit as Conversion by Trustee.—A trustee, who deposits in a bank and causes to be credited to his private account, money of a trust fund, without giving any notice that it is not his private property, or making any special agreement in regard to it, thereby converts it to his own use, so that the bank, in the absence of any notice that it is not his private property, may apply it as such.[12]

Mingling Trust and Personal Funds.—Where, in a depositor's account, his own and his trust funds are mingled and checked out, so that the trust money can not be identified, the beneficiary can not maintain conversion against the bank, though a part of the commingled fund was applied to the depositor's debt to the bank.[13]

Effect of Notice.—A bank that appropriates a deposit made by a trustee to the satisfaction of a debt due to it from the trustee in his individual capacity, knowing that it is a trust fund, is liable to the true owner on such

tional Bank, 64 Neb. 413, 89 N. W. 1030.

New York.—Meyers *v.* New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. S. 504.

10. Swift *v.* Williams, 68 Md. 236, 11 Atl. 835; Burtnett *v.* First Nat. Bank, 38 Mich. 630.

When a trustee has deposited money belonging to his beneficiary in a bank to which he is himself indebted, and the bank, without his authority, and in ignorance of the true ownership of the fund, has applied it on the debt, the owner is not debarred from recovering it from the bank if it can be identified. Burtnett *v.* First Nat. Bank, 38 Mich. 630.

11. Effect of deposit on title to and character of funds.—Cady *v.* South Omaha Nat. Bank, 46 Neb. 756, 65 N. W. 906. The same principle was recognized in the following cases. Third Nat. Bank *v.* Stillwater Gas Co., 36 Minn. 75, 30 N. W. 440; Peak *v.* Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; Baker *v.* New York Nat. Exch. Bank, 100 N. Y. 31, 2 N. E. 452, 16 App. N. C. 458, 53 Am. Rep. 150; Whitley *v.* Foy, 6 Jones Eq. 34; Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 114 U. S. 54, 26 L. Ed. 693; Union Stock Yards Bank *v.* Gillespie, 137 U. S. 411, 34 L. Ed. 724, 11 S. Ct. 118.

When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust, as much and as effectually as the money would have done had it specifically been placed by the trustee in a particular repository, and so remained; that is to say, if the specific debt shall be claimed on behalf of the cestuis qui trustent, as between the trustee and his executors and the general creditors after his death. Cady *v.* South Omaha Nat. Bank, 46 Neb. 756, 65 S. W. 906; Pennell *v.* Deffell, 4 De Gex M. & G. 372.

12. Deposit as conversion by trustee.—Smith *v.* Des Moines Nat. Bank, 107 Iowa 620, 78 N. W. 238; School Dist. *v.* First Nat. Bank, 102 Mass. 174; Hatch *v.* Fourth Nat. Bank, 147 N. Y. 184, 41 N. E. 403, citing Justh *v.* National Bank, 56 N. Y. 478; Stephens *v.* Board, 79 N. Y. 183, 35 Am. Rep. 511.

13. Mingling trust and personal funds.—Mayer *v.* Citizens' Bank, 86 Mo. App. 422.

appropriation[14] or conversion.[15]

What is notice to a bank of the fiduciary character of a deposit depends upon the circumstances surrounding the transaction. The same person may be administrator, guardian, agent or other trustee and may also be doing business on his own account. If he mingles all his accounts and makes a general deposit in the bank, the bank acting in good faith, and without notice, may set off any part of such deposit to any indebtedness of his to the bank but if the administrator makes one deposit, the guardian another, the agent a third and the private business man a fourth, the bank, thus having knowledge of the nature of the several deposits, could not pay a debt to one account by drawing upon another.[16] A deposit, followed by the word "agent,"[17] and deposits to the credit of "A., trustee,"[18] "A. as trustee for G.,"[19] have been held to be notice to the bank of

14. Effect of notice.—American Trust, etc., Co. *v.* Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167; Nehawka Bank *v.* Ingersoll, 2 Neb. 617, 89 N. W. 618; Globe Sav. Bank *v.* National Bank, 89 Neb. 1030, 64 Neb. 413.

Where a bank, in whose hands is a trust fund, participates with the trustee in a misapplication of the fund by applying it on the debt of the trustee, the bank is liable to the cestui que trust. Bank *v.* Clapp, 76 N. C. 482.

Pennsylvania.—A., the assignee for the benefit of creditors, deposited in bank the proceeds of the sale of the assigned estate on his individual account. The president of the bank knew that the money belonged to the estate of the assignor. The bank appropriated part of the fund to the payment of certain notes drawn and indorsed by A. as an individual. Held, that A. was entitled to recover the amount so appropriated by the bank. First Nat. Bank *v.* Peisert (Pa.), 2 Penny. 277.

Tennessee.—Wagner *v.* Citizens' Nat. Bank, etc., Co., 122 Tenn. 164, 122 S. W. 245.

15. Globe Sav. Bank *v.* National Bank, 64 Neb. 413, 89 N. W. 1030.

16. What constitutes notice.—Shepherd *v.* Meridian Nat. Bank, 149 Ind. 532, 48 N. E. 346.

17. "Agent."—Silsbee State Bank *v.* French Market Grocery Co., 103 Tex. 629, 132 S. W. 465; Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885; Coleman *v.* First Nat. Bank, 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871.

18. "A., trustee."—Bundy *v.* Monticello, 84 Ind. 119.

In case of sale of town bonds and a deposit of the proceeds in a bank to the credit of "A. B., trustee," held, that the form of deposit was notice to the bank of the real ownership, and the funds could not be appropriated for a debt of the trustee. Bundy *v.* Monticello, 84 Ind. 119.

Where a depositor had two accounts, one in his own name and one to his credit as "J. C. W. trustee," the word "trustee" was not merely descriptive personæ but was a description of the fund deposited. It embodied the existence of a trust and was notice to the bank of the character of the fund. It is unusual and out of the ordinary course of business for a depositor to open two accounts with the same bank or the same firm; and this fact coupled with the fact that the deposit in question was made as trustee, and not in the usual way, was sufficient notice that the fund was held in trust. Shepherd *v.* Meridian Nat. Bank, 149 Ind. 532, 48 N. E. 346; Bundy *v.* Monticello, 84 Ind. 119.

19. "A. as trustee for G."—Defendant deposited money in a bank to the credit of himself as "trustee for G. children." Defendant owed the bankers on his note, and directed them to apply such trust fund towards the payment of the note. They agreed to do that, and to deliver the note as soon as their cashier could make the proper entries. Before the note was delivered, they assigned for the benefit of creditors. Defendant knew nothing of their financial embarrassment, or that they intended to assign. Held, in an action on such note by the assignees, that the agreement to apply such trust

the fiduciary character of the funds; because the form in which it is made is sufficient to excite inquiry; but the addition of the words "administrator,"[20] "agent,"[21] "assignee,"[22] "cashier,"[23] the abbreviation "C. & M." after the name of depositor who was a clerk and master of a chancery court,[24] "collector,"[25] "county treasurer,"[26] "curator,"[27] "receiver,"[28] "trustee," "treasurer,"[29] "or deputy treasurer,"[30] have been held not to be notice either because of the depositor's course of dealing or because they appeared to be mere descriptio personæ.

fund bound the bankers. Sayre *v.* Weil, 94 Ala. 466, 10 So. 546, 15 L. R. A. 544.

Defendant deposited money in a bank to the credit of himself as "trustee for G. children," and had also made another deposit in the name of his wife, and it was understood by the bank that he could check against this deposit. He subsequently checked against the deposit, but his wife had not drawn on it. Defendant afterwards directed the bank to apply the trust fund to the payment of a note which he owed the bank, and also directed that enough be taken from the deposit in the name of his wife to pay the balance due on the note. The bankers agreed to this, and the wife ratified the act of defendant. Held, that this agreement bound the bankers. Sayre *v.* Weil, 94 Ala. 466, 10 So. 546, 15 L. R. A. 544.

Assignees of bank.—The assignees were invested with no higher or more extensive authority than the bankers, but were bound by those agreements equally with the bankers. Sayre *v.* Weil, 94 Ala. 466, 10 So. 546, 15 L. R. A. 544.

20. Administrator.—A person who had transacted business with a bank for eight years maintained during that time but one account in his name "as administrator," and deposited to that account all the money, checks, etc., which he deposited, and drew all of his checks for all purposes, including his private debts, against this account. The bank had no knowledge that the account did not belong to the depositor individually. Held that, notwithstanding the fact that the account was in the depositor's name as administrator, the bank was justified, from his course of dealing, in supposing that it was his individual account, and therefore in drawing therefrom an amount sufficient to satisfy a personal note of the depositor, although in fact the money belonged to the estate of which the depositor was administrator. Sparrow *v.* State Exch. Bank, 103 Mo. App. 338, 77 S. W. 168.

The depositor collected money belonging to heirs of whom he was curator, and deposited it in the bank in his individual name; the bank, however, crediting the same to his account as administrator. Thereafter the depositor drew out a portion of this money, with knowledge that it had been placed to his account as administrator; and, after the account had been nearly exhausted, the bank drew therefrom an amount sufficient to pay a personal note of the depositor. Held that, as against the heirs, the bank was justified in treating the fund as belonging to the depositor individually, and applying a portion of it to the payment of his note. Sparrow *v.* State Exch. Bank, 103 Mo. App. 338, 77 S. W. 168.

21. "Agent."—State Bank *v.* McCabe, 135 Mich. 479, 98 N. W. 20; Patterson *v.* Marine Nat. Bank, 130 Pa. St. 419, 18 Atl. 632, 17 Am. St. Rep. 778; Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

22. "Assignee."—Laubuch *v.* Leibert, 87 Pa. 55.

23. "Cashier."—Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

24. "C. & M."—Comfort *v.* Patterson, 70 Tenn. (2 Lea) 670.

25. "Collector."—Swanton *v.* Bank, 5 Denio 555.

26. "County treasurer."—Mayer *v.* Citizens' Bank, 86 Mo. App. 422; Moore *v.* First Nat. Bank (Kan.), 135 S. W. 1005.

27. "Curator."—Eyerman *v.* Second Nat. Bank, 84 Mo. 408; Mayer *v.* Citizens' Bank, 86 Mo. App. 422; Sparrow *v.* State Exch. Bank, 103 Mo. App. 338, 77 S. W. 168.

28. "Receiver."—Clark *v.* First Nat. Bank, 57 Mo. App. 277; Sparrow *v.* State Exch. Bank, 103 Mo. App. 338, 77 S. W. 168.

29. "Trustee" or "treasurer."—State Bank *v.* McCabe, 135 Mich. 479, 98 N. W. 20.

30. "Deputy treasurer."—Citizens' Bank *v.* Alexander, 120 Pa. 476, 14 Atl. 402.

Extent Where Bank Put upon Inquiry.—A bank which has notice of such facts as put it upon inquiry is bound by every fact which an inquiry would have disclosed.[31]

Assertion of Ownership by Depositor.—Where a debt thus paid was created before the trust funds were deposited, and the fact that such funds were impressed with the trust was known to the bank by entries upon a check which was delivered to it, the fact that the depositor made statements to the bank that he was the real owner of the funds, and the bank acted upon such statements, would not relieve the bank from its liability to the true owner of the funds when it appeared that such statements were not true.[32]

Deposit of Trust Fund for Specific Purpose.—Where, pursuant to agreement between creditors of an insolvent business concern, its funds were deposited in a bank, which was a creditor, for pro rata distribution among all the creditors, and the bank, through its president, consented thereto, and the funds were not to be checked out without the signature of the representative of the committee of the creditors, the funds were trust funds for a specific purpose, with the consent of the bank, and it had no right to set-off in such funds against the concern's indebtedness to it.[33]

Money of Ward to Individual Debt of Guardian.—Where a bank had credited money of wards to the individual account of the guardian, and knew what portion of the funds credited to the guardian belonged to the wards, it could not escape liability for misappropriating the wards' funds to an individual debt of the guardian because their funds were intermingled with hers,[34] but a bank, having previous authority to apply a customer's deposit to his debt, can appropriate it to the debt, though the deposit was in part money of the depositor's ward, the bank having no knowledge of the fact.[35]

Money of Mortgagee Deposited by Mortgagor.—Where a chattel mortgagor intrusted with the mortgaged property to sell has deposited the proceeds of the sale with a bank to his personal account and the bank is notified of the character of the funds so deposited, it can not thereafter apply the deposit to the mortgagor's debt to the bank.[36]

31. **Extent—Bank put upon inquiry.**—Moore *v.* First Nat. Bank (Kan.), 135 S. W. 1005; Eyerman *v.* Second Nat. Bank, 84 Mo. 408.

32. **Assertion of ownership by depositor.**—American Trust, etc., Co. *v.* Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167.

33. **Deposit of trust fund for specific purpose.**—Wagner *v.* Citizens' Bank, etc., Co., 122 Tenn. 164, 122 S. W. 245.

34. **Money of ward to individual debt of guardian.**—First Nat. Bank *v.* Greene (Ky.), 114 S. W. 322.

Where a check for a ward's share of an estate was payable to both the ward and guardian, and the bank where it was deposited knew that the money was the ward's, it can not be relied from liability for applying the proceeds of the check to payment of a debt due it from the guardian individually. First Nat. Bank *v.* Greene (Ky.), 114 S. W. 322.

35. Meyers *v.* New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. S. 504.

36. **Money of mortgagee deposited by mortgagor.**—First Nat. Bank *v.* Eastern Trust, etc., Co., 108 Me. 79, 79 Atl. 4.

Checks Payable to Public Officer.—If checks designated on their face as trust funds, and payable to a public officer as such, are deposited by the latter with directions to apply the proceeds on his individual indebtedness, and the bank so appropriates the same, it is liable to account therefor to the beneficiaries.[37]

Official Deposits to Individual Debts.—A bank can not apply the official deposits of a public officer to the payment of his individual debt, although such debt was incurred to make good such officer's defalcation.[38]

§ 134 (7b) Application to Debts of Beneficiary.—Funds Deposited by Receiver.—Where a bank, which was the creditor of an insolvent estate, received a deposit of funds from the receiver, it could not apply such funds on its claim, nor plead such claims as a set off against the deposit.[39]

Personal Funds of Receiver and of Insolvent Mingled.—In an action by a receiver of a corporation against a bank for money had and received, proof that defendant knew that some of the money on deposit in the receiver's name and appropriated by it belonged to the estate of the corporation was not sufficient to render it liable without proof that the

37. **Checks payable to public officer.**—Shepard *v.* Meridian Nat. Bank, 149 Ind. 532, 48 N. E. 346.

38. When a bank took the note of a county treasurer, placing the amount to credit of his official deposit as a loan to make good his defalcation, and at the same time a check on such deposit to enable the bank to apply the same amount in turn to the discharge of his note, if the credit to his deposit was in effect a loan to make good temporarily a defalcation of the treasurer, the title of the county attached to it, and the application of it by the treasurer's check to pay the note, his individual debt, was unauthorized. But if the intent of the treasurer and the officers of the bank was to fabricate evidence to cancel the former's defalcation, with no intent that any real right in the county should result, the bank would not become liable to the county without some element of estoppel in the transaction. Anderson *v.* Walker, 93 Tex. 119, 53 S. W. 821, affirmed in 49 S. W. 937.

The commissioner's court examining the report of the county treasurer as required by Rev. Stat., art. 867, received from him his check on the bank where he kept his deposit as treasurer, for the full amount due, which, being cashed by the bank, was counted by them, found correct, and again deposited to the credit of that officer as county treasurer; but he had not that amount on deposit before, being short in his accounts, and after the return of the money to the bank it appropriated to itself sufficient of the deposit to cover such shortage. Held, that the money was delivered to the commissioners officially, for the county, and became its property despite any secret intention of the officers of the bank to the contrary; and the bank was estopped to deny that it belonged to the county and could not escape liability for the entire sum by appropriating any part of it to the personal debt owed to it by the treasurer. Skipwith *v.* Hurt, 94 Tex. 322, 60 S. W. 423, reversing 58 S. W. 192.

B. deposited a note with the defendant bank to secure a loan to M., who was county collector, and agreed to pay the note in the event M. did not pay the loan, and in payment thereof M. drew a check on the bank in favor of B. Held, that the appropriation of money collected by M. for taxes and deposited in the bank in his own name to the payment of the check was fraudulent and void, and rendered the bank liable for the money so appropriated, since the debt discharged was that of M., and not of B. Carroll County Bank *v.* Rhodes, 69 Ark. 43, 63 S. W. 68.

39. **Funds deposited by receiver.**—State *v.* Corning State Sav. Bank, 128 Iowa 597, 105 N. W. 159; Wagner *v.* Citizens' Bank, etc., Co., 122 Tenn. 164, 122 S. W. 245.

estate was depleted thereby to the extent of leaving an insufficient sum in the receiver's hands to pay existing liabilities.[40] In an action by a receiver against a bank for appropriating a portion of money on deposit in plaintiff's name as receiver but composed of funds belonging to the receiver individually and also to the estate, the burden was on plaintiff to show that the amount appropriated depleted the trust estate.[41]

§ 134 (8) Applying Individual Deposit to Firm Debt and Vice Versa—§ 134 (8a) Individual Deposit to Firm Debt—§ 134 (8aa) In General.—By the weight of authority, a bank can not apply an individual deposit to the payment of a debt owed to it by a firm of which the depositor is a member,[42] but in Kentucky[43] and Mississippi[44] a bank may apply the individual deposit of a partner to the payment of a firm debt, or when sued for the deposit plead the firm debt as a set-off.

Overdrafts of Firm.—A bank can not charge an overdraft of a firm against the individual account of a member of the firm, though the member, as such may be liable for the overdraft.[45]

Joint Note Partnership Character of Which Unknown to Bank.—One of two joint makers of a note to a bank can not defeat the right of the bank to set off his individual deposit by showing the partnership character of the debt, the bank having no notice thereof.[46]

§ 134 (8ab) Deposit of Partner Continuing Business after Dissolution.—When, after the dissolution of a firm consisting of two partners, one of whom continued in the business, deposits were made in their bank by the continuing partner for his use under the new business arrangement, the bank had no right to appropriate part of the new deposits to the payment of an overdraft of the old firm.[47]

§ 134 (8ac) Deposits by Surviving Partner.—Where a bank knows that a surviving partner is making deposits as such, it is bound to know

40. Personal funds of receiver and of insolvent mingled.—Moore *v.* First Nat. Bank (Kan.), 135 S. W. 1005.

41. Moore *v.* First Nat. Bank (Kan.), 135 S. W. 1005.

42. Applying individual deposits to firm debts and vice versa.—International Bank *v.* Jones, 119 Ill. 407, 9 N. E. 885, 59 Am. Rep. 807.

Indiana.—Shepard *v.* Meridian Nat. Bank, 149 Ind. 532, 48 N. E. 346; Lamb *v.* Morris, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111; Harrison *v.* Harrison, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111.

Louisiana.—A bank can claim no lien or privilege on the deposit of a partner, made on his separate account, in order to set off the same against a debt owing them by the firm. Raymond *v.* Palmer, 41 La. Ann. 425, 6 So. 692, 17 Am. St. Rep. 398.

North Carolina.—Hodgin *v.* People's Nat. Bank, 125 N. C. 503, 34 S. E. 709, 712; S. C., 124 N. C. 540, 32 S. E. 887; Adams *v.* First Nat. Bank, 113 N. C. 332, 18 S. E. 513, 23 L. R. A. 111.

43. *Kentucky.*—Owsley *v.* Bank, 23 Ky. L. Rep. 1726, 66 S. W. 33.

44. *Mississippi.*—Eyrich *v.* Capital State Bank, 67 Miss. 60, 6 So. 615.

45. Overdrafts of firm.—Adams *v.* First Nat. Bank, 113 N. C. 332, 18 S. E. 513, 23 L. R. A. 111.

46. Joint note partnership character of which unknown to bank.—Merchants' Nat. Bank *v.* Maple, 65 Ill. App. 484.

47. Deposit of continuing partner after dissolution.—Richardson *v.* International Bank, 11 Ill. App. 582.

that he is the owner thereof and holds the same in trust for payment of the debts of the dissolved co-partnership, and therefore it can not apply them to payment of a debt to it created by the partnership before its dissolution.[48]

§ 134 (8b) Applying Firm Deposit to Individual Debt—§ 134 (8ba) In General.—Prima facie a bank has no right to charge up to the account of a firm the individual note of one of the partners, and the burden of proof lies on the bank to show the assent of the other partner.[49]

Debt of Deceased Partner.—A bank can not apply deposits on behalf of a firm, whether made during its existence or by a surviving partner, to an individual debt of a deceased partner, evidenced by a note, indorsed by the survivor.[50]

§ 134 (8bb) Dormant Partner Individually Using Trade Name.—Where a dormant partner permits the world to believe that the ostensible partner is alone the owner of the business, a bank, in which the ostensible partner makes deposits under a trade name, has the right to set off an individual note against such account.[51] That an individual negotiated a loan with a bank, and executed the note therefor in a firm name, does not show that the bank dealt with the maker of the note as a partnership, when it was informed and believed that the individual and firm were the same.[52] Where a bank had the right to set off an individual's note against an account kept by him under his tradename, such right passed to the bank's assignee of the note and account, nothing having arisen prior to the transfer to require inquiry on the part of the bank as to a secret partnership between such individual and another, and nothing arising to call for inquiry on the part of the assignee.[53]

§ 134 (9) Moneys Fraudulently Obtained by Depositor.—Where money deposited in a bank was fraudulently obtained by the depositor, the bank may in good faith apply it to the indebtedness of the depositor before it receives notice of the true owners claim;[54] but where a draft was fraudu-

48. **Deposits of surviving partner.**—Hodgin *v.* People's Nat. Bank, 34 S. E. 709, 712, 125 N. C. 503, reversing 124 N. C. 540, 32 S. E. 887.

49. **Applying firm deposit to individual debt in general.**—Coote *v.* Bank, Fed. Cas. No. 3,204, 3 Cranch, C. C. 95.

50. **Debt of deceased partner.**—Hodgin *v.* People's Nat. Bank, 124 N. C. 540, 32 S. E. 887, reversed 125 N. C. 503, 34 S. E. 709, 712.

51. **Dormant partner individually using trade name.**—Willey *v.* Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106.

52. Willey *v.* Crocker-Woolworth Nat. Bank, 141 Cal. 507, 75 Pac. 106.

53. Willey *v.* Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106.

54. **Moneys fraudulently obtained by depositor.**—Plaintiff deposited a stock certificate with a firm who unlawfully used it as collateral security. The money borrowed thereon was in the form of a check, which said firm deposited to its credit in defendant bank. Said firm was also indebted to defendant, which was authorized to apply to the payment of said indebtedness any moneys on deposit to the credit of said firm. Held that, as against plaintiff, defendant had the right to apply the moneys collected on the check to the firm's indebtedness, even after the firm had assigned. Hatch *v.* Fourth

lently obtained from a third person by a depositor and placed to his credit in a bank, the bank has no right to apply the proceeds to the overdue account of the depositor, where it did not part with value or change its position on faith of such draft, before notified of the fraud.[55]

§ 134 (10) Application after Assignment of Deposit—§ 134 (10a) In General.—A bank has no right to apply a deposit to the depositor's debt after being notified of an assignment thereof, but until such notice it can appropriate the deposit to the payment of a sum due it from the assignor.[56]

Debts Not Matured.—Notice to a bank of the assignment by a depositor is necessary only to prevent the bank from parting with the funds on the faith of the deposit still belonging to him; and therefore a failure to give such notice gives the bank no right to apply a deposit to the depositor's debt which falls due after the assignment.[57]

§ 134 (10b) Assignment for Benefit of Creditors—§ 134 (10ba) In General.—A bank holding a debt against an insolvent who makes a statutory assignment has the right to appropriate a deposit with it of the insolvent to the liquidation of its debt, since it is entitled to any defense that would have been good against the assignor.[58]

Nat. Bank, 147 N. Y. 184, 41 N. E. 403, affirming 82 Hun 515, 31 N. Y. Supp. 530.

55. M., being insolvent, by false and fraudulent misrepresentations induced the W. Bank to send to the G. Bank, for credit to M., its draft in payment of a fraudulent check issued by M. to the G. Bank for collection and deposit. The W. Bank discovered the fraud on the day the draft was sent, and notified the G. Bank of such fraud on the evening of that day, and while the draft was yet unapplied, and in the original envelope, and at the same time demanded a return to it of said draft. Prior to such notice, and on the same evening, the G. Bank had determined, at a meeting of its directors, to apply said draft on its overdue promissory note against M. by crediting said draft as a deposit to M.'s account, and itself making a check against such deposit. The G. Bank refused to surrender said draft to the W. Bank, but applied it the next morning upon M.'s overdue note in the manner previously determined upon. M. did not direct such application on his note. Held, that the application by the G. Bank of the proceeds of the draft on its overdue note was an unlawful conversion of the draft. Gibsonburg Banking Co. v. Wakeman Bank Co., 10 O. C. D. 754, 20 O. C. C. 591.

56. **Application after assignment of deposit.**—A. owed the defendant. He deposited with the defendant about half the amount of the debt, but neither he nor the defendant appropriated the money as a part payment. Then the defendant obtained judgment for the full debt. Afterwards A. assigned the claim on account of the deposit to the plaintiff. Held, that after that assignment the defendant could set off the judgment against the deposit, even if it could not appropriate the deposit as a part payment. Marsh v. Oneida Cent. Bank (N. Y.), 34 Barb. 298.

Where it was agreed that an agent should receive the proceeds of all sales of tobacco at a warehouse, and procure the money to pay for all purchases made, he to be reimbursed before anything should be due the principal, and such agent deposited a sum in a bank in his own name as cashier, instructing the bank to pay the funds to no one else, and subsequently the balance due on the bank account was assigned by the principal to the agent, the bank was not entitled, as against the agent, to set off against the balance a sum due it from the principal. Nolting v. National Bank, 99 Va. 54, 37 S. E. 804.

57. **Debts not matured.**—Beckwith v. Union Bank, 6 N. Y. Super. Ct. 604.

58. **Assignment for benefit of cred-**

§ 134 (10bb) Debts Not Matured.—See ante, "Applying Deposits to Debts Not Matured," § 134 (*2*). In those states in which a bank may apply deposits to debts of depositors which have not yet matured, it may apply a deposit to a debt of an insolvent depositor who has made an assignment for the benefit of creditors, although such debt was not due,[59] but in those states in which a bank can not set off against a deposit a debt of the depositor which has not matured, it can not, after an assignment for the benefit of creditors, set off against the deposit of an insolvent depositor debts owing to it by him.[60]

§ 134 (11) Right of Surety, Indorser or Guarantor to Have Deposit of Principal Applied.—While some courts seem to have gone to the extent of holding that, where there are indorsers or sureties, it is the imperative duty of a bank to apply the deposit of the maker to the payment of the note, otherwise the indorser or surety will be discharged,[61] the decided weight of authority is to the effect that a bank holding a note, is under no legal duty to an indorser or surety thereon to appropriate a deposit of the maker in the bank to its payment, and its failure to do so

itors.—Where plaintiff's assignor had indorsed notes held by him, and delivered them to a bank, which advanced him a sum of money thereon, but credited him on its books with the amount of the notes as a deposit, on his assignment for the benefit of creditors the bank was not compelled to pay the amount so credited, and share with other creditors, but could set off the notes against such amount. Templeman *v.* Hutchings, 24 Tex. Civ. App. 1, 57 S. W. 868, affirmed in 93 Tex. 650, no op.

Notes were discounted for a dealer, who deposited collaterals with the bank. Meanwhile the dealer made an assignment of which no notice was given to the bank, and another note made payable at the bank was presented and paid. The collaterals were afterwards collected, leaving a balance over the amount of the notes discounted. Held, that the bank could set off the last note paid in an action for the balance. Griffin *v.* Rice (N. Y.), 1 Hilt. 184.

59. Debts not matured.—Where a bank made a loan secured by indorsed notes, on insolvency of the borrower it could set off the loan against a deposit, though the loan was not due when the borrower made an assignment. Stolze *v.* Bank, 67 Minn. 172, 69 N. W. 813.

Where a voluntary assignee permits bank deposits to remain in the assignor's name, without suing therefor, until after the maturity of the notes held by the bank, on which the assignor is liable as indorser, the bank may set off the deposits against the notes, under Gen. St., c. 202, § 14, under which the right of set-off is to be determined by the state of the claims at the commencement of the action. Nightingale *v.* Chafee, 11 R. I. 609, 23 Am. Rep. 531.

60. A bank can not set off against the deposit of an insolvent depositor notes owing to it by him which had not matured at the time of his assignment in insolvency. Homer *v.* National Bank, 140 Mo. 225, 41 S. W. 790.

A. failed, and made an assignment. At the time of his failure he had money on deposit in a bank, where a bill of exchange, on which he was indorser, had been discounted for him. This bill matured a few days after the assignment, but before the bank had notice of it, and was protested for nonpayment. In an action by A.'s assignee against the bank for the money on deposit, held, that the bank could not, either at common law or by Code 1849, § 112, set off the amount of the bill against the deposit. Beckwith *v.* Union Bank, 9 N. Y. 211.

61. Right of surety, indorser or guarantor to have deposit of principal applied.—Bank *v.* Turney (Tenn.), 52 S. W. 762, commenting on Dawson *v.* Real Estate Bank, 5 Ark. 283, and McDowell *v.* Bank (Del.), 1 Har. 369.

A security on a note to a bank may defend by showing that, after the note

does not discharge the indorser or surety.[62] The general rule accordingly is, that where moneys drawn out and moneys paid in, or other debts and credits, are entered, by the consent of both parties, in a general banking account of a depositor, a balance may be considered as struck at the date of each payment or entry on either side of the account; but where by express agreement, or by a course of dealing, between the depositor and the banker, a certain note or bond of the depositor is not included in the general account, any balance due from the banker to the depositor is not to be applied in satisfaction of that note or bond, even for the benefit of a surety thereon, except at the election of the banker.[63] The right of a

became due, the bank held cash belonging to the principal as a general deposit, which it failed to apply on the note. Dawson *v.* Real Estate Bank, 5 Ark. 283.

Where a bank holds a note due and payable from a depositor, and fails to apply the deposit to payment thereof, the indorser will be discharged. McDowell *v.* Bank (Del.), 1 Har. 369.

62. Bank *v.* Turney (Tenn.), 52 S. W. 762.

In an action by a bank against sureties on a note discounted by it, it is no defense that before maturity the principal directed the bank to pay the note at maturity out of his general deposit in the bank, that the bank failed to do so, and subsequently allowed the principal to check the money out of the bank, although it knew of the suretyship at all times, and the deposit was sufficient to pay the note. Second Nat. Bank *v.* Hill, 76 Ind. 223, 40 Am. Rep. 239.

The fact that the principal on a note payable to a bank had after its maturity, funds on deposit in the bank exceeding the sum due, and the bank did not appropriate the same to its payment, did not discharge the surety. Voss *v.* German American Bank, 83 Ill. 599, 25 Am. Rep. 415.

Maine.—**Part of proceeds of note remaining to credit of principal debtor at maturity.**—A note being discounted by a bank for the benefit of an indorser, and the amount passed to his credit as a deposit, and a part remaining when the note becomes due, it is optional with the bank to retain the same in part payment of the note or not. But a neglect to do so can not affect the right to recover the whole amount of the note from another indorser. Ticonic Bank *v.* Johnson, 21 Me. 426.

Massachusetts.—In National Mahaiwe Bank *v.* Peck, 127 Mass. 298, 301, 34 Am. Rep. 368, the court said: "But of the bank instead of so applying the balance, sees fit to allow him (the depositor) to draw it out, neither the depositor nor any other person can afterwards insist that it should have been so appropriated. The bank being the absolute owner of the money deposited, and being a mere debtor to the depositor for the balance of account, holds no property in which the depositor has any title or right of which a surety on an independent debt from him to the bank can avail himself by use of subrogation."

Tennessee.—Bank *v.* Turney (Tenn.), 52 S. E. 762, quoting the preceding paragraph from National Mahaiwe Bank *v.* Peck, 127 Mass. 298, 34 Am. Rep. 368, with approval.

One learning that a third person was overdrawn at a bank went to the bank, and executed a note, which he signed with his own name and that of such person, to cover the overdraft. Later such person deposited considerable sums of money, but drew them out again, and died having overdrawn at the bank. Held, that the bank was under no legal duty to apply the deposits to payment of the note. Bank *v.* Turney (Tenn.), 52 S. W. 762.

West Virginia.—Merchants', etc., Bank *v.* Evans, 9 W. Va. 373.

United States.—**Maker of collateral note to secure demand note.**—Where a bank discounts a demand note, and receives another negotiable instrument as collateral, the maker of the collateral note is not released from liability to the bank by a failure of the bank to attempt to collect the demand note when its maker has sufficient on deposit to meet it. Third Nat. Bank *v.* Harrison, 10 Fed. 243, 3 McCrary 316.

63. National Mahaiwe Bank *v.* Peck, 127 Mass. 298, 34 Am. Rep. 368.

Florida.—The right of a bank to apply a depositor's credit balance to the

bank to appropriate the balance of account to the satisfaction of such a debt is not in the nature of a lien but of a set off or of an application of payments, neither of which in the absence of express agreement or appropriation, will be required by the law to be so made as to benefit the surety.[64]

The cases from Pennsylvania hold that the duty which a bank holding a note owes to an indorser or surety thereon to appropriate a deposit in the bank to the payment of the note, exists only where the maker of the note at its maturity has a deposit sufficient to pay it, and not previously appropriated to any other purpose.[65]

The Kentucky courts follow the doctrine laid down in the cases from Pennsylvania.[66]

satisfaction of a debt due it by such depositor is in the nature of a set-off or application of payments, which will not be required by law, so as to benefit a surety liable for such debt, where there is no instruction from the depositor to so apply it, nor agreement between him and the bank that it shall be done, and where the debt has not been included in the account between the bank and the depositor by the course of dealing between them. Camp *v.* First Nat. Bank, 44 Fla. 497, 33 So. 241, 103 Am. St. Rep. 173.

Tennessee.—Bank *v.* Turney (Tenn.), 52 S. W. 762, quoting and stating that: "This statement of the rule seems, to be in harmony with our cases of Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669, and McGill *v.* Ott, 78 Tenn. (10 Lea) 147, and the other cases cited by Justice Fulks in Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669."

64. National Mahaiwe Bank *v.* Peck, 127 Mass. 298, 34 Am. Rep. 368; Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227; Bank *v.* Turney (Tenn.), 52 S. E. 762. See Ticonic Bank *v.* Johnson, 21 Me. 426; Second Nat. Bank *v.* Hill, 76 Ind. 223, 40 Am. Rep. 239; Voss *v.* German American Bank, 83 Ill. 599, 25 Am. Rep. 415; Corn Exch. Nat. Bank *v.* Locher, 151 Fed. 764; Webb *v.* Smith, 30 Ch. D. 192.

Where stocks delivered by plaintiffs to a firm of stockbrokers as margin security were lawfully pledged by the firm to a bank to secure a note, plaintiffs were not entitled, on failure of the firm, to have its assets marshaled, and the balance of its deposit in the bank remaining after payment of the note applied to the exoneration of the stock. Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227.

65. *Pennsylvania.*—First Nat. Bank *v.* Peltz, 176 Pa. 513, 35 Atl. 218, 36 L. R. A. 832, 53 Am. St. Rep. 686; German Nat. Bank *v.* Foreman, 137 Pa. 474, 21 Atl. 20; Mechanics', etc., Bank *v.* Seitz, 150 Pa. 632, 24 Atl. 356, 30 Am. St. Rep. 853.

Where a bank discounted the note of its cashier, payable at its banking house, and at its maturity the cashier has a general cash deposit in the bank, exceeding the amount of the note, not applicable to any specific purpose, the bank is bound to charge the note against the deposit, and, if it fails so to do, an indorser thereon will be discharged. Commercial Nat. Bank *v.* Henninger, 105 Pa. 496.

A bank may refuse to apply a deposit of the maker of a note after maturity so as to relieve the indorser. Huckestein *v.* Herman (Pa.), 1 Walk. 92.

It is not required of the bank holding a note, and at the same time funds of the maker sufficient to meet the said note, to apply the said fund in payment, and, failing to do so, lose the right of recovery against the indorser. Such requirement exists only when, at maturity of the note, the bank has sufficient funds of the maker. Farmers' Nat. Bank *v.* Marshall, 9 Pa. Super. Ct. 621.

66. Pursifull *v.* Pineville Banking Co., 97 Ky. 154, 30 S. W. 203.

Where a bank owns and holds a note, and, at the maturity thereof, holds on general deposit for the maker a sum sufficient to pay the note, which it permits to be entirely checked out, and the maker afterwards becomes insolvent, a surety on the note is not liable. Pursifull *v.* Pineville Banking Co., 97 Ky. 154, 30 S. W. 203.

In Pursifull *v.* Pineville Banking Co., 97 Ky. 154, 30 S. W. 203, the court said: "Mr. Morse in his text-book

In West Virginia the courts hold that an application of a depositor's balance to payment of the joint note of the depositor, as principal, and others, as securities, to the bank, would violate the understanding between the parties implied by the law, unless such application was directed by the parties.[67]

General and Special Deposits.—The duty which a bank holding a note owes to an indorser or surety thereon to apply the maker's deposit to the payment of the note applies only to general deposits and not to special deposits or deposits for a special purpose.[68]

Deposit Insufficient to Pay Debt.—The duty which a bank holding a note owes to an indorser or security thereon to appropriate a deposit belonging to the maker to the payment of the note does not apply to a deposit which is insufficient to pay it;[69] aliter in Ohio.[70]

says: 'If a note payable to a bank is sent there for collection and the bank fails to apply an unappropriated deposit of the maker to its payment, the endorser is discharged. When the creditor has within his control the means of paying the debt by use of property of the debtor properly appropriated to the purpose, and does not use the opportunity but gives up the property, the surety is discharged.' 2 Morse, Banks (3d Ed.), § 562."

In Pursifull *v.* Pineville Banking Co., 97 Ky. 154, 30 S. W. 203, the court in reference to the case of Second Nat. Bank *v.* Hill, 76 Ind. 223, 40 Am. Rep. 239, quotes from 2 Morse, Banks (3d Ed.), § 563, criticising that case, as follows: "If the bank, at the maturity of a note held by it, holds funds that, by the scratch of a pen could apply upon the note, thus securing it, it is difficult to see why neglecting so easy a means of security is not as improper as that of collateral expressly designated for the purpose of securing the note."

67. A principal in a note for $6,000, made by himself and sureties, offered it for discount, and the bank discounted for $4,000 only, the cashier indorsing it "for $4,000, and should be so read." Held, that where the note was not paid at maturity, general deposits made by the principal afterwards can not, without his direction to so apply them, be regarded as payments on the note. Merchants', etc., Bank *v.* Evans, 9 W. Va. 373.

68. General and special deposits.—*Kentucky.*—Faulkner *v.* Cumberland Valley Bank, 14 Ky. L. Rep. 923; Pursifull *v.* Pineville Banking Co., 97 Ky. 154, 30 S. W. 203; Commercial Nat. Bank *v.* Henninger, 105 Pa. 496.

Where, at the maturity of a note payable to a bank, the principal, who is then insolvent, has on deposit in the bank money enough to pay the note, the right of the sureties on the note to have the deposit appropriated to the payment of the note depends on the character of the deposit, and hence the sureties must prove that the deposit was a general, and not a special one. Faulkner *v.* Cumberland Valley Bank, 14 Ky. L. Rep. 923.

If before the maturity of a note held by a bank against a depositor, an agreement is made by which the bank agrees to hold the deposit for a specific purpose, and not charge the note against it, the bank will be regarded as a trustee, and the deposit special; and in such case, in the absence of fraud or collusion, an indorser of the note is not entitled to require the application of the deposit to the payment of the note on maturity. National Bank *v.* Speight, 47 N. Y. 668.

69. Deposit insufficient to pay debt. —*Pennsylvania.*—First Nat. Bank *v.* Shreiner, 110 Pa. 188, 20 Atl. 718; First Nat. Bank *v.* Peltz, 176 Pa. 513, 35 Atl. 218, 36 L. R. A. 832, 53 Am. St. Rep. 686.

70. *Ohio.*—An insolvent national bank held a draft which it had discounted for, and carried the proceeds to the credit of, the drawer, for whose accommodation it had been accepted by plaintiff. The draft was protested for nonpayment, and the liability of the drawer made absolute. Plaintiff was the drawer's surety only. When the bank passed into the control of a receiver, the drawer, who afterwards became insolvent, had standing to his credit on his deposit account with the bank a sum less than the amount of

Deposit Made after Maturity of Debt.—The duty which a bank holding a note owes to an indorser or surety thereon to appropriate a deposit of the maker to the payment of the note, does not apply to a deposit made after the maturity of the note,[71] in the absence of an express agreement, but it may so apply it or not at its discretion; aliter in Kentucky.[72]

Deposit by Prior Indorser.—The duty which a bank holding a note owes to an indorser or surety thereon to appropriate a deposit of the maker in the bank to payment of the note does not apply to a deposit made by a prior indorser though he be in fact the principal debtor and the maker be an accommodation maker.[73]

Where Depositor Owes Bank Several Debts.—Where, at the time an insolvent bank passed into the hands of a receiver, one of its depositors owed it several debts, evidenced by notes on which different persons were obligors, a surety on one of the notes had no right to plead as a set-off the amount which the principal had on deposit at the time the receiver was appointed; the bank having the right to apply the deposit to the payment of such of the depositor's debts as its interest may require.[74]

§ 134 (12) Right of Acceptor of Bill to Have Deposit of Drawer Applied.—A bank, being the payee and owner of an accepted bill, is under no duty to the acceptor to apply funds which the drawer has with it on general deposit to payment of the bill.[75]

the draft. Held, that plaintiff, as surety, was entitled in equity to have set off against his liability as acceptor of the draft the amount due his principal on the deposit account with the bank. Armstrong *v.* Warner, 49 O. St. 376, 31 N. E. 877, 17 L. R. A. 466.

71. Deposit made after maturity of debt.—First Nat. Bank *v.* Peltz, 176 Pa. 513, 35 Atl. 218, 36 L. R. A. 832, 53 Am. St. Rep. 686; Bank *v.* Turney (Tenn.), 52 S. W. 762.

Where, at the maturity of a note held by a bank, the maker's deposit is insufficient to meet it, the bank owes no duty to the indorser to apply the maker's subsequent deposits to the note. People's Bank *v.* Legrand, 103 Pa. 309, 49 Am. Rep. 126.

A bank is not bound, in favor of a guarantor, to apply on a note held by it deposits made by the maker after its maturity, nor a balance then due him, which, with the subsequent deposit, does not equal the sum due on the note. First Nat. Bank *v.* Shreiner, 110 Pa. 188, 20 Atl. 718.

A bank holding a depositor's matured note after protest and notice to an indorser thereon is not obliged to apply a general deposit subsequently made by the maker, sufficient to pay the note, in payment thereof, in the absence of an express agreement, but it may so apply it or not, at its discretion. National Bank *v.* Smith, 66 N. Y. 271, 23 Am. Rep. 48, affirming 5 Hun 183.

72. *Kentucky.*—Where the makers of notes payable to a bank deposited money more than sufficient to satisfy their notes to their general deposit account in the bank, the bank owed to a surety on such notes the duty to apply the deposit in satisfaction of the notes, though it was not made until after the notes matured. Bank *v.* Hardesty, 28 Ky. L. Rep. 1285, 91 S. W. 729.

73. First Nat. Bank *v.* Peltz, 176 Pa. 513, 35 Atl. 218, 36 L. R. A. 832, 53 Am. St. Rep. 686.

74. Where depositor owes bank several debts.—Armstrong *v.* Helm, 13 Ky. L. Rep. 460.

75. Right of acceptor of bill to have deposit of drawer applied.—Flournoy *v.* First Nat. Bank, 79 Ga. 810, 2 S. E. 547.

In an action by a bank, as the holder of a bill, against the acceptor thereof, it is no defense that, after maturity of the bill, the drawers and indorsers had on deposit with plaintiff a balance equal to the amount of the bill; as plaintiff was not bound, even if it had

§ 134 (13) Application of Deposit of Public Officer.—The fact that a deposit in the name of a county officer is followed by words designating his office does not earmark the funds as county funds, so that the bank may apply the account to the discharge of an overdraft of the county.[76]

Debt of Officer.—When a sheriff and tax collector, finding himself in arrears with the state on his tax account, borrows a sum from the bank to cover the deficit and gives his note therefor, the bank upon the maturity of the note, has no right, without the sheriff's consent, to apply money on deposit, known to be collections of taxes, to the payment of the note.[77]

Appropriation to Payment of Void Bonds.—Where funds raised by a county tax are deposited with a bank to pay certain bonds of the county, the appropriation of the money to the payment of void bonds, by the bank, with notice of their illegal character, renders it liable for such misappropriation.[78]

§ 135. Set-Off by Depositor[78a]—§ 135 (1) Nature and Extent Generally—§ 135 (1a) General Rule.—Where a depositor is indebted to a bank he can set off his deposit against a debt due from him to the bank in the same right or capacity, on the principle that mutual claims which are

the right, to apply such balance to the payment thereof. Citizens' Bank *v.* Carson, 32 Md. 191.

A national bank closed its doors, and passed into the hands of a receiver before the maturity of an accepted bill of exchange which it had discounted for the benefit of the drawer, and who was, therefore, the principal debtor. At the time of the bank's failure the drawer had some money on deposit with it, though he afterwards became insolvent. Held, that the acceptor was entitled in equity to set off the drawer's deposit against his liability on the bill of exchange. Armstrong *v.* Warner, 49 O. St. 376, 31 N. E. 877, 17 L. R. A. 466.

A bank, to which a bill is indorsed by the drawer, for value, without notice and before maturity, and which, instead of looking to the indorser, on protest thereof for nonpayment, sues the acceptor in another state, can not recover of him, it having received notice, before trial at least, that there was a failure of consideration for the acceptance, and it having had, at the time of such notice, deposited with it by the indorser a sufficient amount, which it could have applied to payment of the indorser's liability. Van Winkle Gin, etc., Co. *v.* Citizens' Bank, 89 Tex. 147, 33 S. W. 862.

76. Application deposit by county officer to debt owing by county.—Plaintiff had deposited money in defendant's bank in his name as "deputy treasurer." In an action to recover the balance, defendant offered to show that one M. was county treasurer, and kept his account in defendant's bank; that he overdrew said account during the time of plaintiff's deposit; and that that deposit had been applied to extinguish the overdraft. Held properly excluded. Although, in fact, the money belonged to the county, yet the fact that it was deposited in plaintiff's name as "deputy treasurer" did not earmark it as county funds, and defendant had no right to apply it on a county overdraft. Citizens' Bank *v.* Alexander, 120 Pa. 476, 14 Atl. 402.

77. Debt of officer.—Boyd *v.* Bell, 69 Tex. 735, 7 S. W. 657.

78. Appropriation to payment of void bonds.—Howard *v.* Deposit Bank, 80 Ky. 496, 4 Ky. L. Rep. 406.

78a. Depositor in savings bank, see post, "In General," § 299.

Set-off by bank, see ante, "Application of Deposits to Debts Due Bank or Set-Off by Bank," § 134.

Setting off debts owing bank by drawer, see post, "Setting Off Debts Owing to Bank by Drawer," § 140 (6).

Right of debtor of insolvent national bank to set off deposit, see post, "Statutory Provisions," § 234; "Deposits in General," § 263.

Right of debtor of savings bank to set off deposit, see post, "Insolvency and Receivers," § 309.

Right of set-off in action for overdraft, see post, "Overdrafts," § 150.

between creditor and debtor may be set off against each other.[79] Demands due to or from a bank and a depositor are considered due in the same right, where the bank may sue or the depositor be sued, in his own name, without setting out or specifying any representative character, and where the depositor has a lien upon, or legal right to, the application or distribution of the fund when collected.[80] In an action by a bank on a note, defendant depositor should be credited with the amount due him on deposit with the bank,[81] but not by dividends of stock or other profits.[82]

§ 135 (1b) Descriptio Personæ.—The addition of words to the name of a depositor which are mere descriptio personæ does not alter the right of the depositor to have mutual claims that are due the bank and himself set off against each other;[83] as, for instance, appending to the name of a depositor the word "assignee,"[84] or the abbreviation "C. & M." after the name of one who was a clerk and master of a chancery court.[85]

79. **General rule.**—Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902; St. Paul, etc., Trust Co. *v.* Leck, 57 Minn. 87, 5 N. W. 826, 47 Am. St. Rep. 516; Laubach *v.* Leibert, 87 Pa. 55.

80. Miller *v.* Franklin Bank (N. Y.), 1 Paige 444.

81. **Action on note.**—Equitable Bank *v.* Claassen, 3 Misc. Rep. 148, 23 N. Y. S. 310, 51 N. Y. St. Rep. 503; S. C., 3 Misc. Rep. 151, 23 N. Y. S. 311.

Under Kirby's Dig., §§ 6098, 6101, providing that a set-off can only be pleaded in an action founded on contract, or must be a cause of action arising on contract, or ascertained by a decision of court, a depositor may set off his general deposit against a note given by him to the bank in an action by the bank thereon. Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902.

82. **Dividends of stock or other profits.**—A defendant can not retain in his hands the amount specified in the promissory note on which the action is brought by a bank, although the bank may have in its possession money, dividends of stock, or other profits, to the same or greater amount, belonging to the defendant. He can only claim to have deducted from the note money or other funds in the possession of the bank, belonging to him. Whittington *v.* Farmers' Bank (Md.), 5 Har. & J. 489.

83. **Descriptio personæ.**—Miller *v.* Franklin Bank (N. Y.), 1 Paige 444; People *v.* German Bank, 116 App. Div. 687, 101 N. Y. S. 917; Laubach *v.* Leibert, 87 Pa. 55; Comfort *v.* Patterson, 70 Tenn. (2 Lea.) 670.

84. **The word "assignee," appended to the name of a depositor** in his account, does not identify the deposit as belonging to any particular fund. It is the individual property of the depositor, and he is therefore entitled to use it as a set-off against his indebtedness to the bank. Laubach *v.* Leibert, 87 Pa. 55.

85. **"C. & M."**—A bank, at the time of assigning its assets in trust for creditors, was indebted to a depositor $5,517 upon an account kept in his name as "C. & M.," he being clerk and master of a chancery court. Part of this sum was his individual money, part was costs earned, to which he was entitled, and part was funds received officially, for which he was accountable as clerk and master; all entered to his credit without discrimination. Held, that the addition "C. & M." was mere descriptio personæ, and so much of the deposit as belonged to him individually could be set off against a debt due by him personally to the bank by note in the trustee's hands. Comfort *v.* Patterson, 70 Tenn. (2 Lea) 670.

The presumption, in absence of all evidence to the contrary, would be that the individual interest of the depositor was sufficient to set off such balance. In such case, it seems, the title and control of the deposit would be so far in the depositor personally, that the addition of his official title would be a mere descriptio personæ, not altering the rights of either party. Comfort *v.* Patterson, 70 Tenn. (2 Lea.) 670; State *v.* Copeland, 96 Tenn. 296, 34 S. W. 427, 31 L. R. A. 844, 54 Am. St. Rep. 840.

§ 135 (1c) Deposit by Attorney or Public Officer.—A public officer who has deposited money in a bank in his official capacity, for which deposits he may recover in his own name,[86] or an attorney or solicitor who has deposited moneys collected for different clients in one general account in his name as attorney or solicitor to be drawn out on his own check when called for,[87] may set off such deposits against a demand held by the bank against him individually. In neither case could the bank object to a set-off of the money against a demand in favor of the bank, unless it had notice from the persons having equitable claims thereon not to pay it. Neither does the right of set-off depend upon the question whether the depositor was personally liable in case of loss by the failure of the bank.[88]

§ 135 (1d) Deposit of Trustee.—See post, "Funds and Deposits Which May Be Set-Off," § 135 (3c).

§ 135 (1e) Partnership Deposit.—See post, "Partnership Deposit against Individual Debt and Vice Versa," § 135 (3cg).

§ 135 (2) Appropriation by Check to Payment of Indebtedness.—Where one who is indebted to a bank, and has a deposit therein, draws checks upon the bank, which, upon their face, indicate that they are drawn to pay his indebtedness to the bank, these checks operate as an appropriation of the fund on deposit from the time of presentment, and the bank can not refuse to accept them in payment of the debt of the depositor.[89]

§ 135 (3) Right of Depositor in Insolvent Bank—§ 135 (3a) In General.—A depositor indebted to an insolvent bank may, when sued to recover the money due from the bank, set off deposits due from the bank at the time of its insolvency.[90]

§ 135 (3b) Debts and Claims Which May Be Set Off—§ 135 (3ba) Direct and Ascertained Indebtedness.—Where the assets of a bank are assigned for the benefit of creditors, only the direct and ascertained indebtedness of depositors can be properly set off against their ascertained claims for shares in the money to be distributed.[91]

86. **A public officer.**—Miller *v.* Franklin (N. Y.), 1 Paige 444; People *v.* German Bank, 116 App. Div. 687, 101 N. Y. S. 917.

87. **Attorney.**—Miller *v.* Franklin Bank (N. Y.), 1 Paige 444; People *v.* German Bank, 116 App. Div. 687, 101 N. Y. S. 917.

88. Miller *v.* Franklin Bank (N. Y.), 1 Paige 444.

89. **Appropriation of deposit by check to payment of indebtedness to bank.**—Laubach *v.* Leibert, 87 Pa. 55.

90. **Right of depositor in insolvent bank.**—Bernstein *v.* Coburn, 49 Neb. 734, 68 N. W. 1021; Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

91. **Direct and ascertained indebtedness.**—In re Humboldt, etc., Trust Co., 3 Pa. Co. Ct. R. 621. See, also, Norwood *v.* Interstate Nat. Bank, 92 Tex. 268, 48 S. W. 3, reversing 45 S. W. 927.

A. deposited a sum of money with B., a private banker, receiving a certificate that it would be paid to order,

§ 135 (3bb) Matured and Unmatured Debts.—Matured Debts.—A depositor is entitled to set off his deposit against his indebtedness to an insolvent bank where both claims are due.[92] When the deposit is not due, but the debt is overdue; the receiver can not set off the bank's debt against the deposit of an insolvent depositor.[93]

Fraction of Day.—The day will not be divided into fractions to deprive a depositor of the right of offset.[94]

A Depositor in an Insolvent Bank.—Where the depositor's liability has not matured he may, nevertheless, set off his deposit against such liability,[95] as, for instance, notes payable to the bank, but not then due.[96]

with interest, if left four months. At the time of the deposit, B. held A.'s overdue note. After the deposit, and before demand by A., but in less than four months, B. failed, and assigned his property for the benefit of creditors. In an action by the assignee against A. upon the overdue note, held, that A. was entitled to set off the amount against his deposit. Seymour *v.* Dunham (N. Y.), 24 Hun 93.

92. Matured debts.—Where, at the time of the appointment of a receiver for an insolvent bank, a depositor was indebted to it, and also had a claim against it for deposits, both claims being due, one may be set off against the other. In re Van Allen (N. Y.), 37 Barb. 225.

93. A depositor of a bank at the time of the appointment of a receiver thereof was also a debtor to the bank. The deposit was not then due, and the depositor was insolvent. Held, that the receiver could not against the depositor's will apply in set-off the bank's claim against the depositor's claim. In re Van Allen (N. Y.), 37 Barb. 225.

94. Fraction of day.—On the day of the failure of the S. Bank, the H. Bank, which owed it a deposit balance of $9,688.17, called for payment of a demand note of the S. Bank, held by it. Held, that the day would not be divided into fractions to deprive the H. Bank of its defense to an action for the deposit balance, and that the note might be offset against such balance. Fisher *v.* Hanover Nat. Bank, 64 Fed. 832, 12 C. C. A. 430.

95. A depositor in an insolvent bank.—Colton *v.* Drovers', etc., Loan Ass'n, 90 Md. 85, 45 Atl. 23, 46 L. R. A. 388, 78 Am. St. Rep. 431; Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; Kilby *v.* First Nat. Bank, 32 Misc. Rep. 370, 66 N. Y. S. 579; In re Hatch, 155 N. Y. 401, 50 N. E. 49, 40 L. R. A. 664; Clute *v.* Warner, 8 App. Div. 40, 40 N. Y. S. 392.

Ohio.—Armstrong *v.* Warner, 49 O. St. 376, 31 N. E. 877, 17 L. R. A. 466. See, also, Armstrong *v.* Law, 27 Wkly. L. Bull. 100, 11 O. Dec. 461.

96. Undue notes.—In re Van Allen (N. Y.), 37 Barb. 225; Jack *v.* Klepser, 46 Atl. 479, 196 Pa. 187, 97 Am. St. Rep. 699.

Arkansas.—That a depositor's note to a bank was not due at the time of its insolvency does not prevent his right to set off his general deposit against the note. Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902.

Maryland.—A note executed by defendant, held by and payable to a bank is an asset in the hands of the bank's receivers, and is subject to equities existing between defendant and the bank, though the receiver was appointed before the note matured. Colton *v.* Drovers', etc., Loan Ass'n, 90 Md. 85, 45 Atl. 23, 46 L. R. A. 388, 78 Am. St. Rep. 431.

Michigan.—A depositor in an insolvent bank may set off the deposit standing to his credit when the bank closed its doors against his notes payable to the bank, but not then due. Thompson *v.* Union Trust Co., 130 Mich. 508, 90 N. W. 294, 97 Am. St. Rep. 494.

Pennsylvania.—Where a depositor was indebted to a bank on a note which had not matured at the time of the bank's failure, he is entitled to set off the amount of his deposits in the bank at the time of its failure against an action on the note by its assignees. Jordan *v.* Sharlock, 84 Pa. 366, 24 Am. Rep. 198; Jack *v.* Klepser, 196 Pa. 187, 46 Atl. 479, 79 Am. St. Rep. 699.

Wisconsin.—A depositor in a bank which makes an assignment for the benefit of creditors may set off against his deposit the amount of his note held by the bank, though the note is not due at the time of the assignment. Jones *v.* Piening, 85 Wis. 264, 55 N. W. 413.

Money on deposit in an insolvent bank at the time the receiver was appointed may be set off against a note of the depositor held by the bank, though the note was not due when the receiver was appointed, and though it had been pledged by the bank as collateral security for a debt, but such debt had been paid, and the note returned to the bank before its failure.[97]

§ 135 (3bc) Particular Claims or Obligations—§ 135 (3bca) Notes—§ 135 (3bcaa) In General.—A depositor in an insolvent bank is entitled to have the full amount of his deposits applied on a note on which he is indebted to the bank.[98]

Negotiable Instruments Law, §§ 3, 55, which declares the liability of parties on accommodation paper, does not preclude the setting off against an accommodation note held by an insolvent bank a sum deposited to the credit of the accommodation payee.[99]

§ 135 (3bcab) Bank a State Depositary.—Where a bank which is a state depositary becomes insolvent, depositors indebted on notes can set off against them in the hands of the receiver their deposits, and the lien of the state for an indebtedness to it affects only balances due after such set-off.[1]

§ 135 (3bcac) Church.—Where a church borrows money of a bank on a note, and the church treasurer deposits the money in his own name in the bank, and the bank makes an assignment in insolvency, the sum still on deposit to the credit of the treasurer will be set off against the amount

97. Clute *v.* Warner, 8 App. Div. 40, 40 N. Y. S. 392.

98. **Notes.**—Balbach *v.* Frelinghuysen, 15 Fed. 675; Stolze *v.* Bank, 67 Minn. 172, 69 N. W. 813; St. Paul, etc., Trust Co. *v.* Leck, 57 Minn. 87, 58 N. W. 826, 47 Am. St. Rep. 516; In re Bank, 71 Minn. 394, 73 N. W. 1096; In re Commercial Bank's Assignment, 4 O. Dec. 108, 2 N. P. 170.

Where a party has funds deposited with a banker, who holds the promissory note of the depositor, the latter may insist that his note shall be satisfied out of the deposit, although the banker, before the note became due, had voluntarily assigned all his effects for the benefit of creditors. McCagg *v.* Woodman, 28 Ill. 84.

S. deposited a sum of money with M., who was a private banker, and who, at the time, held a note belonging to S., for a somewhat smaller sum. M. absconded, leaving a letter, in which he transferred to S. his note to cover his deposit. Thereafter M.'s syndic sued S. on the note, and S. pleaded the deposit in compensation and set-off, and the question was whether the syndic could recover the whole amount of his note from the defendant, leaving the latter to come in, and receive his dividend with other creditors, or whether defendant's note could be declared to be compensated and extinguished by the amount of the deposit. Held, that the plea of compensation should be sustained. Beatty *v.* Scudday, 10 La. Ann. 404.

A private banker, becoming insolvent, made a general assignment of his property, and directed his assignee to pay the debts in the same order and manner in which debts are required to be paid under the provisions of the bankruptcy law. Held, that a customer, who had money on deposit with such banker, was entitled to set off the amount of his deposit against promissory notes made by him, and held by the banker. Fort *v.* McCully (N. Y.), 59 Barb. 87.

99. **Effect of negotiable instrument of law.**—Building, etc., Co. *v.* Northern Bank, 206 N. Y. 400, 99 N. E. 1044.

1. **Bank a state depositary.**—State *v.* Brobston, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138.

due the bank on the note.[2]

§ 135 (3bcb) Bond and Mortgage.—Depositor, also indebted to a bank on bond and mortgage, is entitled to set off his deposit against indebtedness on the bond in the hands of a receiver.[3] The right of action against a bank for money deposited, and the right of a bank to foreclose a mortgage held by it against the depositor, are not cross demands, within a statute, under which cross demands can be deemed compensated, so far as they equal each other, under such circumstances as that, if one party had brought an action against the other, a counterclaim could have been set up.[4]

§ 135 (3bcc) Claim for Dividends Wrongfully Received.—A depositor of an insolvent bank, of which he is a stockholder, may, when sued for dividends wrongfully paid to him by the bank, set off against the claim the amount of his deposit.[5]

§ 135 (3bcd) Funds Received for Use of Commissioners.—One who has received money for the use of the commissioners of a bank in liquidation can not plead in compensation a debt due to him as a depositor, by the bank, before its failure.[6]

§ 135 (3c) Funds and Deposits Which May Be Set Off—§ 135 (3ca) Demand or Notice.—When a bank closes its doors, and commits an act of insolvency, its deposits, whether on account or certificate, at once become due, without demand or notice, and are available as a set off against a depositor's debt due the bank. The insolvency of the bank relieves the depositor from the necessity of making a formal demand and, of course, the fact that he fails to do so will not bar his right to the set-off.[7] Under such circumstances, a demand on presentation would necessarily be waived, since to make it would be an idle ceremony, not requisite for the protection

2. **Church.**—Third Swedish Methodist Episcopal Church *v.* Wetherell, 43 Ill. App. 414.

3. **Bond and mortgage.**—New Amsterdam Sav. Bank *v.* Tartter (N. Y.), 54 How. Prac. 385; McKean German-American Sav. Bank, 118 Cal. 334, 50 Pac. 656, holding under Code Civ. Proc. of Cal., § 440.

4. McKean *v.* German-American Sav. Bank, 118 Cal. 334, 50 Pac. 656.

5. **Claim for dividends wrongfully received.**—Reid *v.* Owensboro Sav., etc., Co., 141 Ky. 444, 132 S. W. 1026.

6. **Funds received for use of commissioners.**—French *v.* Stanton, 1 La. Ann. 8, so holding under Act March 9, 1842.

7. Colton *v.* Drover's, etc., Loan Ass'n, 90 Md. 85, 45 Atl. 23, 46 L. R. A. 388, 78 Am. St. Rep. 431; Kilby *v.* First Nat. Bank, 32 Misc. Rep. 370, 66 N. Y. S. 579; Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; Armstrong *v.* Law, 27 Wkly. L. Bull. 100, 11 O. Dec. 461.

Under Acts 1896, c. 349, art. 23, § 264a, providing that assets of an insolvent corporation shall be distributed in the same manner as assets of an insolvent debtor under Code, art. 47, § 11, which provides that such estates shall be distributed according to the principles of equity, defendant's deposits in an insolvent bank, which held a note against him, but failed before its maturity, being an equitable set-off against the note in the hands of the bank's receivers, may be allowed, though no demand had been made for the deposits, since the insolvency of the bank relieved him of the necessity of making a demand. Colton *v.* Drovers', etc., Loan Ass'n, 90 Md. 85, 45 Atl. 23, 46 L. R. A. 388, 78 Am. St. Rep. 431.

of the bank, which was unable to comply therewith.[8] The fact that if, at a particular time, a bank should close, its liabilities would exceed its assets, will not make due and payable, without demand, a deposit on open account, or one the certificate of which has matured, so as to give the depositor the right to set off such deposits against his debt to the bank, but the depositor has such right, in the absence of fraud, only in case of the declared insolvency of the bank.[9]

§ 135 (3cb) Unmatured Deposits.—Where a debtor of a bank has deposits, the certificates of which have not yet matured, the fact that the bank is insolvent will not give the debtor the right to have such deposits set off against his debt.[10]

§ 135 (3cc) Deposit Made after Suit and before Insolvency.—One sued by a bank on a note can not, after the bank is declared insolvent, maintain a counterclaim for a deposit made before the bank became insolvent and after the suit was commenced, under a statute, authorizing a counterclaim only where the cause of action arises out of the transaction alleged in the complaint, or connected with the subject of the action, or arises on a contract existing at the commencement of the action.[11]

§ 135 (3cd) Proceeds of Note against Liability Thereon.—A person indebted to an insolvent bank on a note discounted for himself may set off the proceeds of the discount passed to his credit on the books of the bank.[12]

§ 135 (3ce) Proceeds of Draft against Liability after Dishonor.—Where a customer deposited in bank a draft drawn on a correspondent,

8. Stadler *v.* First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582; Scott *v.* Armstrong, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148; Bank *v.* Bailey, Fed. Cas. 2,635; Laybourn *v.* Seymour, 53 Minn. 105, 54 N. W. 941, 39 Am. St. Rep. 579; Payne *v.* Gardiner, 29 N. Y. 146; Seymour *v.* Dunham (N. Y.), 24 Hun. 93; Pardee *v.* Fish, 60 N. Y. 265; Munger *v.* Albany City Nat. Bank, 85 N. Y. 580; Downes *v.* Phœnix Bank (N. Y.), 6 Hill 297.

9. **Liabilities exceed assets.**—Stadler *v.* First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582.

10. **Unmatured deposits.**—Stadler *v.* First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582.

11. **Deposit made after suit and before insolvency.**—Piedmont Bank *v.* Wilson, 124 N. C. 561, 32 S. E. 889, so holding under § 244, N. C. Code.

The fact that an indorser of a note deposited money in a bank after it had brought suit on the note, and that it subsequently became insolvent, affords no ground for equitable interference, though the Code makes no provision whereby the indorser may set up his deposit as a counterclaim. Piedmont Bank *v.* Wilson, 124 N. C. 561, 32 S. E. 889.

12. **Proceeds of note discounted against liability on note.**—Butterworth *v.* Peck, 18 N. Y. Super. Ct. 341.

A customer of a bank asked the cashier if he would discount his note for a certain sum. The cashier asked him if he had property, to which he replied that he had a homestead in the name of his wife. Whereupon the cashier told him to get his wife to sign a note. He obtained such note, indorsed it, and the bank discounted it and placed the money to his credit. The bank thereafter made an assignment, and the depositor petitioned to have the amount of his deposit in such bank set off against the amount due of such note. It was held that the set-off should be allowed. In re Commercial Bank's Assignment, 2 N. P. 170, 4 O. Dec. 108.

having theretofore slightly overdrawn his account, and the draft was passed to his credit, and checked against, and where, on suspension of the bank, he stopped payment of the draft, the receiver of the bank in a suit to recover on the draft was entitled to recover only the amount due the bank after charging back the draft.[13]

§ 135 (3cf) Deposit as Trustee against Individual Debt.—A trustee who deposits the trust funds in bank to the credit of a trustees' account, where it remains until the insolvency of the bank, can not, even with the consent of his associate trustees, be permitted to apply upon his individual indebtedness the fund belonging to the cestui que trust.[14]

§ 135 (3cg) Partnership Deposit against Individual Debt and Vice Versa.—As a general rule a partnership deposit can not be set off against the debts of individual members of the partnership owed to the bank, unless there be some special equity or equities to justify it. Such special equities may arise under circumstances of fraud; or where there are a series of transactions in which joint credit is given with reference to the special debt; or where the mode or course of dealing is such as to furnish a presumption that there was an agreement that the mutual dealings on each side, and independent debts, were to be set off against each other, and that, without such right of retaining against each other, the parties would not have continued dealing with each other.[15]

In Pennsylvania a member of a firm, when sued by the assignee of an insolvent bank on his individual note, may, with the consent of his copartner, set off a debt due the firm.[16]

13. **Proceeds of draft against liability after dishonor.**—Stapylton *v.* Cie des Phosphates de France, 31 C. C. A. 383, 88 Fed. 53.

14. **Deposit as trustee against individual debt.**—People *v.* German Bank, 116 App. Div. 687, 101 N. Y. S. 917.

Petitioner borrowed $45,000 from a bank with which to pay the administrator of a decedent's estate for decedent's interest in a firm. Petitioner executed checks to the administratrix, each representing a distributee's interest in the purchase price, one of which for $19,000 represented the interest of decedent's widow who was an incompetent, under the guardianship of petitioner and two others. The administrator deposited this check in the same bank to the credit of the widow's committee as trustees, where the deposit remained until the failure of the bank. Held, that petitioner was not entitled to an equitable set-off of such deposit against his indebtedness to the bank on the note. People *v.* German Bank, 116 App. Div. 687, 101 N. Y. S. 917.

15. **Partnership deposit against individual debt vice versa.**—Second Nat. Bank *v.* Hemingray, 34 O. St. 381.

Set-off of partnership deposit against individual debt.—A banker induced a firm to continue its deposit account with him by deceptively representing himself to be still the holder of several negotiable notes made to him by the principal member of the firm, when in fact he had assigned them as collateral security for a debt. There was an understanding between the firm and the banker, from the course of dealing between them, that the notes of the individual member were to be paid through the deposit account of the firm, and which he had a right to treat as his own for that and other purposes. On the bankruptcy of the banker, held, that after satisfying the debt for which the notes of the individual member were held as security, the latter, as against the assignees of the bankrupt, was in equity entitled to set off the firm account against the balance due on the notes. Second Nat. Bank *v.* Hemingray, 34 O. St. 381.

16. *Pennsylvania*—Jack *v.* Klepser,

§ 135 (3ch) Deposit of Public Officers' Attorney.—If a public officer could not set off money deposited in a bank in his official capacity against a demand by the bank against him individually before appointment of a receiver of the bank, the fact that he thereafter made payments as a public officer, out of his own moneys, will not give him the right of set off.[17]

§ 135 (3ci) Wife's Money Credited by Mistake to Husband.—A deposit of the wife's money by mistake in the name of the husband may be set off against the indebtedness of the wife to the bank.[18]

§ 135 (3cj) Amount Paid on Proposed Increased Capital Stock.—An amount paid on an account of a proposed increase of capital stock of a bank which had never become effective is a proper set-off pro tanto against a note of such subscriber held against him by the bank.[19]

§ 135 (3d) Person against Whom Set-Off Available—§ 135 (3da) Assignee for Benefit of Creditors.—The depositor has the same right to set off his deposit against his indebtedness to the bank when sued by a general assignee for the benefit of creditors, that he would have had if the suit were by the bank itself. The assignee has no immunities against set-offs not possessed by the bank.[20]

§ 135 (3db) Receiver.—In a suit by a receiver of an insolvent bank upon a note or obligation due the bank the defendant will be allowed to set off his deposit or a certificate of deposit held by him at the time of the suspension of the bank. The depositor's right to set off is not divested by the appointment of a receiver,[21] and will be allowed even against a

196 Pa. 187, 46 Atl. 479, 79 Am. St. Rep. 699. See post, "Right of Assignee of Depositor after Insolvency of Bank," § 135 (7).

17. **Deposits of public officer.**—Miller *v.* Franklin Bank (N. Y.), 1 Paige 444. See ante, "Deposit by Attorney for Public Officer," § 135 (1c).

18. **Wife's money credited by mistake to husband.**—In a suit by the receiver of a bank against the wife of the president thereof upon an overdrawn account as depositor, the defendant may set off and recover over money collected by her husband and by mistake deposited to his own instead of to her credit. Madden *v.* Wright, 108 Ga. 400, 33 S. E. 987.

19. **Set-off of stock subscription against note.**—Armstrong *v.* Law, 27 Wkly. L. Bull. 100, 11 O. Dec. 461.

20. **Assignee for benefit of creditors.**—Berstein *v.* Coburn, 49 Neb. 734, 68 N. W. 1021; Fort *v.* McCully (N. Y.), 59 Barb. 87; Seymour *v.* Dunham (N. Y.), 24 Hun 93; Jordan *v.* Sharlock, 84 Pa. 366, 24 Am. Rep. 198; Jones *v.* Piening, 85 Wis. 264, 55 N. W. 413; Merchants' Exch. Bank *v.* Fuldner, 92 Wis. 415, 66 N. W. 691.

21. **Receiver.**—Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902; Kentucky Flour Co. *v.* Merchants' Nat. Bank, 90 Ky. 225, 13 S. W. 910, 12 Ky. L. Rep. 198, 9 L. R. A. 108; Stone *v.* Dodge, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280; Wagoner *v.* Patterson Gas, etc., Co., 23 N. J. L. 283; Ogden *v.* Cowley (N. Y.), 2 Johns. 274; New Amsterdam Sav. Bank *v.* Tartter (N. Y.), 54 How. Prac. 385; Miller *v.* Franklin Bank (N. Y.), 1 Paige 444; Bank *v.* Rosevelt (N. Y.), 9 Cow. 496; Berry *v.* Brett (N. Y.), 6 Bosw. 627; Smith *v.* Fox, 48 N. Y. 674; McLaren *v.* Pennington (N. Y.), 1 Paige 102; In re Receiver (N. Y.), 1 Paige 585; Bank *v.* Tartter (N. C.), 4 Abb. 215; Platt *v.* Brentley, 11 Am. L. Reg. (N. C.) 171; Barbour *v.* National Exch. Bank, 50 O. St. 90, 33 N. E. 542, 20 L. R. A. 192; Jordon *v.* Sharlock, 84 Pa. 366, 24 Am. Rep. 198; Farmer's Deposit Nat. Bank *v.* Penn Bank, 123 Pa. 283, 16 Atl. 761, 2 L. R. A. 273; Merchants' Exch. Bank *v.* Fuldner, 92 Wis. 145, 66 N. W. 691; Dickson *v.*

temporary receiver.[22]

Receiver Not Bona Fide Purchaser.—Receivers of an insolvent bank are not bona fide purchasers of its assets, and can not refuse a debtor the right to set off a deposit in the bank against his debt.[23]

§ 135 (3dc) Administrator of Insolvent Private Banker.—An administrator of an insolvent private banker suing to collect a debt due from a depositor has no immunity from set-offs not possessed by his decedent.[24]

§ 135 (3dd) Transferee or Pledgee of Bank.—Where a contract obligation of a depositor in a bank, which is insolvent, has been transferred in exact conformity with its terms and has become a lawful demand in the hands of the transferee, with no right of set off then existing, either at law or in equity, the depositor has, upon the insolvency of the bank, no right of set off in law, in equity, or under the bankrupt act, as against the transferee;[25] as, for instance, when notes have been indorsed away for value in the ordinary course of business,[26] or pledged as collateral security

Evans, 6 Term R. 57; Padder *v.* Preston, 9 Jur., N. S., 496.

The insolvency of a bank holding a note of a depositor does not impair the right of the depositor to have the debt due the bank and his claim based on his deposit set off as against each other, but the duty to make the set-off is continued to the receiver of the bank. Hall *v.* Burrell (Colo. App.), 124 Pac. 751; Hall *v.* McIntosh (Colo. App.), 124 Pac. 753; Hall *v.* Hardy (Colo. App.), 124 Pac. 753; Hall *v.* Rocky Ford Trading Co. (Colo. App.), 124 Pac. 754.

22. Temporary receiver.—Where a depositor is sued by the temporary receiver of a bank on a note payable thereto, set-off to the amount of his deposit may be allowed defendant, on application to the court. Sickels *v.* Herold, 15 Misc. Rep. 116, 36 N. Y. S. 488, following People *v.* St. Nicholas Bank, 76 Hun 522, 28 N. Y. S. 114, 58 N. Y. St. Rep. 843.

23. Receiver not bona fide purchaser.—Colton *v.* Drover's, etc., Loan Ass'n, 90 Md. 85, 45 Atl. 23, 46 L. R. A. 388, 78 Am. St. Rep. 431.

The banks authority to set off matured claims due bank and depositor is transmitted to the receiver while the depositor's differences are not impaired by the bank's insolvency. Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902.

Where defendant made deposits in a bank which held a note against him, nearly matured, on failure of the bank before maturity of the note defendant's deposits constitute a common-law set-off against the note in the hands of the receivers, since such set-off would have been good as against the bank, and the insolvency law does not authorize the receivers to collect more than was due the bank. Colton *v.* Drover's, etc., Loan Ass'n, 90 Md. 85, 45 Atl. 23, 46 L. R. A. 388, 78 Am. St. Rep. 431.

24. Administrator of insolvent private banker.—Skiles *v.* Houston, 110 Pa. 254, 2 Atl. 30.

A banker discounted a note for a depositor whose deposit amounted to less than the value of the note. The banker died insolvent, before the maturity of the note. In a suit by the administrator on the note, held, that the defendant could set off the amount of his deposit. Skiles *v.* Houston, 110 Pa. 254, 2 Atl. 30.

25. Transferee or pledgee of bank.—Munger *v.* Albany Nat. Bank, 85 N. Y. 580.

Judgment in hands of assignee.—Deposits in a bank by a judgment debtor of the bank, which are lost by the bank's insolvency, do not constitute a payment of, or set-off against, the judgment in the hands of an assignee. Spillman *v.* Payne, 84 Va. 435, 4 S. E. 749.

26. If the bank holds notes at the time of its failure and was entitled to receive the amounts due thereon when they matured, an offset of credit on the books in favor of the depositor might be made against the notes, but it can not be allowed where it appears that the notes were not the property of the bank at the time of its failure, but had been indorsed away for value. Balbach *v.* Frelinghuysen, 15 Fed. 675.

A. made a deposit with the B. Bank,

for a debt or a loan to the bank.[27]

Note Pledged to Clearing House.—A bank discounted a note, and then pledged it for a debt due by it to the clearing house, under a stipulation that, after payment of the debt to the clearing house, it should be held as collateral security for other indebtedness due members of the clearing house. Held that, after the bank failed, the note should be applied on such other indebtedness, and the maker could not set off against it the amount of his deposits in the insolvent bank.[28]

Collateral Returned to Receiver.—The transfer of a depositor's note to a pledgee as collateral security impairs any right to set off then or thereafter existing only to the extent necessary to satisfy the debt of the pledgee; and if the latter returns the note to the receiver unpaid to the amount of the maker's deposit in the bank, general creditors would have no interest therein, for the depositor's right to set off his deposit would then be perfect, and it and the note would cancel each other, or, in other words, all of the collateral is the property of the receivers, subject to the payment of the debt of the pledgee. Where the notes of several depositors are pledged by the bank to secure a loan of a less amount than the value of the notes, all of the collateral notes are the property of the receivers, subject to the payment of the debt of the pledgee, and subject further, to the equity of the respective maker thereof who had deposits with the insolvent bank to offset them against these notes, as against the receivers' interest therein. In such case where none of the makers of the collateral notes had any equity superior to that of the other makers, each was equitably entitled to have left unpaid on his note in the hands of the pledgee

receiving a certificate payable to his order, with interest. Afterwards, the B. Bank discounted A.'s note, and transferred it in the ordinary course of business to the C. Bank, before maturity, the C. Bank having no knowledge of the deposit. The C. Bank held collateral for all papers so transferred to it by the B. Bank. The B. Bank became bankrupt. The C. Bank transferred the collateral to the assignee in bankruptcy against the protest of A., who insisted upon their appropriation to the payment of his note. The payment of the certificate had not been demanded of the B. Bank before the adjudication of bankruptcy. Held, that A. had no right of set-off in law, in equity, or under the bankrupt act. Munger *v.* Albany Nat. Bank, 85 N. Y. 580.

27. Homans & Co., bankers, of Cincinnati, held several notes of R. Hemingray. R. Hemingray & Co., of which R. Hemingray was the principal partner, kept their bank account with Homans & Co. By mutual agreement of the members of the firm, R. Hemingray did his individual banking business in the name R. Hemingray & Co., and kept no bank account in his individual name. Homans & Co., while in good credit, without knowledge of Hemingray or Hemingray & Co., transferred, by indorsement, his notes to the plaintiff as collateral security for a loan of money, and afterwards became insolvent, before Hemingray was notified of the transfer. Hemingray & Co. had on deposit with Homans & Co. $10,000, which R. Hemingray was authorized to use to pay his notes, one of which was due in July, 1869. It was held that Hemingray could not set off his claim against the bank based on the deposit against his liability on the note in the hands of the plaintiff, although Hemingray received a check from R. Hemingray & Co. for a part of their deposit on the day of the failure of Homans & Co., but before notice of the transfer of his notes to the plaintiff. Second Nat. Bank *v.* Hemingray, 31 O. St. 168.

28. Note pledged to clearing house.—Philler *v.* Woodfall, 32 Wkly. Notes Cas. 183.

a sum equal to his deposit, so that when the note was returned to the receivers his set-off would be available, unless its payment was reasonably necessary to protect the interest of the pledgee; and where the maker of one of the notes was forced to pay, and did pay, under protest, the whole amount thereof, although both the pledgee and receivers had notice of his equity, and there was no necessity for the pledgee's exacting payment in full of the note, the maker was entitled to be reimbursed by the receiver out of the collateral returned to him to the amount of his deposit.[29]

Transferrer after Insolvency to Secure Antecedent Debt.—A transferee who obtains a depositor's note from a bank after its insolvency on account of an antecedent indebtedness of the bank, no part of the indebtedness being paid by it, nor any new consideration being given, is not a bona fide purchaser, and has no better title than the bank and it of course has no immunity against set-offs not possessed by the bank.[30]

Notes Delivered to Director and His Surety.—In an action by the assignee of a bank for the proceeds of notes delivered by its cashier, before insolvency, to one of its directors, who was also a depositor, and to his surety, to secure them against losses, the bank's failure being then foreseen, defendants will not be allowed to set off the debt due them for deposits further than the amount to which the director would have been entitled to dividends previously paid by the assignee.[31]

§ 135 (3e) Loss of Right of Set-Off by Payment of Debt.—Where a depositor in a bank which has made an assignment requests the trustees to allow such deposit as a credit on a note due by the depositor to the bank, and payable at a future day, and, receiving no reply from the trustees before the maturity of the note, voluntarily pays the note at maturity, he can not thereafter have his deposit set off against the amount of the note.[32]

29. **Collateral returned to receiver.**—In re Bank, 71 Minn. 394, 73 N. W. 1096. A note made to a bank was, with other collateral, pledged by it to secure a loan. The bank then became insolvent. The maker of the note, who had a deposit with the bank, paid the note to the pledgee, but under protest as to the amount covered by the deposit. After securing its claim, the pledgee returned the balance of the collateral to the receiver of the bank. Held, that the maker was entitled to be reimbursed by the receiver out of such collateral to the amount of his deposit. In re Bank, 71 Minn. 394, 73 N. W. 1096.

30. **Transfer after insolvency to secure antecedent debt.**—Defendants executed a note to a bank, which, after becoming insolvent, indorsed it, before maturity, to a third person as collateral, and the note was thereafter, and after maturity, transferred to plaintiff. Held, that defendants were entitled to set off the amount of funds on deposit to their credit in such bank at the date of insolvency. Merchants' Exch. Bank *v.* Fuldner, 92 Wis. 415, 66 N. W. 691.

31. **Notes delivered to director and his surety.**—Lamb *v.* Pannell, 28 W. Va. 663.

32. **Loss of right of set-off by payment of debt.**—At the time of its assignment, an insolvent bank had on deposit funds of another bank, but held the note of the depositing bank for an amount in excess of the amount of the deposit. After the assignment, the bank indebted on the note notified the trustees of the insolvent bank to apply the amount of its deposit on its note, and it would pay the balance, but it afterwards paid its note in full at maturity. Held, that the depositing bank could

§ 135 (3f) Interest and Costs.—Where a depositor in an insolvent bank seeks to offset his deposit against notes which had been discounted for him by the bank, interest on the deposit can not be offset against interest on the notes.[33] A petition by defendant, in an action by the receiver of an insolvent bank on notes which had been discounted for defendant, to compel the receiver to apply on the notes the amount of defendant's deposit, invokes the discretionary power of the court, and it may impose as a condition that defendant pay a part of the costs of the action on the notes.[34]

§ 135 (4) Right of Endorser or Surety on Note.—A depositor in an insolvent bank, who had indorsed a note that was subsequently discounted by said bank, can, in a suit by the bank to recover the amount of the note, set off his deposit against this amount, when the note matured after the insolvency of the bank,[35] if the maker is insolvent, and the indorser has no security;[36] but the surety on a note held by the trustee of an insolvent bank can not have his deposit in the bank credited on the note where the maker is solvent.[37]

One of Several Indorsers.—One of several indorsers on a note to a bank, which, with the principal maker, becomes insolvent, is entitled to set off his deposit in the bank as against his contributive share of the note; and, in justice and equity, the receiver must adjust such share in view of the solvency vel non of the other indorsers.[38]

Surviving Indorser.—The survivor in a suit by the assignees of a bank against the indorsers of a note, overdue when assigned, may set off certificates of a deposit with the assignees, stating that the deposit constituted a claim in favor of the defendant or order against the assets of the bank. The cause of action, originally joint, upon the sugges-

not afterwards claim priority of payment of its deposit out of the insolvent bank's assets on the ground that such deposit should have been set off against the note. In re Commercial Bank's Assignment, 4 O. Dec. 108, 2 N. P. 170.

33. Interest and costs.—People *v.* Canal St. Bank, 6 Misc. Rep. 319, 26 N. Y. S. 794, 56 N. Y. St. Rep. 248.

34. People *v.* Canal St. Bank, 6 Misc. Rep. 319, 26 N. Y. S. 794, 56 N. Y. St. Rep. 248.

35. Right of indorser or surety on note.—Yardley *v.* Clothier, 49 Fed. 337; refusing to follow Armstrong *v.* Scott, 36 Fed. 63; Stephens *v.* Schuchmann, 32 Mo. App. 333; distinguishing National Security Bank *v.* Price, 22 Fed. 697; Balbach *v.* Frelinghuysen, 15 Fed. 675.

In a suit on a note by the assignee in bankruptcy of the bank, an indorser can set off a deposit in the bank. Arnold *v.* Niess (Pa.), 1 Walk. 115.

36. Where a bank to whom a note was given became insolvent, having on deposit money belonging to both the maker and indorser of the note, and the maker was solvent, the indorser can not set off his deposit in the bank against the amount due on the note; the insolvency of the maker being a prerequisite to such set-off. Borough Bank *v.* Mulqueen, 70 Misc. Rep. 137, 125 N. Y. S. 1034.

The indorser of a note held by an insolvent bank may have his money on deposit in the bank set off against the note, though the note was not due when the bank assigned, if the maker is insolvent, and the indorser has no security. O'Connor *v.* Brandt, 12 App. Div. 596, 42 N. Y. S. 1079.

37. New Farmer's Bank's Trustee *v.* Young, 100 Ky. 683, 19 Ky. L. Rep. 35, 39 S. W. 46.

38. One of several indorsers.—Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

tion of the death of the deceased defendant, survived against the survivor alone, and the suit, to all practical purposes, so far became a several suit against him alone. The case is analogous to that of an action against a surviving partner, in which a debt which became due from himself separately, before or after the death of his partner may be set off, or in which a survivor is sued for his own separate debt and is allowed to set off a debt due him as surviving partner.[39]

Note Charged to Account of Indorser and afterwards Collected from Maker.—The agreement between a bank and a depositor, who directed it to charge the amount of the note upon which he was surety to his account, which was not so charged because, at the suggestion of the bank, the actual entry was not made at the time in order that the bank should retain the note, and collect it for the benefit of the depositor, the latter having at all time an amount to his credit equal to the sum due on the note; amounted to an equitable satisfaction of the note, so far as respects the depositor, and made it his property. The agreement was upon a sufficient consideration, and after it was made the depositor had at no time the right to draw on his account without leaving an amount equal to the sum due on the note. The agreement gave to the bank a right which it would not otherwise have had and the depositor became entitled to the amount collected on it as against the receiver of the bank.[40]

Allegation of Insolvency of Principal Debtor.—The rule that a surety can not set off a debt due the principal debtor from the plaintiff, on his motion, unless he shows the insolvency of his principal debtor, and is unable to obtain relief either in an action brought by him, or as a defense to an action on the note, and that the principal debtor should be made a party to the suit; applies to the case of a note given to a bank to secure a loan on another bank.[41]

§ 135 (5) Right of Principal to Have Deposit of Guarantor Applied.—A tender on the maturity of a note owned by a bank and guaranteed by a depositor of the depositor's check for the amount of his deposit,

39. **Surviving indorser.**—Newberry *v.* Trowbridge, 13 Mich. 263.

40. **Note charged to account of indorser and afterwards collected from maker.**—Harrison *v.* Harrison, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111.

41. **Allegation of insolvency of principal debtor.**—Willoughby *v.* Ball, 18 Okl. 535, 90 Pac. 1017.

Where the president of a bank, desiring to increase his cash reserve without showing increase in its liabilities, borrows money from another bank in his individual name, executing his own note therefor, and leaving the money with the bank to which the note was given to the credit of his own bank, and the bank from which the money was borrowed fails, and at a time when the other bank had on deposit with the failing bank more than enough money to pay the note, the maker of the note can not compel the receiver of the failing bank to set off the deposit of the other bank against the note on the theory that the debt for which the note was executed was the debt of the bank, without alleging that the bank for whose benefit the note was executed was insolvent, as otherwise he could pay the note and recover the amount back in an action at law. Willoughby *v.* Ball, 18 Okl. 535, 90 Pac. 1017.

and cash for the balance necessary to pay the note, constitutes a payment of the note and discharges the maker.[42]

§ 135 (6) Right of Guarantor for Repayment of Deposit.—Where a party executes a guaranty for the payment of sums deposited in a bank to which he is indebted, which sums are due and payable at the time of the bank's suspension, equity will give him credit on his indebtedness for the payments made because of the bank's failure to do so, whether he is regarded as a surety, and becomes subrogated to the rights and claims of the depositors, or simply that by the bank's failure and default he became liable for such sums.[43] Where such guarantor owed certain notes to the bank, which became due before a receiver was appointed for such bank, but owing to the time required to fix plaintiff's liability, he did not pay the creditors for some time after suspension, that payment will be deemed to relate back, and to have been made at the time of suspension, and the amount so paid may be set off against the notes held by the bank against plaintiff.[44]

§ 135 (7) Right of Assignee of Depositor after Insolvency of Bank.—In an action by the receiver or assignee of a bank against one of its debtors to recover a sum due at the time of its insolvency, the defendant can not set off a check,[45] a certificate of deposit,[46] a sum

42. Right of principal to have deposit of a guarantor applied.—Lionberger *v.* Kinealy, 13 Mo. App. 4; Shipp *v.* Stacker, 8 Mo. 145.

43. Right of guarantor for payment of deposits.—Kilby *v.* First Nat. Bank, 32 Misc. Rep. 370, 66 N. Y. S. 579; Blumenthal *v.* Einstein, 81 Hun 415, 30 N. Y. S. 1126, 63 N. Y. St. Rep. 264.

44. Kilby *v.* First Nat. Bank, 32 Misc. Rep. 370, 66 N. Y. S. 579.

45. Right of assignee of depositor after insolvency of bank—Check.—Butterworth *v.* Peck, 18 N. Y. Super. Ct. 341.

A debtor of a suspended bank, acquiring a check thereon with notice of the suspension, can not set off the amount thereof against his debt, though he acquire the check before a receiver for the bank is appointed. In re Hamilton, 26 Ore. 579, 38 Pac. 1088.

46. Certificate of deposit.—Stone *v.* Dodge, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280; Smith *v.* Mosby, 56 Tenn. (9 Heisk.) 501.

Where a certificate of deposit was assigned to a party, after the appointment of a receiver of the bank issuing the certificate, the holder of the certificate was not entitled to set off his claim against the bank, to the prejudice of other creditors, in an action by the bank against the holder of the certificate. Ingwersen *v.* Buchholz, 88 Ill. App. 73.

In an action by the receiver of an insolvent bank, organized under Laws 1887, Act No. 205, against a debtor of the bank, for money due at the date of suspension of the bank, defendant can not set off a certificate of deposit obtained from a creditor of the bank, after its suspension, and before application for a receiver, it being provided by § 47 that all assignments of deposits, either for its use or the use of its stockholders or creditors, either after the commission of an act of insolvency or in contemplation thereof, with a view to the preference of one creditor over another, shall be void. Stone *v.* Dodge, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280.

On the insolvency of a bank, and assignment for the benefit of creditors, a debtor can not set off against his debt certificate of deposit assigned to him after the bank closed its doors, but before the appointment of receivers for the bank, in consideration of the payment to the depositor of the amount of the credit on his debt obtained by the use of the certificates. Oyster *v.* Short, 177 Pa. 589, 35 Atl. 686.

claimed as bill holder,[47] or other claim,[48] procured by him from a creditor of the bank after its suspension, and before application was made for the appointment of a receiver.[49] Where under the bankrupt law a banker is not insolvent unless he "stops or suspends fraudulently for a period of fourteen days," the insolvency of a bank can not be assumed from the simple fact of closing its doors for two or three days unless or until some such step as filing a bill to have its insolvency determined has been taken. In such case upon the general principle applicable to insolvent estates, a depositor in a bank has a right to his set off if the claims were mutual at the time when the insolvency occurred; a certificate of deposit assigned after suspension but before the filing of the bill for winding up the affairs of the bank as an insolvent corporation, is a valid offset in favor of the assignee against a debt owing by him to the corporation.[50]

Preference.—If the assignee can use his equitable title to the deposit as a defense to the legal claims of the bank against him, a preference of a creditor of the bank over others is wrought out and secured after the act of insolvency. This could not be done under the Bankrupt Act of June 3, 1864.[51]

Assignment of Firm's Deposit to One Copartner.—Where an assignee of an insolvent bank sues the members of a firm on their note, one of them may set off the deposit in the bank of another firm, of which such defendant is a member, the other member of such firm having assigned his interest therein to such defendant, though after the failure.[52]

Right Given by Statute.—A right may be expressly given by statute to

47. Bill holder.—Stone *v.* Dodge, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280; McLaren *v.* Pennington (N. Y.), 1 Paige 102; Clarke *v.* Hawkins, 1 R. I. 219.

In Bank *v.* Rosevelt (N. Y.), 9 Cow. 409, it was held that bills obtained by the debtor of a bank after it has stopped payment, but before a receiver was appointed, are not admissible as a set-off. In re Receiver of Middle District Bank, 1 Paige 585, is to the same effect. Stone *v.* Dodge, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280.

48. Claim.—Stone *v.* Dodge, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280.

49. Stone *v.* Dodge, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280.

50. Moseby *v.* Williamson, 53 Tenn. (5 Heisk.) 278, distinguishing in Stone *v.* Dodge, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280.

"If a party should become a creditor of one to whom he is a debtor only a few days before his death, this fact could not defeat his right of set-off, even though the death might be deemed probable. So, in the case before us, we hold that defendant was entitled to his set-off, as he was the owner of the certificate before the bill was filed." Moseby *v.* Williamson, 53 Tenn. (5 Heisk.) 278.

51. Preference.—T. gave to the V. National Bank his bond for $65,000, with warrant of attorney to confess judgment, and at the same time deposited $31,000 United States bonds as collateral. R. had to his credit in the bank $43,000. The bank, being insolvent, stopped payment. On the next day R. assigned his deposit to T., and on the same day the bank entered judgment against T. on his bond. Held, that T. could not set off the deposit against his indebtedness to the bank, as to allow him to do so would secure him a preference over other creditors of the bank, after the act of insolvency, and would conflict with §§ 50, 52, of the act of congress of June 3, 1864, relating to national banks. Venanga Nat. Bank *v.* Taylor, 56 Pa. 14.

52. Assignment of firm's deposit to one copartner.—Jack *v.* Klepser, 196 Pa. 187, 46 Atl. 479, 79 Am. St. Rep. 699.

the holder of checks[53] or certificates of deposit[54] purchased by him after the completion of an assignment for the benefit of creditors or other act of insolvency by a bank, to set off the same against his indebtedness to the bank, in which case equity will follow and obey the statute.[55]

Power of Receiver to Allow.—A receiver of an insolvent bank has no power to allow a set-off against a debt owing to the bank, when the demand sought to be set off was assigned to the debtor for that purpose after his appointment.[56]

Burden of Proof.—Where a defendant who is sued upon a note by a receiver of an insolvent bank offers as a set off a certificate of deposit given by the bank, the burden is on him to show that he received it previous to the filing of the bill by which the assets of the bank were impounded for the benefit of creditors.[57]

§ 136. Lien of Bank on Deposits.—A bank has no lien upon the general depositor's account of its debtor to secure his indebtedness to it.[58]

"**The word 'lien'** is inaptly applied to a general deposit in a 'bank,' which is the property of the bank itself. It can be properly applied to special specific deposits of chattels, choses in action, valuables, etc."[59]

The banker's lien is defined as "a mere right of the bank to retain in its own possession, property, the title of which (absolute or special) is, or in the case of negotiable paper, purports to be, in one against whom the bank has some demand, until that demand is satisfied."[60]

When Lien Arises.—A general lien for balance of accounts, upon special deposits, may arise in favor of a bank or banker out of contract expressed, or implied in the usage of business, in absence of evidence of contrary intention. But it does not arise as of course, and is not favored.[61]

53. Right given by statute.—By the provisions of the Act of March 12, 1842, the assignees of the Bank of Pennsylvania are bound to receive, in payment of debts due to said bank, the checks of its depositors, at par, whether held by the defendant at the time of the commencement of the suit, or acquired afterwards. Bank *v.* Spangler, 32 Pa. 474.

54. A private banker closed his bank, and after six days made a voluntary assignment. Plaintiff, whose note to the assignor became due prior to the assignment, between the day of closing and the day of assignment purchased certificates of deposit issued by the assignor. Held, that under Rev. St., § 4258, authorizing one sued on a note by an assignee after maturity to set off against the same a contract demand against the assignor which he holds as assignee, in good faith, before notice of assignment, if the demand be such as might have been set off against the assignor while the note belonged to him, the certificate should be a set-off against his note. Johnston *v.* Humphrey, 91 Wis. 76, 64 N. W. 317, 51 Am. St. Rep. 873.

55. Johnston *v.* Humphrey, 91 Wis. 76, 64 N. W. 317, 51 Am. St. Rep. 873.

56. Power of receiver to allow.—Van Dyck *v.* McQuade, 85 N. Y. 616.

57. Burden of proof.—Stone *v.* Dodge, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280; Smith *v.* Mosby, 56 Tenn. (9 Heisk.) 501.

58. Lien of bank on deposits.—Davenport *v.* State Banking Co., 126 Ga. 136, 54 S. E. 977.

59. "Lien."—Tallapoosa County Bank *v.* Wynn, 173 Ala. 272, 55 So. 1011; Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

60. Definition.—Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804, quoting 1 Morse on Banks and Banking, § 323.

61. When lien arises.—Reynes *v.* Du-

To What Lien Attaches.—A banker's lien ordinarily attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit. It attaches to such securities and funds, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion.[62]

Contract Essential.—In order to give such lien, there must be a contract for that purpose, either express or implied. The credit must be given on the credit of the securities of valuables in expectancy. This is the extent of the banker's lien.[63]

Securities Not in Possession in Course of Business.—It does not arise upon securities accidentally in the possession of the bank, or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien.[64]

Commercial Paper Deposited for Collection.—When a bank makes advances or gives new credit on faith of a check or other commercial paper a customer deposits for collection, and for which he receives credit, it becomes entitled to a lien on it and its proceeds for the amount advanced.[65] Where a bank accepts a check for collection and gives a depositor credit for it, and the latter draws against his account to an amount of the check, it has a lien for the overdraft, and to that amount is a holder for value and may recover to such extent against the maker, under an act, relating to negotiable instruments, and providing that where the holder has a lien on the

mont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486.

"Undoubtedly while 'a general lien for a balance of accounts is founded on custom, and is not favored, and it requires strong evidence of a settled and uniform usage, or of a particular mode of dealing between the parties, to establish it,' and 'general liens are looked at with jealousy, because they encroach upon the common law, and disturb the equal distribution of the debtor's estate among his creditors', (2 Kent Com. 636), yet a general lien does arise in favor of a bank or banker out of contract expressed, or implied from the usage of the business, in the absence of anything to show a contrary intention." Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486.

62. To what lien attaches.—Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486; Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693.

"In Bank *v.* New England Bank (U. S.), 1 How. 234, 11 L. Ed. 115, Mr. Chief Justice Taney, in delivering the opinion, referring to the general principle that a banker who has advanced money to another has a lien on all paper securities in his hands for the amount of his general balance, says: 'We do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of transactions between the parties.'" Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486.

63. Contract essential.—Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

64. Securities not in possession in course of business.—Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486; Yardley *v.* Philler, 167 U. S. 344, 42 L. Ed. 192.

65. Commercial paper deposited for collection.—National Bank *v.* Bonsor, 38 Pa. Super. Ct. 275.

instrument he is deemed a holder for value to the extent thereof.[66]

Note Refused Discount.—A bank has no lien upon a note which it refuses to discount.[67]

A collateral deposit to secure one bill or class of debts, is not subject to a lien for all debts of the depositor to the bank. The specific pledge of the deposit for a certain sum is inconsistent with a general lien.[68]

66. National Bank *v.* Bonsor, 38 Pa. Super. Ct. 275.

67. **Notes which bank refused to discount.**—A bank which receives notes sent to it for discount, the proceeds to be placed to the credit of its correspondent, which refuses to discount the paper, but which pays drafts drawn in the belief that the notes had been discounted, has no lien upon the note for its reimbursement. In such a case the bank, in settlement with a receiver of its correspondent, is chargeable with money collected on the paper thus sent for discount, and with the value of so much of it as remained unpaid to be set off by the amount of the drafts drawn upon it by its correspondent after the notes were forwarded for discount. Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

68. **Collateral.**—It is a well-established rule that collateral deposited with a bank for one debt or class of debts can not be appropriated to a different debt or class of debts, in the absence of an agreement, express or implied, between the parties to that effect. And this is true even where collaterals are allowed to remain in the bank after the debt secured by them is paid. But a usage or custom of the bank, known to the depositor, to treat the collaterals as security for all loans made to the pledgor so long as the collaterals remain in the possession of the bank, may change this rule. Loyd *v.* Lynchburg Nat. Bank, 86 Va. 690, 11 S. E. 104; Bacon *v.* Bacon, 94 Va. 686, 27 S. E. 576.

Specific pledge excludes general lien.—"In Duncan *v.* Brennan, 83 N. Y. 487, the language of the court is: 'The general lien which bankers hold upon bills, notes, and other securities deposited with them for a balance due on general account, can not, we think, exist where the pledge of property is for a specific sum and not a general pledge.'" Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486.

The facts in Beibinger *v.* Continental Bank, 99 U. S. 143, 25 L. Ed. 271, were that a customer of a bank had deposited with it, as collateral security for his current indebtedness on discounts, a note secured by mortgage, which he withdrew for foreclosure, at the sale under which he purchased the property, and left the deed he received with the bank at its request. His indebtedness to the bank was then fully paid, but after a temporary suspension of his dealings he again incurred debts to it. It was held that as it did not appear that money was loaned or debt created on the faith of possession of the deed, the bank could not claim against the debtor's assignee an equitable mortgage by the deposit of the conveyance. There are instances of an express pledge of securities for a specific loan, where the surplus realized from them has been directed to be applied to satisfy a general debt, but there is no pretense in the case at bar of any ground for the application of the principle of tacking. Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486.

S., a New York banking house, the correspondents of a New Orleans national bank and also a banking firm there of which C., the president of the bank, was senior member, failed, and its trustee in bankruptcy claimed a banker's lien upon bonds placed with it by C. & Son, their apparent owners, for the balance of account due S. by C. & Son, as well as a lien by agreement for an unsecured balance due by the New Orleans bank to the extent of $100,000. Both the New Orleans bank and C. & Son had failed. The written authority relied on was that the drafts to be drawn by the bank on S. were "to represent exchange bought and paid for," and the bonds were to be held as collateral to advances by S. before remittances of the exchange. "Exchange bought and paid for" meant bills drawn against shipments, and purchased by advances made to the shippers upon the strength of documents to be furnished by them with the bills, to repay the advances so made. It was to enable the bank to make such advances in New Orleans that S., on its part, advanced to the bank, and, to assist the bank, C. & Son were willing to and did pledge the bonds as collateral, to a maximum of $100,000. The understanding was

Fire Insurance Policy.—A bank has not an equitable lien on a fire insurance policy left with it, for any debt due it by the owner of the policy, in the absence of a contract, express or implied, to that effect, and the giving of credit on the faith of the lien.[69]

Waiver or Estoppel to Assert Lien.—A bank is estopped from claiming a lien on a deposit made for a special purpose, and resulting from an agreement with the depositor where it has tacitly encouraged another person to change his position in the belief that it did not claim any lien upon it for

that the bonds should be held as collateral while S. was uncovered, that is to say, not covered by the remittance of exchange purchased, the bonds thus being used to bridge the interval between making the advances and the receipt of the drafts with bills of lading attached by S. They were not pledged for a general balance, nor was there a banker's lien for the indebtedness of C. & Son. Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486.

The parties were dealing in exchange to their mutual profit, and all that S. stipulated for, and all that C. & Son agreed to, was that the bonds should be held as security while the merchandise was being purchased and shipped, and drafts against the shipments transmitted to S. & Sons in liquidation of their advances. Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486.

A distinct agreement with the latter that they should be held for the debts of the bank must be shown in order to the maintenance of a lien upon them. Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486.

The bonds, being in effect all pledged to guarantee the remittance by the bank of exchange purchased, could not be held by implication as security for the indebtedness of C. & Son on a balance on account. The specific pledge withdrew them from the operation of the alleged banker's lien, for it was inconsistent with the presumed intention of the parties. And, applying the principles upon which such a lien rests, it is doubtful whether it ever existed in favor of S. Reynes *v.* Dumont, 130 U. S. 354, 390, 32 L. Ed. 934, 9 S. Ct. 486.

Presumption.—If there is a presumption, as between customer and banker, that the securities or property of the customer, found in the possession of the banker, have been left with him to secure him generally against loss, this is not an irrebuttable presumption, and each case stands upon its own circumstances. And, since S. did not claim at the time of the failure that it had a general lien, but simply that it held the bonds by "written authority," as collateral security against the bank of New Orleans, there can be no other conclusion than that S. is not entitled to maintain a banker's lien against the bonds, for the ultimate debit balance of C. & Son. Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486.

Equity jurisdiction.—The objection can not be sustained that there was an absence of jurisdiction in equity of a bill to recover the securities upon which the lien was claimed, from the party claiming the lien, because of the adequacy of the remedy at law. S. had collected many thousands of dollars on coupons cut from the bonds after the failure of the bank and C. & Son, and before their own failure. F. the assignee, had made similar collections. F. claimed to hold the moneys and the bonds to secure a balance of account due to S. from the C. & Son, and also as collateral to the indebtedness of the New Orleans Bank. D. claimed a large part of the bonds as against the general creditors of the C. & Son and as against S. and C.'s general creditors claimed the residuum. As to the amount due to F., controversy over some thousands of pounds in the Union Bank of London was involved. An accounting was necessary between the parties, and a multiplicity of suits was inevitable, unless the determination of the conflicting rights set up could be arrived at in a proceeding in equity. And, in addition to these considerations, the raising of this objection, for the first time, at this stage of the cause, ought not to be regarded with favor. Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486.

69. Fire insurance policy.—First Nat. Bank *v.* Cleland, 36 Tex. Civ. App. 478, 82 S. W. 337, affirmed in 98 Tex. 615, no op.

any personal balance against the depositor, where such third person will be pecuniarily prejudiced by the assertion of such lien.[70]

§ 137. Payment of Checks[70a]—§ 138. —— Duties and Liabilities of Bank to Depositor—§ 138 (1) General Rules and Definitions and Terminology.—By the contract of deposit, the bank undertakes to honor the checks which the depositor shall from time to time draw against his account;[71] and is bound to honor the checks of its customer so long as he has funds on deposit to his credit, unless such funds are intercepted by a garnishment or other like process or are held under the bank's right of set-off.[72] For any breach of this agreement the bank is liable in an action by the depositor,[73] which accrues at once upon the bank's failure

70. Waiver or estoppel to assert lien.—Custer County *v.* Walker, 10 S. Dak. 594, 74 N. W. 1040; Andrews *v.* Artisans' Bank, 26 N. Y. 298.

A county treasurer borrowed $1,000 from defendant bank on his individual note, and then deposited it to his account as county treasurer, presumably to take the place of funds previously collected for the county. Thereafter the bank delivered to the treasurer drafts, including one for the $1,000, payable to his order as county treasurer, which were exhibited by him to the county commissioners, and his accounts settled in reliance thereon. Held, that the bank was estopped from claiming a lien on the $1,000 on account of the loan, or from setting up an agreement with the treasurer, that, if the note was not paid in full, the balance was to be charged back to the account. Custer County *v.* Walker, 10 S. Dak. 594, 74 N. W. 1040.

70a. Actions on checks, see post, "Actions by Payee or Holder of Check against Bank," § 155.

Evidence of payment in action to recover deposits, see post, "Actions by Depositors or Others for Deposits," § 154.

Payment through clearing house, see post, "Constitution, By-Laws, and Rules," § 319.

Collections through clearing house, see post, "What Constitutes Collection," § 163.

Trust funds, see ante, "Trust Funds," § 130.

71. General rules and definitions and terminology.—Covert *v.* Rhodes, 48 O. St. 66, 27 N. E. 94; Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 O. St. 60, 42 N. E. 700, 31 L. R. A. 653, 56 Am. St. Rep. 700; S. C., 27 Wkly. L. Bull. 105, 11 O. Dec. 469; Dodge *v.* National Exch. Bank, 30 St. 1; McGregor *v.* Loomis, 1 Disn. 247, 12 O. Dec. 602; McCurdy *v.* Society, 6 O. Dec. 1169; Kuhn & Sons *v.* Frank, 6 O. Dec. 1142, 10 Am. L. Rec. 622, 7 Wkly. L. Bull. 134.

The bank in consideration of the deposit or loan, impliedly agrees with the depositor that whenever demand is made by the presentation of a genuine check, properly indorsed, in the hands of a person entitled to receive the amount, the check will be honored to the extent of the funds on deposit. Wood *v.* American Nat. Bank, 100 Va. 306, 40 S. E. 931; Robinson *v.* Gardiner, 59 Va. (18 Gratt.) 509; Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

A bank, by its contract with a depositor, must pay on his account, to the holder of checks bearing the depositor's genuine signature, the amount called for, provided such amount is to his credit. Linick *v.* Nutting & Co., 125 N. Y. S. 93, 140 App. Div. 265.

The bank will be responsible for the sum deposited, and must pay the same amount of money when so ordered by the depositors—this usually being done on his check. Weisinger *v.* Bank, 78 Tenn. (10 Lea) 330.

The very relation of the bank to its depositor, as it is commonly known and understood, is that it will pay, in whole or in part, upon checks of the depositor. Doty *v.* Caldwell (Tex. Civ. App.), 38 S. W. 1025.

72. Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

The bank has no right, as against the drawer of a check, to do anything but pay it. Oyster & Fish Co. *v.* National Lafayette Bank, 51 O. St. 106, 36 N. E. 833, affirming 4 O. C. C. 135, 2 O. C. D. 463.

73. Cincinnati, etc., R. Co. *v.* Metro-

to pay his check when duly presented.[74]

The word "payable" is defined as that which may, can, or should be paid; suitable to be paid; that may be discharged or settled by delivery of value; matured; now due. A direction in a check to the drawee bank that it is payable through another named bank means that it is to be paid in that way.[75]

The phrase "subject to check" means subject to payment without limitation or restriction, except that the check must be presented to the bank within banking hours, on banking days.[76]

§ 138 (2) Degree of Care Required.—A bank, no matter what care is exercised and precaution taken, can not charge its depositor with any payments except such as are in conformity with his order, in the absence of negligence or misleading conduct of the depositor.[77] Whether the paying teller is guilty of negligence in the payment of a customer's checks is a question of fact, although the customer stood by when the bundle of checks were presented and ordered them paid.[78]

To Prevent or Discover Fraud.—A bank must scrutinize checks and exercise proper care and skill to prevent or discover fraud.[79]

Provision in Pass Book.—Officers are not relieved from using reasonable care in paying out a depositor's money, though provisions in his pass book approximate it to the case of an ordinary savings bank.[80]

§ 138 (3) Right to Close Account and Terminate Relation.—A bank may arbitrarily select its customers, and its act in declining an account is not open to question. But once it accepts an account, the depositor eo instanti becomes its customer, and entitled as such to have his checks honored to the extent of his credits, until the relationship is terminated by

politan Nat. Bank, 54 O. St. 60, 42 N. E. 700, 31 L. R. A. 653, 56 Am. St. Rep. 700.

74. Wood *v.* American Nat. Bank, 100 Va. 306, 40 S. E. 931; Robinson *v.* Gardiner, 59 Va. (18 Gratt.) 509; Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

75. "Payable."—Farmers' Bank *v.* Johnson, etc., Co., 134 Ga. 486, 68 S. E. 85.

76. "Subject to check."—Dottenheim *v.* Union Sav. Bank, etc., Co., 114 Ga. 788, 40 S. E. 825.

77. Degree of care required.—National Dredging Co. *v.* Farmers' Bank (Del.), 6 Penn. 580, 69 Atl. 607; Tomlinson *v.* National German-American Bank, 73 Minn. 117, 75 N. W. 1028.

78. At the time of the failure of a bank with which plaintiff was a depositor, plaintiff had nine checks on said bank outstanding, one of which had been certified by the bank, though plaintiff was not aware of the fact. Plaintiff made arrangements with defendant bank to pay the outstanding checks, and the nine checks were presented in a bundle, and, after being examined by the teller, paid, the teller failing to discover the certification on said check. Defendant knew that plaintiff had not examined the checks since he issued them. Held, it was a question of fact whether defendant was at fault in paying the check, although plaintiff stood by when the bundle of checks was presented, and ordered them paid. Tomlinson *v.* National German-American Bank, 73 Minn. 117, 75 N. W. 1028.

79. To prevent or discover fraud.—Brown *v.* Lynchburg Nat. Bank, 109 Va. 530, 64 S. E. 950.

80. Provisions in pass book.—Siegel *v.* State Bank, 123 N. Y. S. 220.

the act of either or both of the parties.[81] A bank is not justified in closing an account and dishonoring the checks drawn against it without reasonable notice.[82]

§ 138 (4) Necessity, Form and Contents of Check—§ 138 (4a) Necessity and Form Generally.—Necessity.—No order or check is necessary to authorize a bank to pay over money, where the necessity for such order or check was not contemplated by the parties.[83]

Use of Form of Another Bank.—It is not negligence for a bank to pay a depositor's check written on the form of another bank.[84]

§ 138 (4b) Date—§ 138 (4ba) Postdated Checks.—Where a bank pays a postdated check before the day upon which it is dated, the bank makes the payment upon its own responsibility, and can not charge the amount to the drawer of the check.[85]

§ 138 (4bb) Checks Altered as to Date.—A bank which pays a postdated check altered as to date must bear the loss and not the depositor.[86]

§ 138 (4c) Signature and Countersign—§ 138 (4ca) In General.—The proper and only safe rule for the bank is to require the signature to be identical with the credit on its books.[87]

Check of Trustee.—Payment by a bank to a trustee on his checks will discharge it, whether such checks be signed with or without the designation of the trustee.[88]

§ 138 (4cb) Unsigned Checks.—Where the bookkeeper of a depositing corporation presents an unsigned check, which the bank pays, the bookkeeper appropriating the proceeds, such payment is negligence per se, and

81. Right to terminate account and terminate relation.—Jaselli *v.* Riggs Nat. Bank, 36 App. D. C. 159.

82. Jaselli *v.* Riggs Nat. Bank, 36 App. D. C. 159.

83. Necessity for check.—Smith *v.* First Nat. Bank, 43 Tex. Civ. App. 495, 95 S. W. 1111. See, also, Coleman *v.* First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938, affirmed in 94 Tex. 605.

84. Use of form of another bank.—First State Bank *v.* Vogeli (Kan.), 96 Pac. 490.

85. Postdated checks.—Godin *v.* Bank, 13 N. Y. Super. Ct. 76.

86. Check altered as to date.—A depositor postdated a check, and left it with his bookkeeper for a certain purpose, to be cashed by the bookkeeper on the day which the check was dated, provided the depositor was absent at that time. The date of the check was altered by the bookkeeper, who collected the check before the date which it originally bore, and absconded with the money. Held, that the bank, and not the depositor, must suffer the loss. Crawford *v.* West Side Bank, 49 N. Y. Super. Ct. 68.

The plaintiff, on the 20th of April, intending to be absent from his place of business for a few days, drew his check, dated April 22d, payable to his clerk, to pay wages due employees April 22d, in case plaintiff should not return. The clerk altered the date to the 21st, drew the funds on that day, and absconded. Held, that the check, by reason of the alteration, conferred no authority on the bank to pay it, and to charge the same against plaintiff's account. Crawford *v.* West Side Bank, 49 N. Y. Super. Ct. 68.

87. Signature and countersign.—Carr *v.* Fidelity Bank, 126 N. C. 186, 35 S. E. 246.

88. Check of trustee.—Munnerlyn *v.* Augusta Sav. Bank, 88 Ga. 334, 14 S. E. 554, 30 Am. St. Rep. 159.

the bank is liable to the depositing corporation, without reference to any question of the estoppel of the corporation to recover for the payment of forged checks, because of having failed to warn the bank in advance thereof.[89]

§ 138 (4cc) Joint Deposits.—Where several persons make a deposit in a bank to their joint credit, the bank must have the signatures of all of them appended to a check before it is authorized to pay it.[90]

§ 138 (4cd) Partnership or Firm Deposit.—Where a deposit is made in the name of a partnership, the bank having no notice of the nature of the property whence the fund was derived, but knowing that as to the fund itself it was treated as the property of a partnership; and one of said partners drew a check on the firm signing it with the firm name, there was no other course than to pay it. The bank was not called upon to inquire into the nature of the fund or of the supposed partnership. Where it received deposits in the name of the firm and it paid to the order of the firm, it discharged the trust confided to it. This case has no analogy to a deposit made by two or more in their individual names, with notice, express or implied, not to be paid out except upon their joint order.[91]

§ 138 (4ce) Countersigning—§ 138 (4cea) Partnership Check.—Either member of a copartnership may protect himself by stipulating that the other member shall not have authority to bind the firm by signing checks if notice is given to the bank which is the depository of the firm; and when it appears that the bank has disregarded the notice the burden is on the bank to show that the firm received the benefit of the amount so drawn.[92] The fact that members of the firm had an opportunity of examining the bank's account against them does not estop them to rely on the violation of their instructions as a defense.[93]

89. Unsigned checks.—Kenneth Inv. Co. *v.* National Bank, 96 Mo. App. 125, 70 S. W. 173.

90. Joint deposits.—Columbia Finance, etc., Co. *v.* First Nat. Bank, 116 Ky. 364, 25 Ky. L. Rep. 561, 76 S. W. 156; Carr *v.* Fidelity Bank, 126 N. C. 186, 35 S. E. 246.

91. Partnership or firm deposit.—Carr *v.* Fidelity Bank, 126 N. C. 186, 35 S. E. 246.

An agent of tenants in common of land collected rents, which he deposited in defendant bank to the credit of such owners as S. & C.; the bank having no knowledge that the deposits were owned by S. and C. as tenants in common, and not as partners. S. drew a check for a large part of the deposit, signed S. & C., payable to "order of ourselves," and indorsed it S. & C., which check the bank paid. Held, that the bank was not required to inquire as to the nature of the fund or of the supposed partnership, and that such payment was a valid payment of the deposit, as against such tenants in common. Carr *v.* Fidelity Bank, 126 N. C. 186, 35 S. E. 246.

92. Partnership check.—Gladstone Exch. Bank *v.* Keating, 94 Mich. 429, 53 N. W. 1110.

In an action by a bank for overdrafts paid on a firms checks, where it appeared that plaintiff was instructed by defendants to cash no checks not countersigned by their bookkeeper, and that the checks for which recovery is sought were not so countersigned, the burden is on the bank to show that the firm received the benefit of the amount so drawn. Gladstone Exch. Bank *v.* Keating, 94 Mich. 429, 53 N. W. 1110.

93. Gladstone Exch. Bank *v.* Keating, 94 Mich. 429, 53 N. W. 1110.

§ 138 (4ceb) Corporation.—A corporation may protect itself by requiring its checks to be signed and countersigned by certain of its officers where such requirement is communicated to the bank.[94] Where there is a positive agreement between the bank and the corporation that the checks will not be honored unless signed and countersigned by certain officers of the corporation, no check which fails to measure up to these requirements as to signatures of officers can bind the corporation or protect the bank against loss if paid by it.[95] The fact that a check against the deposit of a corporation was not signed and countersigned as all the other checks against such deposit had been, is, of itself, in the absence of any special contract or arrangement in regard to the signing of such checks, sufficient to put the bank upon notice that the check was not such authority as would warrant it to pay out the funds of the corporation thereon.[96] In such case if the bank pays checks irregularly signed it does so at its peril; but where such checks, though not drawn in exact conformity with the instructions, were drawn by officers of the corporation who were at the time in sole charge of its business, and though irregular in form, were for a corporate purpose within the scope of the corporate affairs, for the liquidation of corporate liability, and the benefit of the transaction in each instance was enjoyed by the corporation, which made no effort to again pay the debts thus discharged or ever repudiated the transaction, it must be presumed that it ratified and approved it; and it can not be supposed that in the ordinary course of business it was ignorant of the facts, and, therefore, there can be no recovery from the bank.[97]

94. Corporation.—Metropolitan Nat. Bank *v.* Race, 32 Ill. App. 126.

Checks drawn by agent.—See post, "Agent of Depositor or Third Person," § 138 (8b).

95. Ellis *v.* Western Nat. Bank (Ky.), 124 S. W. 334.

A bank which had agreed with an insurance company, having a deposit with it, that the company's checks should be honored only when signed by its president, and countersigned by another officer, as required by its by-laws, to the knowledge of the bank, having attempted to pay to itself money from the deposit on a check signed only by the company's president, was liable to the company's receiver therefor; and was not entitled to retain it, notwithstanding the check was improperly drawn, on the theory that it was used to pay a debt for which the company was liable; it being used to pay a note given to the bank, not by the company, but by individual promoters thereof, for a loan which they turned over to the company, to enable it to comply with the law requiring it to have a certain amount of cash on hand, over and above any liability, before it could do business. Ellis *v.* Western Nat. Bank (Ky.), 124 S. W. 334.

Where the treasurer of a foreign corporation opened an account with a bank and at the same time handed it authorized signature cards to guide it in the payment of checks drawn thereon, which cards contained the signatures of both the president and the treasurer, the bank was not authorized to pay checks signed by the treasurer alone, and was liable to the corporation for the sums so paid. Shoe Lasting Mach. Co. *v.* Western Nat. Bank, 70 App. Div. 588, 75 N. Y. 627.

96. Ellis *v.* Western Nat. Bank (Ky.), 124 S. W. 334.

97. Effect of payment of irregularly signed.—Metropolitan Nat. Bank *v.* Race, 32 Ill. App. 126.

A bank was instructed to pay no checks on account of a corporation unless countersigned by its secretary. In the absence of the latter the treasurer drew certain checks in payment of debts due by the corporation, and the bank paid them without the secretary's signa-

Notice of Requirement Not Communicated to Bank.—Where the secretary-treasurer of a foreign corporation opened an account with a bank, handing it authorized signature cards to guide it in paying checks drawn thereon, which cards contained only his signature, the corporation could not hold the bank liable for the amount of checks so paid on the ground that they should also have contained the signature of the president.[98]

§ 138 (4cec) Receiver's Check, Countersigning by Judge.—Where the funds in a bank which were diverted were the assets of an insolvent corporation and had been deposited in the bank by a receiver, under order of court providing that they should be paid out only by checks signed by the receiver and countersigned by the judge, of which order the bank had knowledge, the creditors of the corporation would have the right to enforce the liability incurred by the bank where it paid out such funds on checks not countersigned as provided.[99]

Trustees' Check, Countersigning by Surety.—A trustee can not legally enter into an agreement with his surety that the trust deposit shall not be withdrawn except upon the joint check of the trustee and surety.[1]

§ 138 (4d) Memoranda on Margin or Body of Check.—Generally a bank on which a check is drawn need not take notice of memoranda on the margin or on the body of the check, placed there for the convenience of the drawer to preserve information for his benefit, or as a convenient receipt showing the purpose of the payment.[2]

§ 138 (4e) Check against Deposit of City.—That checks did not show on their face that a payment had been authorized in writing by the mayor, on a paper countersigned by a city clerk, was not notice to a bank that they should not be paid, so as to render it liable for their payment, notwithstanding an ordinance providing that no money should be drawn out of a city treasury, except on the written order of the mayor and countersigned by the city clerk, and the city charter (St. 1851, p. 790, c. 296, § 8),

ture. The checks were returned to the corporation, when its bank book was balanced, and no complaint was made by it for some six months. Held, in a suit by the bank against the stockholder of the corporation who had guarantied its note to the bank, that the amount paid on the irregular checks should be credited on the note. Metropolitan Nat. Bank *v.* Race, 32 Ill. App. 126.

98. Notice of requirement not communicated to bank.—Shoe Lasting Mach. Co. *v.* Western Nat. Bank, 70 App. Div. 588, 75 N. Y. S. 627.

99. Receiver's check countersigning by judge.—Exchange Bank *v.* State, 129 Ga. 126, 58 S. E. 867.

1. Guardianship funds payable only upon joint check of guardian and surety.—A guardian agreed with his surety that the ward's funds should be deposited in a bank, and not withdrawn, except on the joint check of the guardian and the surety. The bank failed, and its receiver paid to the guardian dividends without the indorsement of the surety on the certificate of deposit representing the ward's funds. The guardian did not account for the dividends and his surety paid the same to his successor. Held, that the surety did not thereby acquire a right by equitable petition to be reimbursed out of the ward's funds remaining in the hands of the receiver. Fidelity, etc., Co. *v.* Butler, 130 Ga. 225, 60 S. E. 851.

2. Memoranda on check.—Brown *v.* Cow Creek Sheep Co. (Wyo.), 126 Pac. 886.

providing that a city council shall take care that money shall not be paid by the treasurer, unless granted or appropriated.[3] That checks were payable to the order of a city treasurer and indorsed by him was not notice to a bank that they should not be paid, there being nothing to inform the bank to whom or for what purpose they were issued.[4]

§ 138 (5) Consideration.—See post, "Purpose," § 138 (6).

§ 138 (6) Purpose—§ 138 (6a) Checks Given for Unlawful Purpose Generally.—A bank can not decline payment of a customer's checks on the ground that bad use is to be made of the money, nor excuse disobedience of a customer's orders, in the due course of business, by setting up that it knew or had reasonable grounds to believe that such orders were given in promotion of an unlawful purpose.[5]

§ 138 (6b) Checks Drawn in Connection with Gambling Transaction.—Ordinarily a bank can not refuse to honor a customer's check on the ground that it was delivered in connection with a gambling or wagering transaction;[6] and certainly the amount paid on such checks can not be recovered in an action against the bank where there was no notice.[7]

Check a Contract within Ohio Gaming Act.—Section 4269 of the Revised Statutes of Ohio providing that all promises, agreements, notes, bills, bonds, or other contracts, when the whole or any part of the consideration of such promise is for money won or lost upon any game whatsoever, shall be absolutely void and of no effect. It is at least a contract, for it imports an agreement upon the part of the drawer to pay it if on presentment to the drawee it is not paid, and due notice is given him of such nonpayment.[8]

§ 138 (7) Sanity of Drawer.—A bank in Ohio will not be protected in paying a check of a person who had been lawfully adjudged to be insane and who was in fact insane when the check was drawn. This is true though the fact of insanity was unknown to the bank at the time of pay-

3. **Check against deposit of city.**—Newburyport *v.* Spear, 204 Mass. 146, 90 N. E. 522.

4. Newburyport *v.* Spear, 204 Mass. 146, 90 N. E. 522.

5. **Check for unlawful purpose.**—McCord *v.* California Nat. Bank, 96 Cal. 197, 31 Pac. 51.

6. **Checks drawn in connection with gambling transaction.**—McCord *v.* California Nat. Bank, 96 Cal. 197, 31 Pac. 51.

Check in payment of election bet.—A bank can not refuse to cash a check, though it knows that the check was drawn in payment of a bet made in violation of law on the result of an election; and the fact that a check was so cashed is not ground on which the drawer can recover the amount from the bank. McCord *v.* California Nat. Bank, 96 Cal. 197, 31 Pac. 51.

7. **Recovery from bank in absence of notice.**—Snyder *v.* Corn Exch. Nat. Bank, 221 Pa. 599, 70 Atl. 876; Northern Nat. Bank *v.* Arnold, 187 Tenn. 356, 40 Atl. 794.

That checks drawn by an agent on his principal's account were delivered in connection with gambling or wagering transactions is unavailing in an action against the bank, where there was no notice. Snyder *v.* Corn Exch. Nat. Bank, 221 Pa. 599, 70 Atl. 876.

8. **Check a contract within Ohio Gaming Act.**—Lagonda Nat. Bank *v.* Portner, 46 O. St. 381, 21 N. E. 634.

ment and though the adjudication of insanity was made in another state.[9]

Supervening Insanity.—While it is true that, where a person whose contract it is sought to avoid was in such a state of insanity at the time it was executed as to render him incapable of transacting the business, the contract is voidable, though the other party may have acted fairly and without knowledge of his insanity, yet where one becomes a depositor in a bank the relation is that of debtor and creditor, the bank agreeing to pay on demand, and where the contract of deposit is made when the depositor is sane, the bank may pay the money at any time in the absence of knowledge of his incapacity at the time of doing so, and no duty devolves upon it to guard against any misuse to which he might put the money.[10]

§ 138 (8) Person Who May Draw—§ 138 (8a) Depositor—§ 138 (8aa) Depositor Not Having Beneficial Interest—§ 138 (8aaa) In General.—The contract of a bank, by accepting a deposit, to pay the amount according to the depositor's check, is between the depositor and the bank alone, without reference to the beneficial interest in the money deposited.[11] A bank can not refuse to honor checks of a depositor on the ground that the money deposited belongs to some other person, or that the title of the depositor is defective.[12] The bank has no right to raise a question as to how the funds of such depositor were acquired.[13]

Notice of Real Ownership.—Where money is deposited in a bank to the credit of one, having an open account with it, but who is not the owner of the funds so deposited, the bank will not be liable for allowing him to check out the deposit in the absence of notice of the real ownership of the funds.[14] Where a bank has notice of the fact that money deposited be-

9. Sanity of drawer.—American Trust, etc., Co. *v.* Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167.

10. Supervening insanity.—Reed *v.* Mattapan Deposit, etc., Co., 198 Mass. 306, 84 N. E. 469.

11. Depositor not having beneficial interest.—Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804, citing Robinson *v.* Gardiner, 59 Va. (18 Gratt.), 509.

The relation between banker and customer is somewhat peculiar, and it is most important that the rules which regulate it should be well known and carefully observed. A banker is bound to honor an order of his customer with respect to the money belonging to that customer which is in the hands of the banker; and it is impossible for the banker to set up a jus tertii against the order of the customer, or to refuse to honor his draft on any other ground than some sufficient one resulting from an act of the customer himself. Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885, reversing 77 S. W. 44.

12. Nebawka Bank *v.* Ingersoll, 2 Neb. 617, 89 N. W. 618.

13. First Nat. Bank *v.* Randall, 1 Tex. App. Civ. Cases, § 971, citing Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

14. Notice of real ownership.—Davis *v.* Panhandle Nat. Bank (Tex. Civ. App.), 29 S. W. 926.

In the case of Davis *v.* Panhandle Nat. Bank (Tex. Civ. App.), 29 S. W. 926, in passing on the question of the bank's liability for the payment of the factor's checks to others than the cestui que trust, it was said: "As to whether the bank should be protected in the amount it allowed H. (the depositing trustee) to check out, will depend on the question of notice. If it had notice of the real ownership of the funds, and that H. was not authorized to use them at the time it honored its checks, it is liable." Interstate Nat. Bank *v.* Claxton (Tex. Civ. App.), 77 S. W. 44, reversed in 97 Tex. 569.

longs to another than the depositor, it may refuse to pay his check, and be compelled to pay to the real owner.[15]

Means by Which Depositor Obtained Funds.—Where the drawee in a check has funds in his hands subject to the check, he can not inquire into the legality of the means by which the drawer obtained the funds.[16]

§ 138 (8aab) Duty to Investigate Destination of Money.—The bank is under no duty to supervise and safeguard a trust account therein, nor to look after appropriation of the funds when withdrawn, and it may, in absence of knowledge to the contrary, presume a depositor, who presents a check in proper form, is acting in course of a lawful exercise of his rights, and suspicion on its part that an improper use of the proceeds of a check regularly drawn and presented is intended to be made by the drawer will not justify a refusal to honor it, nor cast on the bank duty to investigate.[17]

Corporation.—A bank may pay out a check drawn in the name of a corporation, in the usual course of business, and when there are no circumstances of suspicion to put it on inquiry, without investigating the destination of the money.[18]

Deposit of Agent.—A bank receiving a deposit credited to the depositor, followed after his name by the word "agent," must treat the depositor as the real owner of the fund and honor checks properly drawn without concerning itself as to the application made or to be made of the money drawn out.[19]

Deposit for an Agent.—Where a bank received money on deposit for an agent who had a beneficial interest therein, by accepting the deposit the bank assumed the relation of a debtor to the agent, and promised to pay the amount according to his check, and such contract is between the depositor and the bank alone, without reference to the beneficial interest in the money deposited.[20]

Check of Trustee.—Since the contract between the bank and the depositor is that the former will pay according to the checks of the latter, the bank, when a check drawn in proper form by a trustee is presented, is

15. Hanna *v.* Drovers' Nat. Bank, 194 Ill. 252, 62 N. E. 556.

16. **Means by which depositor obtained funds.**—First Nat. Bank *v.* Randall, 1 Tex. App. Civ. Cases, § 971.

17. **Duty to investigate destination of money.**—Lowndes *v.* City Nat. Bank, 82 Conn. 8, 72 Atl. 150.

"A bank must honor the checks of its depositors drawn in proper form, without regard to the use of the depositor is going to make of the fund. The only limitation is that the bank must not itself participate in the profits of the fraud. If a bank participates in the misapplication of trust money, it is liable; as where money deposited by A in his own name and known by the bank to belong to another, was applied by A to pay his debt to the bank, it was held liable to the principal." Merchants' Nat. Bank *v.* Phillip, etc., Machinery Co., 15 Tex. Civ. App. 159, 39 S. W. 217, affirmed in 93 Tex. 667, no op., citing Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

18. **Corporation.**—Hatch *v.* Johnson Loan, etc., Co., 79 Fed. 828.

19. **Deposit of agent.**—Silsbee State Bank *v.* French Market Grocery Co., 103 Tex. 629, 132 S. W. 465.

20. **Deposit for an agent.**—Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

bound to presume that the trustee is in the course of lawfully performing his duty, and to honor it accordingly.[21]

Checks of Cashier Who Was Also a Trustee.—A bank may be liable where it pays checks drawn by its cashier, who was also administrator of an estate, which deplete the estate, where the transaction was the result of the director's neglect.[22]

§ 138 (8aac) Bank Having Notice of Intended Breach of Trust.—A banking institution is not authorized to pay out funds intrusted to it on deposit to a person known by it to stand in a trust relation to the depositor, when it has notice that such person intends to misappropriate and divert the fund received, to his own uses when paid over; and in case such payment is made the amount so paid may be recovered at the suit of the depositor.[23]

§ 138 (8aad) Acceptance in Payment of Individual Debt.—See post, "Deposits by Corporation," § 138 (8ad).

§ 138 (8aae) Charging Individual Check to Trust Account.—It is a well-settled rule of law that a person who has deposited in bank money in a trust capacity, or a trustee, can not withdraw such money on individual checks, and if the bank knows of the trust character in which the funds were deposited, such funds can not be appropriated to individual debts.[24] Where the drawer has no account with the bank upon which the check is drawn, but has an account there as administrator, or in some other trust capacity, it is wrong for the bank to pay the check and charge it to the trust account.[25] Where the clerk of the courts deposits funds with a bank as clerk of the courts, the bank has no authority to pay out such funds on the individual check of such clerk, even though there be printed on such checks the words "county clerk," and if the bank pay such checks, it, and

21. Check of trustee.—Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693.

22. Check of cashier who was also a trustee.—Lowndes *v.* City Nat. Bank, 82 Conn. 8, 72 Atl. 150.

23. Bank having notice of intended breach of trust.—Emerado Farmers' Elevator Co. *v.* Farmers' Bank, 20 N. Dak. 270, 127 N. W. 522; Exchange Bank *v.* State, 129 Ga. 126, 58 S. E. 867.

Fund deposited by one as guardian.—When C. deposited in the bank of A. & L. a sum of money due to the estate of his ward, J., and the money was entered to the credit of C., guardian, the fund so deposited became the money and property of the ward's estate. Anderson *v.* Walker, 93 Tex. 119, 53 S. W. 821; Skipwith *v.* Hurt, 94 Tex. 322, 60 S. W. 423, reversing 58 S. W 192. A. & L. were notified by the fact that C. made the deposit as guardian that the money belonged to the estate of the ward, and they could not lawfully pay it to any person except by C.'s order, and then only for the uses of the estate; that is, they could not have knowingly applied the money in their hands to the payment of any order made by C. in any other character than that of guardian, nor could they have applied the money to the payment of any debt due from C. personally to them, or to any other person. Moore *v.* Hanscom, 101 Tex. 293, 106 S. W. 876, 877, reversing 103 S. W. 665.

24. Charging individual check to trust account.—State *v.* Hobson, 5 N. P. 321, 5 O. Dec. 442. See, also, McMillan *v.* Boyd, 40 O. St. 35.

25. First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723; State *v.* Hobson, 5 N. P. 321, 5 O. Dec. 442.

not the bondsmen of the clerk, will be liable to the county for the amount so paid.[26]

§ 138 (8ab) In Case of Adverse Claim to Deposit—§ 138 (8aba) Right of Depositor to Notice.—Checks Already Drawn.—As to checks already drawn by a customer before he is notified of an adverse claim to his deposit, the bank acts at its peril when it dishonors them.[27]

§ 138 (8abb) Payment Pendente Lite.—A bank which, after notice of suit, pays out money in dispute, does so at its peril.[28]

§ 138 (8ac) Deposits by Agent.—Where an agent employed to collect notes due his principal collected notes, and deposited the proceeds in a bank of which he was president to the credit of the principal, the bank was liable for the amount deposited, though the cashier paid checks drawn against the account in the name of a corporation in which the president was interested, or in the name of the president himself, without reason to believe that the payments were for the benefit of the principal.[29]

§ 138 (8ad) Deposits by Corporation.—Acceptance in Payment of Individual Debts.—Where a bank credits the amount of a check wrongfully drawn on the deposit of a corporation, by its officers, to the individual debt of such officers with knowledge of the misappropriation, the corporation may recover the amount of the misappropriated money,[30] and upon its insolvency the receiver of the corporation could recover from the bank the amount of the check.[31]

§ 138(8b) Agent of Depositor or Third Person—§ 138 (8ba) Agent Having Authority to Draw Checks.—A bank, which pays checks drawn by an agent of a depositor, acting within the scope of his apparent authority, the proceeds of which are misappropriated by such agent, is not liable to the depositor for the moneys paid out on such checks and misappropriated by such agent.[32]

26. State *v.* Hobson, 5 N. P. 321, 5 O. Dec. 442.

27. Checks already drawn.—Jaselli *v.* Riggs Nat. Bank, 36 App. D. C. 159.

28. Payment pendente lite.—Pearce *v.* Dill, 149 Ind. 136, 48 N. E. 788.

29. Deposits by agent.—Dixon *v.* Jackson Exch. Bank (Mo.), 129 S. W. 481.

30. Acceptance in payment of individual debts.—Kelsey *v.* Bank, 85 App. Div. 334, 83 N. Y. S. 281; Gerard *v.* McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; Rochester, etc., Road Co. *v.* Paviour, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790.

31. Kelsey *v.* Bank, 85 App. Div. 334, 83 N. Y. S. 281.

The president and cashier of an insurance company, as officers, made a check payable to the bank, drawn on the fund to the credit of the company. The bank credited the amount of the check to the individual debt of the president and cashier, with knowledge of the misappropriation of the company's funds by its officers. Held, that the receiver of the insurance company could recover from the bank the amount of the check. Kelsey *v.* Bank, 85 App. Div. 334, 83 N. Y. S. 281.

32. Agent having authority to draw check.—When an agent, having a power of attorney to collect any and all moneys due or to become due to his principal from any source, and especially a certain described claim, and to give, for his principal and in her

§ 138 (8bb) Check Drawn by Unauthorized Person.—Before the bank can charge the account of its depositor with the check of another, it must show authority or ratification by the depositor.[33]

Depositor Having Two Accounts.—Where a depositor in a bank made two accounts under an agreement that a third person should, as her agent, have the right to draw on one of them, the bank could not charge checks drawn by the third person on the other account.[34]

Checks Drawn by Agent without Authority.—A bank which pays checks drawn by an agent of a depositor, without authority from his principal, the proceeds of which are misappropriated, is liable to the depositor for the moneys paid out in such checks and misappropriated.[35] Where a depositor gave his agent the power of attorney to draw checks against his depositor for a certain number of days only and deposited the power of attorney with the bank and afterwards resumed his business of drawing his own checks, but the agent continued to draw checks without the knowledge of the depositor, part of which he appropriated to the business of his principal, and appropriated the balance to his own use, the bank was liable to the depositor for the moneys paid out on the checks drawn by the clerk after his agency ceased, and which he appropriated to his own use.[36] Where a depositor's bank book was written up, showing the payment of such checks, and the checks delivered to the agent with the bank book but the depositor had not examined the book, and had no knowledge of the facts, the bank had no right to presume that the clerk had general author-

name, any and all receipts and acquittances necessary or proper on receiving, or in order to receive, any and all such moneys, and also to apply portions of such moneys to debts of the principal, and generally to do and perform any other acts in and about said business that may be deemed necessary or proper, deposits in bank, to the principal's credit, some of the moneys arising from the claim specially mentioned in the power, and afterwards, during the existence of the agency, draws out the deposit in checks purporting to be signed by the principal, and believed by the officer of the bank to be genuine, the bank is discharged, whether the checks be in fact genuine or not. They are, in effect, receipts and acquittances in the name of the principal. City Bank *v.* Kent, 57 Ga. 283.

Representation that another, partner and authorized to check.—A representation made by a depositor to a bank that his brother was a partner in reference to the deposit, and also, in the same connection, that his brother had the right to sign the depositor's name to checks on the deposit, and that he was fully authorized to draw and receive said money or any part thereof, would authorize the bank to pay the deposit to the brother, it matters not in what manner drawn. Bruni *v.* Garza (Tex. Civ. App.), 26 S. W. 108.

Check delivered in wageing transaction.—See ante, "Consideration," § 138 (5).

33. Crab *v.* Citizens' State Bank, 22 Idaho 408, 126 Pa. 520.

34. Depositor having two accounts.—Hiller *v.* Bank (S. C.), 75 S. C. 787.

35. Check drawn by agent without authority.—A bank received money from one A., who informed it that the deposit was for decedent. The pass book was made out in decedent's name, and delivered to her. Held, that the bank was liable for the amount of checks drawn on such fund by A., signed by him in decedent's name, but cashed by the bank without presentation of the book, and without authority from her. Fletcher *v.* Integrity Title Ins., etc., Co. (Pa.), 31 Wkly. Notes Cas. 503.

36. Manufacturers' Nat. Bank *v.* Barnes, 65 Ill. 69, 16 Am. Rep. 576, approving Weisser *v.* Dennison, 10 N. Y. 68, Seld. Notes 219, 61 Am. Dec. 731.

ity to draw checks thereafter from such fact.[37]

Checks Drawn by Son in Father's Name.—Where a bank paid a deposit to the son of a person in whose name it was made, it was liable to the father therefor, in the absence of the father's holding out the son, or permitting him to act, in such a manner as to justify the bank in paying checks drawn by the son in the father's name.[38]

Delegation of Authority Officer of Corporation to an Agent.—Where the by-laws of a corporation authorize the president and secretary to sign checks and they have authority to withdraw a fund on deposit, they may delegate their authority to sign check to some other person, and may so conduct the business of the corporation that the bank has a right to assume that a man conducting business at its office was conducting a department of the corporation and checking for it.[39]

Estoppel to Deny Authority of Agent.—The principle that when one of two innocent parties must suffer by reason of a fraudulent transaction, it shall be the one whose act made it possible for the fraud to be perpetrated, applies to the payment by a bank of fraudulent checks drawn by an agent of a depositor.[40] This principle applies to the case of a third party simply and not the one where the party guilty of the fraud was in fact himself the bank, as, for instance, where the manager of a bank fraudulently fills out and cashes checks signed in blank by a depositor and left with him for a particular purpose.[41]

37. Manufacturers' Nat. Bank *v.* Barnes, 65 Ill. 69, 16 Am. Rep. 576, approving Weisser *v.* Dennison, 10 N. Y. 68, Seld. Notes 219, 61 Am. Dec. 731.

B. gave his clerk a power of attorney to draw checks on a bank against deposits for 15 days only, leaving the instrument with the bank, and, after an absence and return, resumed his business of drawing his own checks; but the clerk, without B.'s knowledge, still continued to draw checks, and appropriated a part of the money to his own use. Held, that the bank had no right to presume that the clerk had general authority, after the fifteen days expired, to draw checks, from the mere fact that when B.'s bank book was written up it was delivered to the clerk, with the paid checks. B. not having examined the same, and not knowing the facts. Manufacturers' Nat. Bank *v.* Barnes, 65 Ill. 69, 16 Am. Rep. 576, approving Weisser *v.* Dennison, 10 N. Y. 68, Seld. Notes 219, 61 Am. Dec. 731.

38. **Checks drawn by son in father's name.**—Fricano *v.* Columbia Nat. Bank, 118 App. Div. 567, 103 N. Y. S. 189.

39. **Delegation of authority of officer of corporation to an agent.**—The by-laws of a corporation in the wholesale liquor business provided that checks should be signed by the secretary or treasurer and countersigned by the president or vice president. The president and secretary, in the name of the corporation, by power of attorney authorized one designated a "manager" to sign checks for the corporation; the act not being authorized by the directors. The "manager" was selling beer for his own account under the name of "Manager of Foreign Beer Department," preceding the name of the corporation, with the directors' knowledge; the purpose being to violate the liquor laws by selling without a license. Held, that a bank paying the "manager's" checks could assume that he was conducting a department of the corporation and was checking for the corporation. First Nat. Bank *v.* Fleming & Son Co., 226 Pa. 416, 75 Atl. 718.

40. **Estoppel to deny authority of agent.**—Tobias *v.* Morris, 126 Ala. 535, 28 So. 517; Daniels *v.* Empire State Sav. Bank, 92 Hun 450, 38 N. Y. 580; Fricano *v.* Columbia Nat. Bank, 118 App. Div. 567, 103 N. Y. S. 189.

41. Daniels *v.* Empire State Sav. Bank, 92 Hun 450, 38 N. Y. S. 580.

Plaintiff, then an unmarried woman, having a deposit in a bank, on leaving

Application of Estoppel to Subsequent Deposits.—Where a depositor by negligent silence or silent acquiescence estops himself from denying the authority of an agent to draw checks against his deposit, the estoppel applies as to subsequent deposits in the absence of evidence of a notification to the bank that they should be treated differently from the first in respect to their withdrawal. A course of dealing between the bank and a depositor may establish obligations as to its continuance, and if nothing is provided to the contrary, will govern subsequent transactions of the same nature between them. The foregoing principles apply to deposits by a wife which were checked out by her husband.[42]

§ 138 (9) Presentment—§ 138 (9a) Stipulation as to Presentment.—Where a check was drawn on a bank in another town from that in which the drawer resided, and immediately following the directions to the drawee bank, in the lower left-hand corner of the check, there was stamped, when the check was drawn, "Payable through [a named bank in another city of the same state] at current rate," the drawee bank was not required to pay the check when not presented through the bank thus named.[43]

§ 138 (9b) Time of Presentment.—Stale Checks.—If a check six days old is ever to be regarded as stale, and there may be cases which would make it so, a check drawn on Christmas eve does not become stale in six days, so as to put the bank on inquiry upon its presentation at the end of that period.[44]

§ 138 (10) Person to Whom Payment May Be Made—§ 138 (10a) In General.—The bank can not charge a depositor with any payments made on checks, except such as are authorized by the terms of the check and the indorsements thereon, as interpreted by the law merchant.[45] The implied contract between a banker and his depositor as to the depos-

for Europe, to be absent a year, signed checks in blank, and left them with the cashier, who was also manager of the bank, to be used as she might thereafter direct. The following year she returned, and later married, changing her name. Afterwards the cashier filled out one of the checks, though it was not charged to plaintiff's account on her book. Held, that the bank could not charge plaintiff with the amount of the check. Daniels *v.* Empire State Sav. Bank, 92 Hun 450, 38 N. Y. S. 580.

42. Application of estoppel to subsequent deposits.—Tobias *v.* Morris, 126 Ala. 535, 28 So. 517.

Deposit of wife checked out by husband.—Where a married woman made a deposit of a draft to her credit in a bank under such circumstances that she would be estopped from denying that her husband had authority to sign checks in her name on the fund, she will also be estopped from denying such authority in her husband as to subsequent deposits to her credit, in the absence of any new arrangement with the bank in regard thereto. Tobias *v.* Morris, 126 Ala. 535, 28 So. 517.

43. Stipulation as to presentment.—Farmers' Bank *v.* Johnson, etc., Co., 134 Ga. 486, 68 S. E. 85.

44. Stale checks.—Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

45. Person to whom payment to be made.—Armstrong *v.* National Bank, 46 O. St. 512, 22 N. E. 866; Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648; Kuhn & Sons *v.* Frank, 7 Wkly. L. Bull. 134, 10 Am. L. Rec. 622, 6 O. Dec. 1142.

itor's checks is that the banker will pay them to persons to whom the drawer orders payment, and when a definite order is made in the check the duty is absolute to pay only in accordance therewith.[46] The contract between a bank and the depositor is that it will pay out his money only upon and in accordance with his express direction.[47]

§ 138 (10b) Identification of Payee—§ 138 (10ba) Check in Favor of Named Payee or Order.—The contract between a bank and its customers is to pay the customer's checks or bills to the person or persons designated by the customer, and to none other, and if a check or bill is payable to a particular payee or order, the bank has only authority to pay it to the actual payee or to another person who becomes the holder by genuine, or duly authorized indorsement.[48] If the bank mistakes the identity of the payee, or pays upon a forged indorsement, it is not a payment in pursuance of its authority and it will be responsible to the depositor for the amount erroneously paid out;[49] hence, a bank, paying a check, is required to sat-

46. Jordan Marsh Co. *v.* National Shawmut Bank, 201 Mass. 397, 87 N. E. 740.

47. Western Union Tel. Co. *v.* Bi-Metallic Bank, 17 Colo. App. 229, 68 Pac. 115.

A banker is the debtor of his depositor, and engages to disburse his creditor's money only as directed by him. It follows that when once the order of the depositor, as contained in his written check, drawn as he intended to draw it, has passed beyond his control, and is issued for the purposes for which it was drawn, the banker can only discharge his duty to his depositor by strictly complying with the original terms of the check. Burnet Woods Bldg., etc., Co. *v.* Bank, 3 N. P. 84, 4 O. Dec. 290.

48. Check in favor of named payee or order.—Califf *v.* First Nat. Bank, 37 Pa. Super. Ct. 412; United Security Life Ins., etc., Co. *v.* Central Nat. Bank, 185 Pa. 586, 40 Atl. 97; Houser *v.* National Bank, 27 Pa. Super. Ct. 613; Jackson *v.* Bank, 92 Tenn. 154, 20 S. W. 802. See, also, Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. Rep. 900; Pollard *v.* Wellford, 99 Tenn. 113, 42 S. W. 23; Jackson *v.* Bank, 92 Tenn. 154, 20 S. W. 802; Unaka Nat. Bank *v.* Butler, 113 Tenn. 574, 83 S. W. 655; Farmer *v.* Bank, 100 Tenn. 187, 47 S. W. 234.

A check payable to a particular person is authority only for payment such person, or to some one claiming under him by his genuine indorsement. Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648; Kuhn & Sons *v.* Frank, 6 O. Dec. 1142, 10 Am. L. Rec. 622, 7 Wkly. L. Bull. 134.

Payment to another than payee.—A bank is obliged by custom to honor checks payable to order and pays them at its peril to any other than the person to whose order they are made payable. Jackson *v.* Bank, 92 Tenn. 154, 20 S. W. 802.

A check payable to order of a particular person is authority only for payment upon such order. Dodge . National Exch. Bank, 30 O. St. 1.

"Where a banker pays a draft or check drawn upon him, he, at his peril, pays it to anyone but the payee, or to one who is able to trace his title back to the payee through genuine indorsements. The mere possession of the check or bill, under apparent title, does not necessarily imply the right to demand or receive payment, and when it is paid to such holder the drawer has put upon him the risk of seeing that the apparent is the real title to the paper. For the banker holds the funds of his depositor, under an obligation to pay them to him or to his order, and if he pays them otherwise he can not treat such a payment as a discharge of his liability. Shipman *v.* Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Robards *v.* Tucker, 16 Q. B. 575; Dodge *v.* National Exch. Bank, 30 O. St. 1." Chism *v.* First Nat. Bank, 96 Tenn. 641, 36 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863.

49. Western Union Tel. Co. *v.* Bi-Metallic Bank, 17 Colo. App. 229, 68 Pac. 115.

isfactorily identify the payee.[50]

Possession as Dispensing with Necessity for Indorsement.—The mere fact that the party presenting a check, payable to order of a particular person, for payment has rightful possession thereof does not dispense with the necessity of such order or indorsement.[51]

Possession as Authority to Indorse.—The possession, by a third person, of a check drawn payable to the order of a particular person affords no presumption of authority in him to indorse it for the payee. Authority to indorse is not implied from authority to receive such check for the payee.[52]

Negligence of Drawer.—A banker, on whom a check is drawn, must ascertain at his peril the identity of the person named in it as payee, and it is only when misled by some negligence or some fault of the drawer that he can set up his own mistake as against the drawer.[53]

Circumstances Amounting to Direction to Pay without Reference to Identification or Genuineness of Indorsement.—The bank may be relieved from liability for payment to the wrong person or under an indorsement not genuine, where the circumstances of the case amount to a direction from the depositor to the bank to pay without reference to identification or to the genuineness of the indorsement.[54] Where a bank had no knowledge of the fact that the drawer of a check was not satisfied that the person receiving the check as payee was the person therein named as payee, and took his receipt therefor, it can not claim that such circumstances amount to a direction from the drawer to pay without reference to identification or to the genuineness of the indorsement, so as to relieve the bank from liability for paying to the wrong person, it having paid to another bank, which had in the first instance paid the check, and in so doing relied solely on the indorsements.[55]

Mere Possession of Check.—The mere possession of a check will not justify a bank in making payment to the person in possession, without some identification, or some evidence of the genuineness of the indorsement, if an indorsement is in question.[56]

Name of Indorser Different from That of Payee.—Where a bank pays a check simply upon the face of the indorsement, and that indorsement did not purport to be that of the payee named in the check, being that of a

50. Zaloom *v.* Ganim (Sup.), 129 N. Y. S. 85.

51. **Possession as dispensing with necessity for indorsement.**—Dodge *v.* National Exch. Bank, 30 O. St. 1.

52. **Possession as authority to indorse.**—Jackson *v.* Bank, 92 Tenn. 154, 20 S. W. 802. See, also, Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. Rep. 900.

53. **Negligence of drawer.**—Murphy *v.* Metropolitan Nat. Bank, 191 Mass. 159, 77 N. E. 693, 14 Am. St. Rep. 595.

54. **Circumstances amounting to direction to pay without reference to identification or genuineness of indorsement.**—Western Union Tel. Co. *v.* Bi-Metallic Bank, 17 Colo. App. 229, 68 Pac. 115.

55. Western Union Tel. Co. *v.* Bi-Metallic Bank, 17 Colo. App. 229, 68 Pac. 115.

56. **Mere possession of check.**—Western Union Tel. Co. *v.* BiMetallic Bank, 17 Colo. App. 229, 68 Pac. 115.

different name entirely, no question of idem sonans can arise, because, if for no other reason, payment was made upon the written indorsement only. The name of the indorser being different from that of the payee, was amply sufficient to place the bank upon its guard and cause it to have made inquiry.[57] Where a bank had no knowledge of the error of a depositor in giving a check to the wrong person, and the check, when presented, was paid under the indorsement of a name different from that of the payee, the bank can not, in an action for the money by the depositor, invoke the doctrine that, where two persons are equally innocent, the one failing to act on his knowledge must bear the loss.[58]

§ 138 (10bb) Bearer Check.—A check payable to bearer is authority for payment to the holder.[59] Where a check is in the ordinary form, and is payable to bearer, so that no indorsement is required, a bank, to which it is presented for payment, need not have the holder identified, and is not negligent in failing to do so.[60]

§ 138 (10bc) Check Indorsed in Blank.—A check payable to a particular person, and indorsed in blank by him, is payable to the holder.[61]

§ 138 (10c) Right to Require Indorsement of Holder.—See ante, "Identification of Payee," § 138 (10b); post, "Right to Require," § 140 (1f).

§ 138 (11) Checks Payable to Fictitious Payee—§ 138 (11a) In General.—Where the drawer of a check knowingly makes it payable to a fictitious payee, it is considered payable to bearer; but, if a real person is intended by the name of the payee, the check must be indorsed by that person, and payment by a bank upon indorsement of some unauthorized person is not binding upon the drawer.[62] A statute which provides that negotiable

57. Name of indorser different from that of payee.—Western Union Tel. Co. *v.* BiMetallic Bank, 17 Colo. App. 229, 68 Pac. 115.

Where a bank paid a check simply upon the face of the indorsement, which was made by one "Daley" while the check was payable to one "Daily," that fact was amply sufficient to have placed the bank upon its guard, and caused it to have made some inquiry as to whether it was paying to the proper person. Western Union Tel. Co. *v.* Bi-Metallic Bank, 17 Colo. App. 229, 68 Pac. 115.

58. Western Union Tel. Co. *v.* Bi-Metallic Bank, 17 Colo. App. 229, 68 Pac. 115.

59. Bearer check.—Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648; Kuhn & Sons *v.* Frank, 6 O. Dec. 1142, 10 Am. L. Rec. 622, 7 Wkly. L. Bull. 134.

In case of a check or bill payable to bearer, in the absence of knowledge that the party presenting the paper is wrongfully in possession of it, the drawee bank can safely pay, because in so doing it is complying with the positive demand of the depositor. Chism *v.* First Nat. Bank, 96 Tenn. 641, 36 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863.

60. Farmers', etc., Bank *v.* Bank, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817.

61. Check indorsed in blank.—Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648.

Where the payee of a bank check indorses it in blank and it is lost, he can not recover of the bank for paying it to a bona fide purchaser, though he had notified the bank of its loss. Unaka Nat. Bank *v.* Butler, 113 Tenn. 574, 83 S. W. 655.

62. Check payable to fictitious payee.—Guaranty State Bank, etc., Co. *v.* Lively (Tex. Civ. App.), 149 S. W. 211.

If a check drawn by a depositor was

paper made payable to a fictitious person, and negotiated by the maker, has the same validity, "as against the maker and all persons having knowledge of the facts, as if payable to bearer," does not apply where the maker believes the payee of a check drawn by him to be a real person, and does not intend to have the check go into circulation until it has been indorsed by the payee, but the check is fraudulently negotiated by a third person without fault of the maker.[63]

§ 138 (11b) Cashiers' Checks.—Checks drawn by the cashier of a bank, payable to fictitious persons, whose names he indorses thereon, are in effect payable to bearer, and payment of such checks by the drawee binds the bank.[64] The fact that the payees in the checks, whose names were indorsed thereon by the cashier, were customers of the bank, does not vary the rule applicable to fictitious payees, where the cashier did not intend to deliver the paper to the customers, as the fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name.[65]

§ 138 (11c) Checks Fraudulently Procured—§ 138 (11ca) In General.—Where checks obtained by fraud, were made payable to a named payee, whether they were made to a fictitious person depended on whether the name given by the person who suggested it, and whose suggestion was followed by the drawer, was used as designating the person to whom the name belonged, or as a mere name without reference to its belonging to any person, and with an intention that it should not designate any particular person.[66] Where plaintiff was induced by fraud to make certain checks payable to a named payee, who in fact indorsed them before they were presented for payment, such checks could not be regarded as made payable to a fictitious person, and hence payment was properly made.[67]

§ 138 (11cb) Payment upon Forged Indorsement of Fictitious Payee.—Where, by the fraud of a third person, a depositor of a bank is induced to draw his check payable to a nonexisting person or order, the drawer being in ignorance of the fact and intending no fraud, the bank on

payable to a nonexistent or fictitious person, the bank is liable to the depositor for loss occasioned by the payment of the check unless the depositor was himself negligent in not ascertaining that the payee was fictitious. Burnet Woods Bldg., etc., Co. *v.* German Nat. Bank, 4 O. Dec. 290, 3 N. P. 84.

63. Shipman *v.* Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, so holding as to 1 N. Y. Revised Stat., p. 768, § 5.

64. Cashier's checks.—Phillips *v.* Mercantile Nat. Bank, 67 Hun 378, 22 N. Y. S. 254, 51 N. Y. St. Rep. 918; S. C., 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596.

65. Phillips *v.* Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, affirming 67 Hun 378, 22 N. Y. S. 254, 51 N. Y. St. Rep. 918.

66. Check fraudulently procured payable to fictitious person.—Jordan Marsh Co. *v.* National Shawmut Bank, 201 Mass. 397, 87 N. E. 740.

67. Jordon Marsh Co. *v.* National Shawmut Bank, 201 Mass. 397, 87 N. E. 740.

which the check is so drawn is not authorized to pay it, and charge the amount to the account of its customer, on the indorsement of the party presenting it, although it appears to have been previously indorsed by the party named as payee;[68] aliter in Louisiana.[69]

Last Endorsement Genuine.—In one case the proposition is announced that where the last endorsement is genuine the bank is not bound to look to any prior indorsement,[70] but this decision is not sustained by any other court in this county.[71]

68. Payment upon forged indorsement of fictitious payee.—Armstrong *v.* Pomeroy Nat. Bank, 46 O. St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655.

Check procured through forgery of other documents.—A person forged another's name to a note and mortgage, and procured a loan thereon, which was paid by check in favor of the supposed borrower. The payee's indorsement was forged to the check, the person procuring the loan adding his own indorsement. Held, that the bank on which the check was drawn was not protected by payment, though the last indorsement was genuine. Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96.

A person representing himself as the agent of the owner of a note and mortgage sold them, and received in payment a check payable to his alleged principal. He forged an indorsement, and received the amount of the check, being known to both the bank and drawer of the check as a reliable business man hitherto. Held, that the fact that the drawer was deceived, the note and mortgage being spurious, did not release the bank because of the forged indorsement. Kuhn & Sons *v.* Frank, 6 O. Dec. 1142, 10 Am. Law Rec. 622, 7 Wkly. L. Bull. 134.

Forgery by attorney of drawer corporation.—A corporation, through negligence, permitted its attorney to procure the corporation's check drawn to a fictitious person as payee, and the attorney forged the name of the fictitious person, wrote his own beneath, and drew the money at the bank where the corporation kept its account. Held, that the corporation could not recover of the bank. Burnet Woods Bldg., etc., Co. *v.* German Nat. Bank, 4 O. Dec. 290, 3 N. P. 84.

A building and loan association made a loan to one B., upon the representation of its attorney and agent that person named B. desired a loan. The loan having been approved by the proper officers, a check was drawn payable to B., and delivered to the attorney, who indorsed it, and appropriated the money to his own uses. As a matter of fact, there was no such person as B., and it appeared that the association had made no inquiries as to the existence of such person. Held, that the association was guilty of negligence, barring a recovery from the bank of the amount called for by the check. Burnet Woods Bldg., etc., Co. *v.* German Nat. Bank, 4 O. Dec. 290, 3 N. P. 84.

69. *Louisiana.*—Plaintiff, a broker, discounted a forged bill for an entire stranger, purporting to be drawn on and accepted by P. & H., and in payment gave the forger his check on defendant bank, payable to the supposed acceptors, whose name the forger indorsed thereon, and obtained the money from the bank. Held, that plaintiff did not use due diligence in discounting the bill, and that he could not shift the duty of ascertaining the forgery on the bank by making his check payable to the acceptors, and giving it to the forger; and that, although the bank was negligent in paying the check, yet plaintiff could not recover from it the amount so paid. Smith *v.* Mechanics', etc., Bank, 6 La. Ann. 610.

One falsely personated the payee of a state warrant, and sold it to plaintiff after having raised the warrant. Plaintiff gave his check, payable to the order of the payee of the warrant. The indorsement of the latter was forged upon the check, and the check was paid by the drawee, the defendant bank. Held, that the bank was justified in making payment, the negligence of plaintiff having rendered the fraud possible. Levy *v.* Bank, 24 La. Ann. 220, 13 Am. Rep. 124.

70. Last indorsement genuine.—See Levy *v.* Bank, 24 La. Ann. 220, 13 Am. Rep. 124, criticised in Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96.

71. Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96.

§ 138 (12) Checks Procured by Forgery of Other Documents.—See ante, "Payment upon Forged Indorsement of Fictitious Person," § 138 (11cb). Where a person makes his check, for the purchase of a note and mortgage represented to be genuine, to the order of the owner of the land, and delivers it to the broker who negotiated the sale, but who forged the note and mortgage, and such broker identifies some person as payee to the bank, to whom is paid the money, he may recover from the bank the amount, although the fraud was not discovered until a year afterwards.[72]

§ 138 (13) Knowledge of Outstanding Drafts or Checks.—Knowledge by the bank that a draft has been drawn on the depositor and is outstanding will not justify a refusal by the bank to pay out the money deposited when demanded by the depositor.[73]

§ 138 (14) Matters Accruing after Issuance of Check—§ 138 (14a) Insolvency of Drawer—§ 138 (14aa) In General.—The insolvency of the drawer, does not revoke the banker's authority to pay a check.[74]

§ 138 (14ab) Effect of Filing Petition in Bankruptcy.—Since the filing of a petition in bankruptcy by a bank depositor is not a revocation of a check previously delivered by him, the fact that the bank received notice of the filing of the petition is no excuse for its refusal to pay the check when presented.[75]

§ 138 (14b) Death of Drawer.—The death of the drawer operates as a revocation of a check, so that, if the bank pays it after notice of that fact, it does so at its peril.[76] A bank paying a check with notice of the drawer's death is liable to his estate.[77]

72. Checks procured through forgery of other documents.—Kuhn & Son *v.* Frank, 7 Wkly. L. Bull. 134, 10 Am. L. Rec. 622, 6 O. Dec. 1142.

73. Knowledge of outstanding drafts or checks.—Nehawka Bank *v.* Ingersoll, 2 Neb. 617, 89 N. W. 618.

74. Insolvency of drawer.—McGregor *v.* Loomis, 1 Disn. 247, 12 O. Dec. 602.

75. Effect of filing petition in bankruptcy.—Chambers *v.* Northern Bank, 5 Ky. L. Rep. 123.

76. Death of drawer.—Weiand *v.* State Nat. Bank, 112 Ky. 310, 23 Ky. L. Rep. 1517, 65 S. W. 617, 66 S. W. 26, 56 L. R. A. 178; Covert *v.* Rhodes, 48 O. St. 66, 27 N. E. 94; Metropolitan Nat. Bank *v.* Cincinnati, etc., R. Co., 27 Wkly. L. Bull. 105, 11 O. Dec. 469, 8 O. Dec. 585. Contra, McGregor *v.* Loomis, 1 Disn. 247, 12 O. Dec. 602.

A check is revoked by the death of its drawer at any time before its acceptance by the drawee. National Commercial Bank *v.* Miller & Co., 77 Ala. 168, 54 Am. Rep. 50.

A draft on a savings bank, drawn before the drawer has any funds on deposit, is a mere direction to the drawee, and is revoked on the drawer's death. Fordred *v.* Seamen's Sav. Bank (N. Y.), 10 Abb. Prac., N. S., 425.

Where a bank upon which a check was drawn in excess of the amount the drawer had on deposit elected, as it had the right to do, to refuse to pay any part of the check, and returned it to the payee protested for nonpayment, it had no right thereafter to reconsider and pay the check, especially after the administrator of the drawer notified it of the death of his intestate, and directed it not to make payment. Weiand *v.* State Nat. Bank, 112 Ky. 310, 23 Ky. L. Rep. 1517, 65 S. W. 617, 66 S. W. 26, 56 L. R. A. 178.

77. Judgment, 138 Cal. 169, 66 Pac.

In Missouri a check given for a good consideration is not revoked by the death of the donor before its presentment.[78]

In New York, a payment of a check in good faith in the course of business relieves a bank from any liability, though the drawer had died.[79]

Check as Gift Causa Mortis.—Where a gift causa mortis is claimed by reason of a check given for that purpose it is invariably held that, unless the check is presented in the life time of the donor, it is ineffective.[80]

§ 138 (14c) Death of Payee.—The fact that the payee of a check is dead at the time the check is drawn does not entitle the drawee to pay it to any one other than the personal representative of the payee.[81]

Check Indorsed by Payee's Agent.—Where a check is indorsed by payee's agent, who has authority to do so, and is paid after the payee's death, his administrator can not maintain an action against the bank paying the check, which was returned to the drawer after being charged to his account, and by him delivered to the administrator.[82]

§ 138 (15) Presumption and Burden of Showing Payment to Bona Fide Holder.—The legal presumption is that a holder of a check is a bona fide holder for value and the burden of showing that the holder is not a bona fide holder for value rests upon those asserting it and not upon the bank. The bank is entitled to rely upon the presumption in its favor even though those who asserted the mala fides of the holder have communicated their suspicion that the holder was in collusion with the drawer of the check and requested it not to pay the money on presentation of check.[83]

740, reversed. Pullen *v.* Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19.

78. *Missouri.*—Lewis *v.* International Bank, 13 Mo. App. 202.

79. *New York.*—Glennan *v.* Rochester Trust, etc., Co. (Sup.), 136 N. Y. S. 747.

80. **Check as gift causa mortis.**—Pullen *v.* Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19; Thresher *v.* Dyer, 69 Conn. 404, 37 Atl. 979; Gerry *v.* Howe, 130 Mass. 350; Second Nat. Bank *v.* Williams, 13 Mich. 282; Lewis *v.* International Bank, 13 Mo. App. 202; Harris *v.* Clark, 3 N. Y. 93, 51 Am. Dec. 352; Simmons *v.* Cincinnati Sav. Soc., 31 O. St. 457, 27 Am. Rep. 521; Appeal of Waynesburg College, 11 Pa. 130, 3 Atl. 19, 56 Am. Rep. 252; In re Beak's Estate, L. R. 13 Eq. 489; Hewitt *v.* Kaye, L. R. 6 Eq. 198.

A check drawn upon a bank by a person in extremis in favor of a person who is, with the proceeds, to pay the funeral expenses, the balance to be paid to the heirs, is not an assignment of the funds of the drawer, and does not render the bank liable to the payee after the drawer's death. Second Nat. Bank *v.* Williams, 13 Mich. 282.

Where one having money on deposit in a bank delivered a check therefor to another, intending to give the other such money, the death of the drawer before payment or certification of such check revoked the authority of the bank to pay it, and such money thereupon became payable to the administrator of decedent's estate. Simmons *v.* Cincinnati Sav. Soc., 5 O. Dec. 527; Simmons *v.* Cincinnati Sav. Soc., 31 O. St. 457, 27 Am. Rep. 521.

81. **Death of payee.**—Murphy *v.* Metropolitan Nat. Bank, 191 Mass. 159, 77 N. E. 693, 14 Am. St. Rep. 595.

82. **Check indorsed by payee's agent.**—Brennan *v.* Merchants', etc., Bank, 62 Mich. 343, 28 N. W. 881.

83. **Presumption and burden of showing payment to bona fide holder.**—Penn Bank *v.* Frankish, 91 Pa. 339.

G. deposited money in his own name in a bank, and on one occasion presented his check, and obtained there-

§ 138 (16) Estoppel of Depositor to Contest Wrongful Payment —§ 138 (16a) In General.[84]—The principle that a depositor will be estopped by laches in failing to promptly notify the bank of forgery of a check, or that the check was not authorized, is not applicable, where the bank had notice when it paid the checks that they were drawn without authority.[85]

§ 138 (16b) Examination of Bank Statement or Passbook.[86]—It has long been the usage of banks to give out passbooks to their customers, in which the latter are credited with their proper deposits. These passbooks are sent in as occasion may seem to demand, often periodically and by request of the bank, as well as upon the volition of the depositors, and are posted, or statements returned with them, along with the paid checks or vouchers, showing the condition of the depositor's account upon the books of the bank. It matters little whether the passbooks are sent in voluntarily or by request of the bank to be posted—the purpose and effect of the statements rendered by the bank in connection therewith are the same. They not only afford a means whereby the depositor may discover errors to his prejudice, but furnish evidence in his favor in the event of dispute or litigation with the bank. They serve to protect him against the carelessness and fraud of the bank. The right thus accorded by banks to frequent accountings in this manner, so that the depositor may keep informed as to the condition of his account as it appears upon the books of his depositary, is one of such manifest advantage that it entails a correlative duty upon the depositor. It requires of him an examination of the account rendered, and, if errors or omissions become apparent, it is then incumbent upon him to bring them to the attention of the bank, by returning his passbook for correction, or by other convenient method. Otherwise, his silence will be regarded as an admission that the entries as shown are correct.[87] If trans-

for a cashier's check. Shortly after, F. claimed that G. was his agent only, and had made collections on his account, which he refused to pay over, and requested the bank to refuse payment of the cashier's check, and to hold G.'s deposits on F.'s account; and F. also gave the bank a bond of indemnity against loss by such action. Subsequently H., who had been represented to the bank by F. to be in collusion with G., presented the cashier's check, with G.'s indorsement in blank, and, on H. making affidavit that he held the check for value, its amount was paid him. Upon a suit by F. against the bank, the jury were charged that, if they believed the testimony in regard to G.'s transactions, the burden of proof was on the bank to show that it paid the amount of the check to a bona fide holder for value. Held, that this was error, and that the burden of showing that H. was not a bona fide holder rested upon those asserting it. Penn Bank *v.* Frankish, 91 Pa. 339.

84. See ante, "Checks Drawn by Unauthorized Person," § 138 (8bb); "Countersigning," § 138 (4ce); "Checks Payable to Fictitious Payee," § 138 (11); post, "Examination of Bank Statement or Passbook," § 138 (16b).

85. Crab *v.* Citizens' State Bank, 22 Idaho 408, 126 Pac. 520.

86. See ante, "Checks Drawn by Agent without Unauthorized Person," § 138 (8bb).

87. Examination of bank statement or passbook.—National Bank *v.* Tacoma Mill Co., 182 Fed. 1; Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657; Dana *v.* National Bank, 132 Mass. 156; Hardy *v.* Chesapeake Bank, 51 Md. 562, 34

actions of an irregular character have been noted in a depositor's passbook, such as the inadvertent payment by the bank of checks and drafts beyond the scope of express authority, it may be, depending upon the peculiar facts and circumstances attending the transactions themselves, that the depositor will be subsequently estopped to deny the authority of the bank to make such payments, but if he has exercised proper and reasonable care to make the examination of the periodical statements of the bank in connection with the return of his passbook, or in the selection of an agent to do so, he can not be held responsible for the dishonest acts of an agent or employee.[88]

§ 139. —— Notice Not to Pay or Revocation of Check—§ 139 (1) Customer's Checks—§ 139 (1a) Right to Countermand—§ 139 (1aa) In General.—An ordinary, uncertified check on a general account is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually paid, or accepted by the bank on which it is drawn.[89] After acceptance or payment, however,

Am. Rep. 325; Critten *v.* Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529; Morgan *v.* United States Mortg., etc., Co., 125 App. Div. 22, 109 N. Y. S. 274; Myers *v.* Southwestern Nat. Bank, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672.

88. National Bank *v.* Tacoma Mill Co., 182 Fed. 1.

Plaintiff, a milling company, in the course of its business received from customers a large number of checks and drafts which it was its custom to deposit with defendant bank for credit to its account after their indorsement by an employee in a form agreed upon. Instead of depositing certain of such checks and drafts, the employee obtained cash for them from defendant, a portion of which he embezzled. Such checks and drafts were not entered upon plaintiff's books when received, that matter being in charge of the same employee; but in some cases he afterward entered the credit to the customer, using a part of the proceeds of a larger check or draft to cover the previous embezzlement. These checks and drafts were necessarily not shown on the bank passbooks nor in the bank's statements, nor did they appear on plaintiff's books, and the fact of their receipt was only ascertained by plaintiff by writing to its customers. The first of them were so cashed by the employee, some two years before the last. Held, that under the circumstances plaintiff was not negligent in failing to sooner discover and notify defendant of the transactions and was not estopped to recover from defendant the amount of its loss, it being found by the jury that defendant was not authorized to make the payments to the employee. National Bank *v.* Tacoma Mill Co., 182 Fed. 1.

89. Right to countermand.—*Alabama.*—People's Sav. Bank, etc., Co. *v.* Lacey, 146 Ala. 688, 40 So. 346.

Georgia.—Parker-Fain Grocery Co. *v.* Orr, 1 Ga. App. 628, 57 S. E. 1074.

Missouri.—Famous Shoe, etc., Co. *v.* Crosswhite, 51 Mo. App. 55; Albers *v.* Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355.

New York.—Elder *v.* Franklin Nat. Bank, 25 Misc. Rep. 716, 55 N. Y. S. 576; Dykers *v.* Leather Mfg'rs Bank (N. Y.), 11 Paige 612; Freund *v.* Importers', etc., Nat. Bank, 76 N. Y. S. 352; Schnieder *v.* Irving Bank (N. Y.), 30 How. Prac. 190, 1 Daly 500; O'Conner *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816; Florence Min. Co. *v.* Brown, 124 U. S. 385, 31 L. Ed. 424, 8 S. Ct. 531.

North Dakota.—Drinkall *v.* Movius State Bank, 11 N. Dak. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693.

Ohio.—Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 O. St. 60, 42 N. E. 700, affirming 27 Wkly. L. Bull. 105, 11 O. Dec. 469; Covert *v.* Rhodes, 48 O. St. 66, 27 N. E. 94; Kahn *v.* Walton, 46 O. St. 195, 20 N. E. 203; Warner *v.* Armstrong, 21 Wkly. L. Bull. 124, 10 O. Dec. 426; Simmons *v.* Cincinnati Sav. Soc., 31 O. St. 457, 27 Am. Rep. 521, affirming 5 O. Dec. 527; McGregor *v.* Loomis, 1 Disn. 247, 12 O. Dec. 602.

Pennsylvania.—Farmers', etc., Nat.

by the bank, the drawer's right of revocation is lost.[89]

§ 139 (1ab) Checks Operating as Assignment Pro Tanto.—In jurisdictions in which a check operates as a pro tanto assignment of the

Bank *v.* Elizabethtown Nat. Bank, 30 Pa. Sup. Ct. 271.

Tennessee.—Pease, etc., Co. *v.* State Nat. Bank, 114 Tenn. 693, 88 S. W. 172.

Virginia.—Bank *v.* Craig, 33 Va. (6 Leigh) 399.

A check is a revocable order by a creditor upon his debtor, for the payment of money. Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 O. St. 60, 42 N. E. 700, affirming 27 Wkly. L. Bull. 105, 11 O. Dec. 469; Armstrong *v.* Warner, 49 O. St. 376, 31 N. E. 877, 17 L. R. A. 466; Covert *v.* Rhodes, 48 O. St. 66, 27 N. E. 94; Simmons *v.* Cincinnati Sav. Soc., 31 O. St. 457, 27 Am. Rep. 521, affirming 5 O. Dec. 527; McGregor *v.* Loomis, 1 Disn. 247, 12 O. Dec. 602; Warner *v.* Armstrong, 21 Wkly. L. Bull. 124, 10 O. Dec. 426; Kahn *v.* Walton, 46 O. St. 195, 20 N. E. 203.

"A check is simply a written order of a depositor to his bank to make a certain payment. It is executory, and as such it is of course revocable at any time before the bank has paid or committed itself to pay it. But after the bank has paid, or placed itself under an obligation, or has incurred a liability, to comply with the order, the drawer's power to revoke is at an end. * * * The bank is the drawer's agent. Its primary duty is to hold or to pay his money as he directs. Primarily it owes no duty to the holder, except under and by virtue of directions from the drawer. Until, by reason of these directions, it has assumed voluntarily, or by action of law has involuntarily come under, secondary and superseding obligations to the holder, the latest order from the drawer governs its right to act on his behalf. Morse on Banking (4th Ed.), vol. 1, § 398; Zane on Banks, p. 261, § 153; National Commercial Bank *v.* Miller & Co., 77 Ala. 168, 54 Am. Rep. 50; Hudson *v.* Scott, 125 Ala. 172, 28 So. 91; Egerton *v.* Fulton Nat. Bank (N. Y.), 43 How. Prac. 216; Morrell *v.* Wooten, 16 Beav. 197; Wienholt *v.* Spitta, 3 Campbells, 376." People's Sav. Bank, etc., Co. *v.* Lacey, 146 Ala. 688, 40 So. 346.

A check upon a bank, until accepted, is merely an order upon the bank. The bank is not liable upon it, and it may be revoked. Schneider *v.* Irving Bank (N. Y.), 1 Daly 500, 30 How. Prac. 190.

A bank check is revocable by the drawer before its presentation for payment, unless the bank on which it is drawn has accepted or certified it, or otherwise become committed to its payment. Kahn *v.* Walton, 46 O. St. 195, 20 N. E. 203.

Under Negotiable Instrument Law, § 189 (Acts 1899, p. 172, c. 94), providing that a check is not an assignment of any part of the drawer's funds, and the bank is not liable to the holder unless and until it accepts or certifies the check, the drawer of an ordinary check may, before it is accepted, revoke it and forbid its payment, and any subsequent payment by the bank is made at its peril. Pease, etc., Co. *v.* State Nat. Bank, 114 Tenn. 693, 88 S. W. 172.

Check procured by fraud.—The drawer of a check procured from him by fraud may stop payment on it. Famous Shoe, etc., Co. *v.* Crosswhite, 51 Mo. App. 55.

Demand of payment before deposit withdrawn.—A person having funds deposited in a bank drew a check in favor of different persons thereon to a much larger amount than his deposit, and afterwards, on the same day, in banking hours, forbade the bank to pay the checks, and some time afterwards drew out the whole of such fund for the purpose of distributing it ratably among all the check holders. Held, that the owner of a check, who demanded payment of the bank after it was forbidden to pay, and before the fund was drawn out, was not entitled to claim the amount of the bank. Dykers *v.* Leather Mfg'rs Bank (N. Y.), 11 Paige, 612.

90. After acceptance.—Kahn *v.* Walton, 46 O. St. 195, 20 N. E. 203.

If a bank receives a check, gives credit to the holder, cancels and charges up the check to the drawer, such acts amount to payment, after which it is too late for the drawer to countermand. Albers *v.* Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355.

Acceptance by telegraph.—Where a national bank upon which a check is drawn telegraphs through its cashier to another bank, in response to an inquiry, that the check is good and will be paid, and the second bank, relying upon the telegram, cashes the check, the bank upon which the check was drawn can not justify its subsequent re-

drawer's deposit, the rule is different. In Illinois a bank is not justified in refusing to pay a check because the drawer orders it not to pay it, where it has sufficient funds of the drawer on deposit to pay it when presented for payment.[91]

In Kentucky[92] and Minnesota[93] the drawer of a check may revoke it at any time before its presentation for payment.

In South Carolina the drawer of a check can not countermand its payment, if the check has passed into the hands of a bona fide holder, by notifying the bank that the check was obtained by fraud and that there was a failure of consideration.[94]

fusal to pay the check on the ground that the drawer had, in the meantime, stopped payment of it. Farmers', etc., Nat. Bank *v.* Elizabethtown Nat. Bank, 30 Pa. Super. Ct. 271.

Unindorsed check certified.—Plaintiff made his check on the I. Bank, where he had moneys on deposit, to the order of O., and delivered it to O. for accommodation, without consideration. The check passed into the hands of B. without the payee's indorsement. The next day, when the check was in possession of the bank, having been sent there by B. for certification, plaintiff's agent directed the bank officers not to pay the check, and requested them to deliver the same to him. Held, that the bank was bound to pay the check, and plaintiff was not entitled to recover the amount thereof retained by the bank from his moneys on deposit. Freund *v.* Importers', etc., Nat. Bank, 76 N. Y. 352.

Burden of proof of payment.—Where a drawer of a check has given to the bank timely notice not to pay it, the burden of proving that it has already been paid is on the bank. Albers *v.* Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355.

91. Checks operating as assignment pro tanto.—*Illinois.*—Judgment, 69 Ill. App. 681, affirmed. Gage Hotel Co. *v.* Union Nat. Bank, 171 Ill. 531, 49 N. E. 420, 39 L. R. A. 479, 63 Am. St. Rep. 270.

Where, after a city council authorizes a warrant, and such warrant issues, but is not paid, the city clerk takes it up and gives the holder a check on a bank for the amount, signed by himself as treasurer, he can not later countermand the payment of such check, and the bank is liable for its payment, there being money in its possession sufficient to meet it standing in the name in which the check is drawn. First Nat. Bank *v.* Keith, 84 Ill. App. 103, judgment affirmed in 183 Ill. 475, 56 N. E. 179.

A city treasurer who takes up a city warrant issued on him by the proper authorities to satisfy a lawful claim against the city, and who gives his check for the amount of the warrant on the bank having on deposit the moneys out of which it is payable, has no power to stop payment of the check, since it operates as an assignment pro tanto of the fund on which it is drawn: and, on refusal of the bank to pay the check, the payee may sue the bank at law, and recover the amount. Judgment, 84 Ill. App. 103, affirmed. First Nat. Bank *v.* Keith, 183 Ill. 475, 56 N. E. 179.

Check for larger sum than drawer's deposit.—K.'s father drew a check to K.'s order, and K. delivered it unindorsed to the stock exchange as a margin. On the same day, and before it was presented to the bank, K. notified the bank to pay it. Nevertheless, the bank officers certified the check. Held, that a decree was proper that the check was void, and that the bank must place its amount to K.'s credit. Public, etc., Stock Exch. *v.* Kune, 20 Ill. App. 137.

92. *Kentucky.*—Weiand *v.* State Nat. Bank, 112 Ky. 310, 23 Ky. L. Rep. 1517, 65 S. W. 617, 66 S. W. 26, 56 L. R. A. 178.

The drawer of a bank check may, by notice to the bank before its presentation for payment, revoke the check. Tramell *v.* Farmers' Nat. Bank, 11 Ky. L. Rep. 900.

93. *Minnesota.* — Though a bank check operates as a pro tanto assignment of the drawer's funds in the bank, the drawer, as against the payee, may stop payment by notice to the bank before the check is presented. Taylor *v.* First Nat. Bank (Minn.), 138 N. W. 783.

94. *South Carolina.* — Loan, etc., Bank *v.* Farmers', etc., Bank, 74 S. C 210, 54 S. E. 364, 114 Am. St. Rep. 991.

In Wisconsin a check given for a valuable consideration, and operating as a pro tanto assignment of the funds of a depositor, may be paid by the bank or depositary without liability to the depositor, either before or after the depositor has attempted to revoke the check and has given notice thereof to the bank, as such a check can not be revoked.[95] The banker, in case of payment after notice of such attempted revocation, has the burden, as against the depositor, of showing that the check operated as a valid assignment, though the check itself, before such notice, would be ample protection to the bank.[96]

§ 139 (1ac) Intention of Parties to Assign All or Part of Deposit.—In order to place a check beyond the control of the drawer and preclude him from stopping payment thereon, it must be clearly shown that it was the intention of the parties to assign all or part of the specific fund on deposit.[97]

§ 139 (1b) Officer to Whom Notice Given.—If one desire to stop the payment of a check, he must go to the cashier and not to the president.[98]

Verbal Notice.—The notice to a bank not to pay a check may be a verbal notice and plaintiff, in an action by a depositor against a bank in which the defense was payment of a check, may prove a verbal notice given by him before the payment to defendant's receiving teller not to pay it, though afterwards on the request of the teller he reduced the notice to writing. That fact did not confine him to the writing in proving notice or necessarily merge the verbal notice into the written one.[99]

§ 139 (1c) Effect on Rights of Holder and Liabilities of Drawer.—While the drawer has the right to countermand the payment of a check, he can only exercise this right at his own risk; and by its exercise he can not affect the validity of a check, unless procured from him by fraud or mistake and he can not affect it at all in the hands of an innocent holder for value.[1]

Check in Hands of Bona Fide Purchasers.—See ante, "Checks Operating as Assignment Pro Tanto," § 139 (1ab).

§ 139 (1d) Effect of Payment after Revocation.—Where payment of a check is countermanded and the bank afterwards pays it on presentation, the drawer may recover from the bank the amount so paid.[2] A

95. *Wisconsin.*—Raesser *v.* National Exch. Bank, 112 Wis. 591, 88 N. W. 618, 56 L. R. A. 174, 88 Am. St. Rep. 979.

96. Raesser *v.* National Exch. Bank, 112 Wis. 591, 88 N. W. 618, 56 L. R. A. 174, 88 Am. St. Rep. 979.

97. **Intention of parties to assign all or part of deposit.**—Pease, etc., Co. *v.* State Nat. Bank, 114 Tenn. 693, 88 S. W. 172.

98. **Officer to whom notice given.**—Bank *v.* Craig, 33 Va. (6 Leigh) 399.

99. **Verbal notice.**—People's Sav. Bank, etc., Co. *v.* Lacey, 146 Ala. 688, 40 So. 346.

1. **Effect on rights of holder and liabilities of drawer.**—Parker-Fain Grocery Co. *v.* Orr, 1 Ga. App. 628, 57 S. E. 1074.

2. **Effect of payment after revocation.**—It is no defense to an action by a depositor against a bank that it paid his check; payment having been after notice from him not to pay it. People's

bank, honoring a check through oversight, after it had been ordered by the depositor to stop payment, is liable to him for the amount, though he had agreed that it should not be responsible for a failure to execute such orders, where it had agreed to endeavor to execute them, as its agreement rendered it liable for negligence, notwithstanding his agreement.[3]

Ratification of Payment after Revocation.—Where a bank pays a check after payment has been countermanded, the drawer may ratify such act of the bank and relieve it from liability therefor.[4] The bringing of suit by the drawer of a check against the payee to recover the sum for which it was drawn was not a ratification by him of the act of the bank in paying the check after he had stopped payment thereof.[5]

§ 139 (2) Cashier's Checks.—A cashier's check, being merely a bill of exchange drawn by a bank on itself, and accepted in advance by the act of its issuance, is not subject to countermand by the payee after indorsement, as is an ordinary check by the drawer, and the relations of the parties to such an instrument are analogous to those of the parties to a negotiable note payable on demand.[6]

§ 140. —— Obligation of Bank to Payee or Holder—§ 140 (1) Duty of Bank to Pay in General—§ 140 (1a) General Rule.—In most jurisdictions the bank is under no legal obligation to the payee or holder of a check before acceptance, for the reason that there is no privity between them;[6a] aliter in jurisdictions in which a check operates as an equitable assignment pro tanto of the drawer's funds on deposit.[7] Ordinarily a bank

Sav. Bank, etc., Co. *v.* Lacey, 146 Ala. 688, 40 So. 346.

Where a bank was notified by the drawer of a check not to pay it, and the paying teller promised not to do so, but afterwards paid it to the holder on presentation, held, that the drawer might recover from the bank the amount of the check so paid. Schneider *v.* Irving Bank (N. Y.), 30 How. Prac. 190, 1 Daly 500.

3. Elder *v.* Franklin Nat. Bank, 25 Misc. Rep. 716, 55 N. Y. S. 576.

4. **Ratification of payment after revocation.**—Pease, etc., Co. *v.* State Nat. Bank, 114 Tenn. 693, 88 S. W. 172.

A bank paid a check to D., and four days afterwards, discovering evidence that it was forged, sent it to D.'s office, where D.'s clerk replaced it by a check signed in blank by D., and filled out by D.'s clerk. On the messenger's return, D., who was present with the cashier, took the check in his hands, and expressed no dissent to the substitution but later in the day denied his clerk's authority to issue it, tendered back the other check, stopped payment of his own, and demanded its return. Held, that the surrender of the other was a sufficient consideration for the issue of D.'s check, and his ratification was irrevocable. Charles River Nat. Bank *v.* Davis, 100 Mass. 413.

5. Pease, etc., Co. *v.* State Nat. Bank, 114 Tenn. 693, 88 S. W. 172.

6. **Cashier's checks.**—Drinkall *v.* Movius State Bank, 11 N. Dak. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693.

6a. **General rule.**—Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 O. St. 60, 42 N. E. 700, 31 L. R. A. 653, 56 Am. St. Rep. 700; Covert *v.* Rhodes, 48 O. St. 66, 27 N. E. 94; Kahn *v.* Walton, 46 O. St. 195, 20 N. E. 203. Contra, McGregor *v.* Loomis, 1 Disn. 247, 12 O. Dec. 602. Compare Stout *v.* Ohio Life Ins., etc., Co., 3 O. Dec. 304; Mad River Nat. Bank *v.* Melhorn, 8 O. C. C. 191, 4 O. C. D. 401; Warner *v.* Armstrong, 10 O. Dec. 426, 21 Wkly. L. Bull. 124. See post, "Privity of Contract," § 140 (1 hbbb).

7. See post, "Check as Transfer or Assignment of Funds in Bank," § 140 (1h).

is held to agree with a customer to receive his deposits, to account with him for them, to repay them to him on demand, and to honor his checks to the amount for which they are accountable to him when the checks are presented; and for any breach of that agreement they are liable to an action by him. It makes no agreement with the holders of his checks. A check drawn by him in common form, not designating any special fund out of which it is to be paid, not corresponding to the whole amount due to him from the bank at the time, is a mere contract between the drawer and payee, on which, if payable to bearer, and not paid by the bank, any holder might doubtless sue the drawer;[8] but which passes no title, legal or equitable, to the payee or holder, in the moneys previously paid to the bank by the drawer; and the bank's promise to the drawer to honor his checks does not render them, while still liable to account with him for the amount of any check as part of his general balance, liable to an action of contract by the holder also, unless they have made a direct promise to the latter, by accepting the check when presented, or otherwise.[9]

§ 140 (1b) Requisites, Form and Contents of Check—§ 140 (1ba) Signature and Countersigning.—See ante. "Signature and Countersign," § 138 (4c). Where one, authorized by another to demand payment of a deposit made by the latter in a certain bank, presented a check drawn in the depositor's name, except that it omitted the abbreviation "Jr.," and the bank refused payment without specifying the reason, it can not, in an action by the agent, justify its refusal to pay because of the defect in the check.[10]

Check Payable to Payee "for Account of" Another.—The fact that a check is payable to a certain person "for account of" another does not change its character as a check. It transfers to the payee an amount equal to the sum expressed on its face, and gives payee a right of action thereon against the drawee.[11]

§ 140 (1bb) Memoranda on Checks.—Memoranda on the margin or in the body of a check, enumerating facts for the convenience of the depositor, and as a guide to the bank that the money is not being misappropriated, do not change the right of the bank, or make it its duty to treat the account other than an entirety.[12]

§ 140 (1bc) Declarations in Check.—The payee in a check is not

8. Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6.

9. Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6.

10. **Signature and countersigning.**—Illinois State Bank *v.* Batty, 5 Ill. (4 Scam.) 200.

11. **Check payable to payee "for account of" another.**—Ridgely Nat. Bank *v.* Patton, 109 Ill. 479.

12. **Memoranda on checks.**—State Nat. Bank *v.* Reilly, 124 Ill. 464, 14 N. E. 657.

The insertion of the word "mem." in a bank check does not affect the right of the holder to present it to the bank and demand payment immediately, and the bank will be protected in the payment of such check to the same extent that it would had not that word been inserted. Dykers *v.* Leather Mfg'rs Bank (N. Y.), 11 Paige 612.

privy to declarations contained in a check and is not bound by them in favor of the bank.[13]

§ 140 (1bd) Postdated Check.—Where a check is postdated, the presumption is that the drawer has not, and will not have until the day it is dated, funds in the bank; and persons taking such check are bound by this presumption, and can not recover against the bank, unless it has funds on that date, even though the check had been certified by the drawee's cashier.[14]

§ 140 (1be) Delivery of Check.—Where a bank has paid a check to one not the payee or his indorsee and charged or deducted the amount on settlement with the drawer it is immaterial that it does not appear that the check was delivered to payee, or how it came into possession of the bank, as by suing upon it the payee ratifies the receipt of the check on his account, though not its subsequent collection.[15]

§ 140 (1c) Particular Check—§ 140 (1ca) Check against Conditional Deposit.—A bank with which money was deposited to the credit of a third party to be paid on a condition imposed for the depositor's benefit could not pay any part of it on the depositor's check until the condition was met.[16] The person to whose credit the deposit was made is presumed

13. Declarations in check.—In the body of a check it was declared that it was given in payment for corn bought from the payee, and that the money to be paid by the bank, the drawee, was an advance on exchange sold to it. Held, that the payee was not privy to the declarations, and was not bound by them. Citizens' Bank *v.* Grand, 33 La. Ann. 976.

14. Postdated check.—Clarke Nat. Bank *v.* Albion Bank (N. Y.), 52 Barb. 592.

15. Delivery of check.—Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. Rep. 900.

16. Check against conditional deposit.—Republic Life Ins. Co. *v.* Hudson Trust Co., 115 N. Y. 503, 130 App. Div. 618, order affirmed in 198 N. Y. 590, 92 N. E. 1100.

T. deposited money to S. Company's credit in defendant bank conditionally. Though the condition never arose, the company drew a check for the amount in favor of plaintiff corporation, and a bank officer who did not know of the condition credited plaintiff with the amount in a passbook issued to it. Before any account was opened on the books, it was discovered that the deposit was not subject to check, and the S. Company was notified within 24 hours, the check was returned, and defendant refused to transfer the account. It does not appear that plaintiff was a bona fide purchaser of the deposit, or that its position was changed to its prejudice between issuance of the passbook and notice to the S. Company. Held, that defendant is not bound by the credit indicated by the passbook. Republic Life Ins. Co. *v.* Hudson Trust Co., 115 N. Y. S. 503, 130 App. Div. 618, order affirmed in 198 N. Y. 590, 92 N. E. 1100.

Bona fide purchaser.—Plaintiff is not an innocent purchaser of the deposit, and has no more right to recover the fund than the S. Company, if it had actual or constructive knowledge that the company had no right to draw the check. Republic Life Ins. Co. *v.* Hudson Trust Co., 115 N. Y. S. 503, 130 App. Div. 618, order affirmed in 198 N. Y. 590, 92 N. E. 1100.

Presumption of notice.—Plaintiff was charged with notice of the facts depriving the S. Company of the right to draw the check, since R., who as president of the S. Company was at least presumptively chargeable with knowledge of the condition attached to the deposit, acted for such company in drawing the check and for plaintiff, of which he was also president, in accepting the check. The plaintiff has the burden of showing that it was an

to know that he can not draw on the deposit without a new agreement with the person making it.[17]

§ 140 (1cb) Checks for Purchase Money.—See post, "Promise to Accept," § 140 (3e); "Obligation of Bank Where Check in Excess of Deposit," § 140 (5).

Check against Deposit of Draft with Bill of Lading Attached.—A bank which is accustomed to credit to a depositor any proceeds of drafts with bill of lading attached can not, when the depositor has not paid in full for the property bought by him, be held responsible by the seller, for the balance of the purchase money, which is a matter between buyer and seller, which can not concern the bank when the seller has turned over the property to the depositor, although the depositor had given the seller a check on the bank with which he deposited the draft with bill of lading attached.[18]

§ 140 (1cc) Overchecks to Be Secured by Draft and Bill of Lading.—An agreement by a bank to honor checks for the purchase of live stock, the drawee bank to be secured by a draft and bill of lading on their shipment, is valid, so as to render the bank liable for the payment of the checks; it having sufficient funds for such purpose derived from the draft.[19] Such agreement is not rendered invalid by the fact that the drawers were already indebted to the bank on other transactions.[20]

§ 140 (1cd) Duplicate Checks.—Where a depositor having abundant funds to pay both checks, draws a duplicate check in lieu of the original check which had not been presented, which on its face gives explicit directions as to the application of his funds, the bank is bound by them.[21]

innocent purchaser of the deposit for value. Republic Life Ins. Co. *v.* Hudson Trust Co., 115 N. Y. S. 503, 130 App. Div. 618, order affirmed in 198 N. Y. 590, 92 N. E. 1100.

17. Republic Life Ins. Co. *v.* Hudson Trust Co., 115 N. Y. S. 503, 130 App. Div. 618, order affirmed in 198 N. Y. 590, 92 N. E. 1100.

18. **Check against deposit of draft with bill of lading attached.**—Perry *v.* Bank, 131 N. C. 117, 42 S. E. 551.

In a cash sale of cotton the seller accepted the buyer's check in payment. The buyer sold a part of it to a third party, drawing his draft on him for the payment, and depositing it, with the bill of lading, to his credit in the bank on which the check was drawn. The bank credited the draft to the buyer's account, and honored checks drawn by him, until his credit was reduced below the amount of the check held by the seller, without knowledge that he had bought the cotton on an agreement to pay cash. Held, that the seller could not maintain an action against the bank for the purchase money. Perry *v.* Bank, 131 N. C. 117, 42 S. E. 551.

19. **Overchecks to be secured by draft and bill of lading.**—Falls City State Bank *v.* Wehrli, 68 Neb. 75, 93 N. W. 994. See, also, York *v.* Farmers' Bank, 105 Mo. App. 127, 79 S. W. 968.

20. Falls City State Bank *v.* Wehrli, 68 Neb. 75, 93 N. W. 994.

21. **Duplicate checks.**—Where an original check not having been presented for payment the duplicate was executed by the drawer, and sent to the payee directing payment of the same sum, with the qualification "if previous check for $500, dated March 9th, is still unpaid," the drawee bank not having paid the original check became liable to the payee for the amount thereof, the drawer by executing the duplicate having assumed all risk as to the first check including the risk that it might be necessary for the

§ 140 (1d) Time When Payable—§ 140 (1da) In General.—A check is usually payable on presentation and demand.[22] It may, however, be postdated, and still be a bank check.[23] A check dated at a time in the future is not subject to payment or acceptance until the time of its date arrives, and if it be presented at a time in advance of its date, the drawee, even if he has funds on hand sufficient to pay it, can not pay it, or retain the fund to pay, as against other checks or drafts presented and payable prior to the time the check bears date, and the drawer of such a check does not undertake to have the funds in the drawee's hands to meet it before the time at which the check bears date arrives.[24]

§ 140 (1db) Presentment and Demand.—See post, "Rule Denying Right," § 140 (1hbb).

Time of Presentment.—As between the holder of a banker's check and the indorser, it ought to be presented for acceptance with due diligence. But as between the holder and the drawer, a demand at any time before suit brought will be sufficient, unless it appears that the drawee has failed, or the drawer, in some other manner, has sustained injury by the delay.[25]

Necessity.—A check holder's right to the fund drawn on is not perfected by the mere delivery of the check to him. He must first demand payment of the check.[26] A bank is not bound to accept by telegrams the checks or drafts of a depositor, although in possession of funds, as its duty to pay or accept depends upon presentation.[27]

§ 140 (1e) Protest.—Where a bank receives a check drawn upon itself, but without sufficient funds in the drawer's account to pay it in full, and the bank makes an effort to induce the drawer of the check to make it good, and also notifies its correspondent in a distant city of the dishonor

bank's protection that it should hold a sufficient amount of the drawer's funds to meet the original in case it should be presented by a bona fide indorsee for value. Southern, etc., Cabinet Co. v. First Nat. Bank, 87 S. C. 79, 68 S. E. 962, 29 L. R. A., N. S., 623.

22. Time when payable.—Stewart v. Smith, 17 O. St. 82; Oyster, etc., Co. v. National Lafayette Bank, 51 O. St. 106, 36 N. E. 833; Morrison v. Bailey, 5 O. St. 13, 64 Am. Dec. 632.

A "check" is payable on demand, and where nothing more appears the bank on which it is drawn must either pay or reject it on presentment. Pollack v. National Bank (Mo. App.), 151 S. W. 774.

23. Postdated checks.—Stewart v. Smith, 17 O. St. 82; Andrews v. Blachly, 11 O. St. 89, limiting and explaining Morrison v. Bailey, 5 O. St. 13, 64 Am. Dec. 632, where it was declared that a draft for money in the usual form of a check, but payable at a future date, is a bill of exchange. See ante, "Postdated Checks," § 138 (4ba); "Postdated Checks," § 140 (1bd).

24. Smith v. Maddox-Rucker Banking Co., 8 Ga. App. 288, 68 S. E. 1092; S. C., 135 Ga. 151, 68 S. E. 1031, is decided in conformity to answers to certified questions.

25. Time of presentment.—Daniels v. Kyle, 1 Ga. 304.

26. Necessity.—Chambers v. Northern Bank, 5 Ky. L. Rep. 123.

A bank owes no duty to the holder of a check until it is presented for payment. Pease, etc., Co. v. State Nat. Bank, 114 Tenn. 693, 88 S. W. 172; Akin v. Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Imboden v. Perrie, 81 Tenn. (13 Lea) 504.

27. Myers v. Union Nat. Bank, 27 Ill. App. 254, affirmed in 128 Ill. 478, 21 N. E. 580.

of the check by telegraph, and on the following day protests the check, it has done all that it is required to do, and can not be held liable to the drawee who was also the holder, because it failed to protest the check on the day on which it was received.[28]

§ 140 (1f) Right to Require Indorsement.—The payee of a check when he receives payment from the drawee need not indorse it in blank as a voucher for the payment.[29] A bank can not require the holder of a check payable to the order of the maker, and by him indorsed in blank, to indorse it on presentation for payment.[30]

§ 140 (1g) Check as Lien on Deposit.—An unaccepted check creates no lien on the deposit, which holder can enforce against the bank.[31]

§ 140 (1h) Check as Transfer or Assignment of Funds in Bank —§ 140 (1ha) Doctrine Generally.—In most jurisdictions, a check when not accepted is not an equitable assignment of a corresponding amount of the drawer's fund in the hands of the bank so as to operate as a transfer of the same to the payee. This is the rule in Missouri,[32] Ohio,[33] North

28. Protest.—Whitman *v.* First Nat. Bank, 35 Pa. Super. Ct. 125.

29. Right to require indorsement.—Osborn *v.* Gheen, 5 Mackey (16 D. C.) 189, affirmed in 136 U. S. 646, 34 L. Ed. 552, 10 S. Ct. 1072.

30. McCurdy *v.* Society of Savings, 6 O. Dec. 1169.

The bank's refusal to pay such a check is a dishonor thereof. McCurdy *v.* Society of Savings, 6 O. Dec. 1169.

31. Check as lien on deposit.—Florence Min. Co. *v.* Brown, 124 U. S. 385, 31 L. Ed. 424, 8 S. Ct. 531; Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897.

32. *Missouri.*—A check which is not drawn upon a particular fund, nor for the entire sum due from the drawee to the drawer, and which does not contain any words of transfer, does not operate before acceptance as an assignment in law or equity of so much of the fund to the credit of the drawer as the check calls for, and affords no right of action on the part of the payee against the drawee. Dowell *v.* Vandalia Banking Ass'n, 62 Mo. App. 482.

33. *Ohio.*—Whatever may have been the former doctrine, it is now well settled in Ohio that a check for less than the whole amount of the deposit upon which it is drawn does not operate as an equitable assignment pro tanto, but is merely an order by a creditor upon his debtor for the payment of money. Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 27 W. L. Bull. 105, 11 O. Dec. 469, affirmed in 54 O. St. 60, 42 N. E. 700; Bank *v.* Windisch Muhlhauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660; Covert *v.* Rhodes, 48 O. St. 66, 27 N. E. 94.

For language indicating that the court was of the opinion that a check was an assignment pro tanto, see in Davis, etc., Co. *v.* Adae, 4 Wkly. L. Bull. 295, 7 O. Dec. 620; Stewart *v.* Smith, 17 O. St. 82; Morrison *v.* Bailey, 5 O. St. 13, 64 Am. Dec. 632; Voorhes *v.* Hesket, 1 O. C. C. 1, 1 O. D. C. 1; McGregor *v.* Loomis, 1 Disn. 247, 12 O. Dec. 602; Gardner *v.* National City Bank, 39 O. St. 600; Chaffee *v.* Bank, 4 O. St. 1; Jacob *v.* First Nat. Bank, 3 Wkly. L. Bull. 274, 5 O. Dec. 572.

This doctrine necessarily results from the relation between the bank and the depositor. Bank *v.* Windischmuhlhauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660.

The doctrine as announced in these cases, that a check is an equitable assignment, seems to be based to a certain extent upon the declarations of Chancellor Kent, in 3 Com. 104, and approved by other text writers (see 2 Story 513, Byles on Bills 114), and likewise of not unfrequent occurrence in judicial opinions (see Stewart *v.* Smith, 17 O. St. 82; Morrison *v.* Bailey, 5 O. St. 13, 64 Am. Dec. 632), that "a check is an absolute appropriation of so much money, in the hands of the banker, to the holder of the check." But, as indicated in Bank *v.* Windischmuhlhauser Brewing Co., 50 O. St.

Carolina,[34] New York,[35] Pennsylvania,[36] Tennessee,[37] Texas,[38] and in the supreme court of the United States;[39] but in Illinois[40] and South Carolina[41] the drawing and delivery of a check is an assignment pro tanto of the drawers' funds in the bank.

Doctrine in Illinois.—The principle that the check of a depositor upon his bank, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, and the bank becomes the holder of the money for the use of the holder of the check, and is bound to account to him for the amount thereof, provided the party drawing the check has funds to that amount on deposit, subject to his check, at the time the same is presented is clearly established in Illinois.[42] Where a banker

151, 33 N. E. 1054, 40 Am. St. Rep. 660, this proposition may be sound as between the drawer and the payee or holder of the check, and yet not sound as between the payee or holder and the bank, and is therefore misleading when quoted regardless of the circumstances in connection with which it was used.

34. *North Carolina.*—Hawes *v.* Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870; Perry *v.* Bank, 131 N. C. 117, 42 S. E. 551.

35. *New York.*—Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743; Bank *v.* Merchants' Nat. Bank, 91 N. Y. 106.

An ordinary, uncertified check upon a general account is neither a legal nor an equitable assignment of any part of the sum standing to the credit of depositor, and confers no right upon the payee that he can enforce against the bank. O'Connor *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816; Attorney General *v.* Continental Ins. Co., 71 N. Y. 325; Duncan *v.* Berlin, 60 N. Y. 151; Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Chapman *v.* White, 6 N. Y. 412, 57 Am. Dec. 464.

36. *Pennsylvania.*—Tibby Bros. Glass Co. *v.* Farmers', etc., Bank, 220 Pa. 1, 69 Atl. 280, 15 L. R. A., N. S., 519.

37. *Tennessee.*—A check in the usual form and on a general account is not an appropriation of any part of the funds to the creditor of the drawer with the bank, and does not constitute any claim or right of action against the bank until it is accepted or certified by it. The remedy of the holder, if payment is refused, is against the drawer. Imboden *v.* Perrie, 81 Tenn. (13 Lea) 504; Pickle *v.* Muse, 88 Tenn. 380, 385, 12 S. W. 919, 7 L. R. A. 93, 17 Am. Rep. 900; Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Pease, etc., Co. *v.* State Nat. Bank, 114 Tenn. 693, 88 S. W. 172.

"Until presented and accepted, it is inchoate, it vests no title, legal or equitable, in the payee, to the fund. Before acceptance, the drawer may withdraw his deposits." Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921.

38. *Texas.*—The simple drawing and delivering a check or draft does not assign the fund against which it is drawn. New York Life Ins. Co. *v.* Patterson, 35 Tex. Civ. App. 447, 80 S. W. 1038, affirmed in 98 Tex. 626, no op.; House *v.* Kountze, 17 Tex. Civ. App. 402, 43 S. W. 561, affirmed in 93 Tex. 641, no op.; Gamer *v.* Thomson, 35 Tex. Civ. App. 283, 79 S. W. 1083, citing Harris *v.* Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; Texas Builders' Supply Co. *v.* National Loan, etc., Co., 22 Tex. Civ. App. 349, 54 S. W. 1059, affirmed in 93 Tex. 721, no op.; Clark *v.* Gillespie, 70 Tex. 513, 8 S. W. 121; Terry *v.* Dale, 27 Tex. Civ. App. 1, 9, 65 S. W. 51, 396, affirmed in 95 Tex. 687, no op.; Pink Front Bankrupt Store *v.* Mistrot & Co., 40 Tex. Civ. App. 375, 90 S. W. 75. But see contra Doty *v.* Caldwell (Tex. Civ. App.), 38 S. W. 1025; First Nat. Bank *v.* Randall, 1 Tex. App. Civ. Cases, § 971.

39. Supreme court of United States.—See post, "Rule Denying Right," § 140 (1hbb).

40. *Illinois.*—See post, the following text paragraph.

41. *South Carolina.*—Loan, etc., Bank *v.* Farmers', etc., Bank, 74 S. C. 210, 54 S. E. 364, 114 Am. St. Rep. 991; Southern, etc., Cabinet Co. *v.* First Nat. Bank, 87 S. C. 79, 68 S. E. 962, 29 L. R. A., N. S., 623.

42. Doctrine in Illinois.—Wyman *v.* Fort Dearborn Nat. Bank, 181 Ill. 279,

receives a deposit, he agrees with the depositor to pay it out on the presentation of his checks in such sums as such checks may call for, and to the person presenting them, and in effect he is held to agree with the whole world that whosoever may become the owner of any of such check, on presentation thereof, will be entitled to receive the amount called for by it, provided the drawer shall at that time have the amount on deposit.[43] Assignment of a check carries with it the legal title to the drawer's deposit for the sum named.[44] The checks operate as an absolute assignment of the fund on which it is drawn from the time it is delivered, as between the drawer and the payee, and the bank is bound as soon as the check is presented, and whatever sum stands upon the books to the credit of the depositor at the time of such presentation is absolutely assigned to the holder of the checks.[45] And the relation existing between the drawer, the check holder, and the bank becomes such, when there are sufficient funds on deposit to meet the check at the time of presentation, that, because such funds were appropriated at the time of the drawing of the check, the contract to be implied between the depositor, the bank, and the check holder is that

54 N. E. 946, 48 L. R. A. 565, 72 Am. St. Rep. 259; Munn *v.* Burch, 25 Ill. 35; National Bank *v.* Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Abt *v.* American, etc., Sav. Bank, 159 Ill. 467, 42 N. E. 856, 50 Am. St. Rep. 175; Gage Hotel Co. *v.* Union Nat. Bank, 171 Ill. 531, 49 N. E. 420, 39 L. R. A. 479, 63 Am. St. Rep. 270.

43. Brown *v.* Schintz, 98 Ill. App. 452; Petrue *v.* Wakem, 99 Ill. App. 463.

The check of a depositor upon his banker, delivered to another for value, transfers the title to so much of the deposit as the check calls for, which may be again transferred by the transfer of the check; and the banker holds the funds for the benefit of the owner of the check upon its presentation, and is bound to account to him therefor, provided the drawer of the check has sufficient funds to meet it on presentation. Munn *v.* Burch, 25 Ill. 35.

Defendant bank refused to certify a check drawn on it by a customer in favor of a third person. The check was then deposited in plaintiff bank, in the usual course of business, and the next day presented for payment, which was refused. At the time the check was presented for certification, and delivered to plaintiff, there were funds with defendant sufficient to pay it; and the evidence fairly established that certain drafts were treated by defendant as being to the credit of the drawer on the morning the check was presented for payment. The refusal to pay was based on a notice received by defendant subsequent to its refusal to certify. Held, that defendant was liable to plaintiff for the amount of the check. American Exch. Nat. Bank *v.* Chicago Nat. Bank, 27 Ill. App. 538.

44. Effect of assignment of check.—Merchants' Nat. Bank *v.* Ritzinger, 20 Ill. App. 27.

45. Wyman *v.* Fort Dearborn Nat. Bank, 181 Ill. 279, 54 N. E. 946, 48 L. R. A. 565, 72 Am. St. Rep. 259; Bickford *v.* First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436; Brown *v.* Leckie, 43 Ill. 497; Fourth Nat. Bank *v.* City Nat. Bank, 68 Ill. 398; Union Nat. Bank *v.* Oceana County Bank, 80 Ill. 212, 22 Am. Rep. 185; Metropolitan Nat. Bank *v.* Jones, 137 Ill. 634, 27 N. E. 533; Niblack *v.* Park Nat. Bank, 169 Ill. 517, 48 N. E. 438, 39 L. R. A. 159, 61 Am. St. Rep. 203; Brown *v.* Schintz, 202 Ill. 509, 67 N. E. 172.

The execution and delivery of a check on a bank deposit operates as an assignment of so much of the deposit as is called for by the check, and when the check is presented for payment the bank is absolutely liable to pay the same if the drawer's funds in its hands at the time of presentment are sufficient for that purpose. Judgments, 98 Ill. App. 452, affirmed, Brown *v.* Schintz, 202 Ill. 509, 67 N. E. 172.

The payee or legal holder of a bank check upon presentation for payment becomes the owner, and entitled to receive the amount called for thereby, if the drawer has that amount on deposit. The check operates as an assignment pro tanto of the drawer's deposit. Shaffner *v.* Edgerton, 13 Ill. App. 132.

the check holder, whoever he may be, may have his action, and recover against the bank the amount, pro tanto, of the check.[46] If the funds are in the bank when the check is drawn, the drawing is an appropriation, as between the drawer and the payee, of the sum of money named in the check, which is to lie in the bank until called for by a presentation of the check. It is true that in such case there is no privity between the bank and the check holder until presentment, and that priority in drawing a check does not give priority of right to the fund as against the banker but that such priority of right is determined by the order of presentation.[47]

Special instructions given by the bank to its officers respecting the hands through which a check should pass before credit to a holder do not bind the holders of checks.[48]

A custom of the bank to retain checks until noon, for the purpose of seeing whether the drawer had funds to meet it, does not affect the case.[49]

A subsequent payment of an overdraft to the depositor himself, after presentation and before payment of such check, will not be allowed to prejudice the rights of the holder thereof.[50]

Check Containing Words of Assignment or Transfer.—A check may be drawn in such form, as, by the insertion of words of transfer,[51] or under such circumstances as to amount to an assignment of a corresponding amount of the drawer's funds on deposit in the drawee bank.[52]

A check for the whole amount of a deposit is an equitable assignment thereof.[53]

46. Wyman *v.* Ft. Dearborn Nat. Bank, 181 Ill. 279, 54 N. E. 946, 48 L. R. A. 565, 72 Am. St. Rep. 259; Gage Hotel Co. *v.* Union Nat. Bank, 171 Ill. 531, 49 N. E. 420.

47. Wyman *v.* Ft. Dearborn Nat. Bank, 181 Ill. 279, 54 N. E. 946, 48 L. R. A. 565, 72 Am. St. Rep. 259; Gage Hotel Co. *v.* Union Nat. Bank, 171 Ill. 531, 49 N. E. 420; Brown *v.* Oakland Nat. Bank, 131 Ill. App. 61.

48. When a check was presented, there were sufficient funds in the bank to meet it, and the bookkeeper, at the request of the drawer, charged him with it on his pass book, leaving still a balance to his credit. In accordance with the regulations of the bank, the check should have passed through other hands and other books before being passed to the credit of the holder. Held, that the public were not bound to inquire into the special instructions given by the bank to its officers, and that the bank was liable to the holder of the check. Munn *v.* Burch, 25 Ill. 35.

49. Munn *v.* Burch, 25 Ill. 35.

50. Munn *v.* Burch, 25 Ill. 35.

51. Check containing words of assignment of transfer.—Drawer *v.* Vandalia Banking Ass'n, 62 Mo. App. 482.

52. Johnson *v.* Amarillo Imp. Co., 88 Tex. 505, 31 S. W. 503; New York Life Ins. Co. *v.* Patterson, 35 Tex. Civ. App. 447, 80 S. W. 1058.

A debtor who had a sum on deposit in a bank informed his creditor of that fact, and that he desired to pay the debt from the money on deposit, and it was agreed that the debtor should issue a check payable to a certain bank, so that that bank could collect the amount and pay it over to the creditor. A check was so issued, whereupon the payee bank telegraphed the bank of deposit to ascertain whether the debtor had funds in that bank, and, on the receipt of a reply in the affirmative, the debtor issued a second check for the balance of the debt, which was delivered to the creditor, who gave a receipt for the account. Held, that the transaction amounted to an assignment of the fund in bank to the creditor, which was good against a subsequent garnishment of the bank in an action against the debtor. New York Life Ins. Co. *v.* Patterson, 35 Tex. Civ. App. 447, 80 S. W. 1058.

53. *Missouri.*—Dickinson *v.* Coates, 79 Mo. 250, 49 Am. Rep. 228; Dowell

Check on Particular Fund.—When a check or order is drawn upon a particular fund, which is specified, it is an assignment thereof.[54]

§ 140 (1hb) Right of Payee to Sue Bank—§ 140 (1hba) Rule in Favor of Right.—Upon the question of the right of the holder of an unaccepted check to bring suit thereon in his own name, the courts of the country are not agreed. The rule is settled in favor of such right, if the bank has funds to meet the check when it is presented, in the following states: Illinois,[55] Iowa,[56] Kentucky,[57] Missouri,[58] Nebraska,[59] Okla-

v. Vandalia Banking Ass'n, 62 Mo. App. 482.

North Carolina.—Houser *v.* Blackwell, 107 N. C. 196, 12 S. E. 245.

Ohio.—Covert *v.* Rhodes, 48 O. St. 66, 27 N. E. 94; Gardner *v.* National City Bank, 39 O. St. 600. Compare Simmons *v.* Cincinnati Sav. Soc., 31 O. St. 457, 27 Am. Rep. 521, holding that where a depositor drew a check for the whole amount of the deposit upon which it was drawn, and gave it to the payee, with the intention of giving the deposit to the payee as a gift causa mortis, the death of the depositor before the presentation or acceptance of the check revoked the authority of the bank to pay the check.

Pennsylvania. — Maginn *v.* Dollar Sav. Bank, 131 Pa. 362, 18 Atl. 901.

54. Check on particular fund.—O'Conner *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816.

55. *Illinois.*—First Nat. Bank *v.* Pettit, 41 Ill. 492; Bank of Antigo *v.* Union Trust Co., 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611; Rauch *v.* Bankers' Nat. Bank, 143 Ill. App. 625; Schoonmaker *v.* Gilmore, 84 Ill. App. 17; Brown *v.* Oakland Nat. Bank, 131 Ill. App. 61.

A depositor may, in good faith, draw checks upon his banker at pleasure, for the whole or any part of the moneys to his credit in bank; and each holder of a check, whether the depositor or another, may recover the amount expressed in it. Chicago Marine, etc., Ins. Co. *v.* Stanford, 28 Ill. 168, 81 Am. Dec. 270.

56. *Iowa.*—It was so decided in Roberts *v.* Corbin & Co., 26 Iowa 315, 96 Am. Dec. 146, and the rule there announced has been either acquiesced in or affirmed in Schollmier *v.* Schoendelen, 78 Iowa 426, 43 N. W. 282, 16 Am. St. Rep. 455; May *v.* Jones, 87 Iowa 188, 54 N. W. 231; Thomas *v.* Exchange Bank, 99 Iowa 202, 68 N. W. 780, 35 L. R. A. 379. The reasoning upon which the rule is based is fully stated in these cases. Bloom *v.* Winthrop State Bank, 121 Iowa 101, 96 N. W. 733.

The holder of an unaccepted check may bring suit thereon in his own name. Bloom *v.* Winthrop State Bank, 121 Iowa 101, 96 N. W. 733.

Banker's check.—The holder of a banker's check may maintain an action against the drawee prior to acceptance, where the drawee has funds of the drawer in his possession, and wrongfully refuses to pay the same. Roberts *v.* Corbin & Co., 26 Iowa 315, 96 Am. Dec. 146.

57. *Kentucky.*—Chambers *v.* Northern Bank, 5 Ky. L. Rep. 123.

The holder of an unaccepted check may recover of the bank for nonpayment on presentation and demand if the drawer had a sufficient deposit to pay the check at the time it was drawn, and the bankers were notified that it was drawn on funds in their hands belonging to the drawer. Lester & Co. *v.* Given, etc., Co. (Ky.), 8 Bush 357.

58. *Missouri.*—Senter *v.* Continental Bank, 7 Mo. App. 532.

The holder of a check may maintain an action against the bank having funds of the drawer, and failing to pay upon presentment and demand. McGrade *v.* German Sav. Inst., 4 Mo. App. 330; State Sav. Ass'n *v.* Boatmen's Sav. Bank, 11 Mo. App. 292.

59. *Nebraska.*—Fonner *v.* Smith, 31 Neb. 107, 47 N. W. 632, 11 L. R. A. 528, 28 Am. St. Rep. 510; Union Pac. R. Co. *v.* Metcalf, 50 Neb. 452, 69 N. W. 961; Columbia Nat. Bank *v.* German Nat. Bank, 56 Neb. 803, 77 N. W. 346; Falls City State Bank *v.* Wehrbe, 68 Neb. 75, 93 N. W. 994.

If a bank having funds of the drawer refuses to pay a check, the holder may recover of the bank in an action brought in his own name. Fonner *v.* Smith, 31 Neb. 107, 47 N. W. 632, 11 L. R. A. 528, 28 Am. St. Rep. 510.

The payee of a check has a right of action against the drawee, if the latter has funds to meet it when it is presented. Falls City State Bank *v.* Wehrli, 68 Neb. 75, 93 N. W. 994.

homa,[60] South Carolina,[61] South Dakota[62] and Wisconsin.[63] The authorities do not go to the extent of holding that the mere making or delivery of the check to the payee gives a right of action against the bank by the holder, but that to create such right of action such check must be presented for payment and that there must be funds in the hands of the bank at the time to the credit of the drawee.[64]

This doctrine applies to checking accounts, and not to those accounts where a demand does not entitle the holder to payment.[65]

Bank Claiming Not to Have Money Does Not Prevent Suit.—The fact that a bank, when a check was drawn on it, claimed not to have the money on hand, did not prevent the application of the rule that the holder of an unaccepted check may maintain an action thereon.[66]

§ 140 (1hbb) Rule Denying Right—§ 140 (1hbba) Statement and Effect Generally.—The rule of decision of the supreme court of the United States is that the holder of a bank check can not sue the bank on which it draws for refusing payment unless the check was accepted by the

60. *Oklahoma.*—There is an implied promise on the part of a bank, when receiving deposits, to pay them out on the checks of the depositor to any person in whose favor he may draw the same, and the check holder is subrogated to the rights of the depositor in so much of the deposits as the check may call for remaining in the bank to the credit of the depositor at the time when such draft is presented for payment. Guthrie Nat. Bank *v.* Gill, 6 Okl. 560, 54 Pac. 434.

61. *South Carolina.*—The holder of a check may recover the amount thereof from the bank on which it is drawn, if the bank, having funds of the depositor, refuses to pay it. Fogarties *v.* State Bank (S. C.), 12 Rich. L. 518, 78 Am. Dec. 468.

The holder of a check can sue the bank for the amount specified therein, if the drawer had funds in the bank sufficient to pay it when it was presented, though it was not accepted, or certified to as good, by the bank. Simmons Hardware Co. *v.* Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700.

62. *South Dakota.*—Under Rev. Civ. Code 1903, § 2279, providing that a check drawn on a bank or banker is payable on demand, where the drawer of a check has sufficient funds on deposit subject to check, a bona fide holder of a check which has been duly presented and payment refused may maintain an action against the bank to recover the amount of the check. Turner *v.* Hot Springs Nat. Bank, 18 S. Dak. 498, 101 N. W. 348, 112 Am. St. Rep. 804.

63. *Wisconsin.*—Raesser *v.* National Exch. Bank, 112 Wis. 591, 88 N. W. 618, 56 L. R. A. 174, 88 Am. St. Rep. 979.

64. Guthrie Nat. Bank *v.* Gill, 6 Okl. 560, 54 Pac. 434.

Where nothing has occurred between the delivery of a check and the demand for its payment to justify the bank in refusing payment, the demand fixes the liability of the bank, and the holder can prosecute an action against the bank to recover the amount of the check, if payment is refused. Chambers *v.* Northern Bank, 5 Ky. L. Rep. 123.

In Oklahoma a check does not constitute an equitable assignment pro tanto of the funds in the hands of the bank to the credit of the drawer before such check has been presented for payment. Guthrie Nat. Bank *v.* Gill, 6 Okl. 560, 54 Pac. 434.

65. Checking accounts.—When in this state a check makes the holder an assignee of a fund in bank, it gives him the right, after presentation, to sue the bank in his own name. This doctrine, however, applies to checking accounts, and not to those accounts where a demand does not entitle the holder to payment. Brown *v.* Oakland Nat. Bank, 131 Ill. App. 61.

66. Bank claiming not to have money does not prevent suit.—Columbia, etc., Trust Co. *v.* First Nat. Bank, 116 Ky. 364, 25 Ky. L. Rep 561, 76 S. W. 156; Bloom *v.* Winthrop State Bank, 121 Iowa 101, 96 N. W. 733.

bank.[67] The rule as established in the supreme court of the United States prevails in California,[68] Colorado,[69] Georgia,[70] Louisiana,[71] Maryland,[72] Massachusetts,[73] Michigan,[74] Missouri,[75] New Jersey,[76] Ohio,[77] North

67. **Statement and effect generally.**—Guthrie Nat. Bank *v.* Gill, 6 Okl. 560, 54 Pac. 434.

Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897; Bull *v.* First Nat. Bank, 123 U. S. 105, 31 L. Ed. 97, 8 S. Ct. 62; St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390; First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229; Laclede Bank *v.* Schuler, 120 U. S. 511, 30 L. Ed. 704, 70 S. Ct. 644; Fourth State Bank *v.* Yardley, 165 U. S. 634, 41 L. Ed. 855, 17 S. Ct. 439.

The holder of a bank check has no right of action upon it against the bank, unless under special circumstances, such as an acceptance of the check by the bank. Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897.

68. *California.*—Under Civ. Code, §§ 3254, 3255, declaring that a check is a bill of exchange subject to the provisions affecting bills of exchange, the holder of a check is a mere bearer of an order drawn by the depositor, so the bank failing to pay the check, though having sufficient funds, is liable only to the depositor. Marble Co. *v.* Merchants' Nat. Bank (Cal.), 115 Pac. 59.

69. *Colorado.*—The holder or payee of a check can not, in his own name, maintain an action against the drawee, when the check has not been accepted. Boettcher *v.* Colorado Nat. Bank, 15 Colo. 16, 24 Pac. 582.

The holder of a check drawn against funds can not maintain an action in his own name against the drawee who refuses payment, regardless of the question of acceptance. Colorado Nat. Bank *v.* Boettcher, 5 Colo. 185, 40 Am. Rep. 142.

70. *Georgia.*—Georgia Seed Co. *v.* Talmadge & Co., 96 Ga. 254, 22 S. E. 1001.

71. *Louisiana.*—Case *v.* Henderson, 23 La. Ann. 49, 8 Am. Rep. 590; State *v.* Bank, 49 La. Ann. 1060, 22 So. 207.

72. *Maryland.*—Moses *v.* Franklin Bank, 34 Md. 574.

73. *Massachusetts.*—Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6; National Bank *v.* Eliot Bank (Mass.), 5 Am. L. Rep. 711, 20 L. Rep. 138; Bullard *v.* Randall (Mass.), 1 Gray, 605; Dana *v.* Third Nat. Bank (Mass.), 13 Allen 445, 90 Am. Dec. 216.

The promise of a bank to one of its depositors to pay all checks which he may draw, does not make the bank liable to an action of contract by the holder of a check afterwards drawn by him for part of the amount deposited. Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6.

74. *Michigan.*—Lonier *v.* State Sav. Bank, 149 Mich. 483, 112 N. W. 1119; Brennan *v.* Merchants', etc., Nat. Bank, 62 Mich. 343, 28 N. W. 881; Grammel *v.* Carmer, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363.

75. *Missouri.*—Dowell *v.* Vandalia Banking Ass'n, 62 Mo. App. 482.

On an ordinary bank check for part of the drawer's deposit no action can be maintained by the payee against the drawee or its assignee before acceptance. Dickinson *v.* Coates, 79 Mo. 250, 49 Am. Rep. 228.

76. *New Jersey.*—National Bank *v.* Berrall, 70 N. J. L. 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821; Creveling *v.* Bloomsbury Nat. Bank, 46 N. J. L. 255, 50 Am. Rep. 417.

77. *Ohio.*—Jacob *v.* First Nat. Bank, 3 Wkly. L. Bull. 274, 5 O. Dec. 572; Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 O. St. 60, 42 N. E. 700, 31 L. R. A. 653, 56 Am. Rep. 700, affirming 27 Wkly. L. Bull. 105, 11 O. Dec. 469; Covert *v.* Rhodes, 48 O. St. 66, 27 N. E. 94; Kahn *v.* Walton, 46 O. St. 195, 50 N. E. 203. Contra, McGregor *v.* Loomis, 1 Disn. 247, 12 O. Dec. 602. Compare Stout *v.* Ohio Life Ins., etc., Co., 3 O. Dec. 304; Mad River Nat. Bank *v.* Melhorn, 8 O. C. C. 191, 4 O. C. D. 401; Warner *v.* Armstrong, 21 Wkly. L. Bull. 124, 10 O. Dec. 426.

An action can not be maintained against a bank by the holder of a check for refusal to pay it, unless the check has been accepted, although there stands to the credit of the drawer on the books of the bank a sum more than sufficient to meet the check. Metropolitan Bank *v.* Cincinnati, etc., R. Co., 27 Wkly. L. Bull. 105; Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 O. St. 60, 42 N. E. 700, 31 L. R. A. 653, 56 Am. St. Rep. 700.

This doctrine would seem to follow from the doctrine that a check is not an equitable assignment, and the converse would also seem to follow, that if the payee or holder has no right of action against the bank for refusal to pay the check, then the check could

Carolina,[78] New York,[79] Pennsylvania,[80] Tennessee,[81] Texas,[82] and Virginia.[83] In jurisdictions where the rule of the supreme court prevails, when

not be an equitable assignment; "for * * * an equitable assignment transfers the fund, and the refusal of the drawee to pay would be a conversion by him of the payee's property, for which suit might be at once brought." Metropolitan Bank *v.* Cincinnati, etc., R. Co., 27 Wkly. L. Bull. 105, 11 O. Dec. 469, affirmed in 54 O. St. 60, 42 N. E. 700. But notwithstanding the seeming soundness of this reasoning, some of the earlier decisions have made a distinction between the effect of the check as between the drawer and payee and as between the payee and the bank, expressly refusing to pass upon the effect of the check in the latter case, and at the same time holding that in the former case the check operates as an assignment. See Gardner *v.* National City Bank, 39 O. St. 600; Voorhes *v.* Hesket, 1 O. C. C. 1, 1 O. C. D. 1; Davis, etc., Co. *v.* Adae, 4 Wkly. L. Bull. 295, 7 O. Dec. 620. See ante, "Check as Transfer or Assignment of Funds in Bank," § 140 (1h).

78. *North Carolina.* — Commercial Nat. Bank *v.* First Nat. Bank, 118 N. C. 783, 24 S. E. 524, 32 L. R. A. 712, 54 Am. St. Rep. 753; Perry *v.* Bank, 131 N. C. 117, 42 S. E. 551; Hawes *v.* Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870.

79. *New York.*—Chapman *v.* White, 2 Seiden 412; Lunt *v.* Bank (N. Y.), 49 Barb. 221.

The holder of an ordinary check, unaccepted and uncertified, can not compel payment from the bank upon which it is drawn, even if the account of the drawer is sufficient to meet it when presented. Under such circumstances the right of action belongs to the drawer or creditor of the bank, and not to the holder who is merely a stranger. O'Conner *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816; Attorney General *v.* Continental Ins. Co., 71 N. Y. 325; Duncan *v.* Berlin, 60 N. Y. 151; Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Chapman *v.* White, 6 N. Y. 412, 57 Am. Dec. 464; Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743; Winter *v.* Drury, 5 N. Y. 525.

80. *Pennsylvania.*—Loyd *v.* McCaffrey, 46 Pa. 410; Saylor *v.* Bushong, 100 Pa. 23, 45 Am. Rep. 353; First Nat. Bank *v.* Shoemaker, 117 Pa. 94, 11 Atl. 304, 2 Am. St. Rep. 649; First Nat. Bank *v.* McMichael, 106 Pa. 460, 51 Am. Rep. 529; German Nat. Bank *v.* Farmers' Deposit Bank, 118 Pa. 294, 12 Atl. 303.

The holder of a check can not maintain an action in his own name against the bank on which the check is drawn, unless the bank has accepted it. Howard H. Clark & Co. *v.* Warren Savings Bank, 31 Pa. Super. Ct. 647.

No action will lie by a payee of a nonaccepted check in his own name against the bank, though it has sufficient funds of the drawer at the time it refuses payment. Tibby Bros. Glass Co. *v.* Farmers', etc., Bank, 220 Pa. 1, 69 Atl. 280, 15 L. R. A., N. S., 519.

81. *Tennessee.*—Planters' Bank *v.* Merritt, 54 Tenn. (7 Heisk.) 177; Planters' Bank *v.* Keesee, 54 Tenn. (7 Heisk.) 200; Imboden *v.* Perrie, 81 Tenn. (13 Lea) 504; Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. Rep. 900; Akin *v.* Jones, 95 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Pease, etc., Co. *v.* State Nat. Bank, 114 Tenn. 693, 88 S. W. 172.

"While the authorities are not agreed, yet the decided weight of opinion is that the holder of a bank check can not sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or that it had done some other act equivalent to and implying acceptance. This has been the uniform view of this court. Planters' Bank *v.* Merritt, 54 Tenn. (7 Heisk.) 177; Planters' Bank *v.* Keese, 54 Tenn. (7 Heisk.) 200; Imboden *v.* Perrie, 81 Tenn. (13 Lea) 504." Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. Rep. 900.

82. *Texas.*—The holder of an unaccepted bank check can not maintain an action thereon against the bank. House *v.* Kountze, 17 Tex. Civ. App. 402, 43 S. W. 561; Gamer *v.* Thomson, 35 Tex. Civ. App. 283, 79 S. W. 1083; Terry *v.* Dale, 27 Tex. Civ. App. 1, 65 S. W. 51, 396; New York Life Ins. Co. *v.* Patterson, 35 Tex. Civ. App. 447, 80 S. W. 1058; Texas Builders' Supply Co. *v.* National Loan, etc., Co., 22 Tex. Civ. App. 349, 54 S. W. 1059. See, also, Harris *v.* Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467. But see contra First Nat. Bank *v.* Randall, 1 Tex. App. Civ. Cases, § 971; Doty *v.* Caldwell (Tex. Civ. App.), 38 S. W. 1025.

83. *Virginia.*—Purcell *v.* Allemony & Son, 63 Va. (22 Gratt.), 739.

payment of a check upon a bank is refused, the recourse of the holder is against the drawer, and not against the bank,[84] even though the bank, at the time the check was presented for payment, held funds of the drawer on deposit, sufficient to meet the check;[85] and the holder can not, in his own name, sue the bank for refusing to pay it.[86] The holder of a bank check has no right of action upon it against the bank, unless under special circumstances, such as an acceptance of the check by the bank.[87] His remedy is confined to an action against the drawer.[88] And the fact that the check is one drawn by an officer of the United States, upon a national bank and public depositary, in favor of a creditor of the government, makes no difference.[89] The promise to a depositor by the bank to accept and pay his checks is a mere chose in action upon which he only, to whom it was made, can sue, and, does not make the bank liable to an action by a holder unless he has taken it on the faith of such promise.[90]

§ 140 (1hbbb) Privity of Contract.—The payee or holder of a check, before it is accepted by the drawee, can not maintain an action upon it against the latter, as there is no privity of contract between them;[91] he

84. Case *v.* Henderson, 23 La. Ann. 49, 8 Am. Rep. 590; Moses *v.* Franklin Bank, 34 Md. 574; Creveling *v.* Bloomsbury Nat. Bank, 46 N. J. L. 255, 50 Am. Rep. 417.

85. Case *v.* Henderson, 23 La. Ann. 49, 8 Am. Rep. 590; Moser *v.* Franklin Bank, 34 Md. 574; Nat. Bank *v.* Eliot Bank (Mass.), 5 Am. L. Rep. 711, 20 L. Rep. 138; Creveling *v.* Bloomsbury Nat. Bank, 46 N. J. L. 255, 50 Am. Rep. 417; Jacob *v.* First Nat. Bank, 3 Wkly. L. Bull. 274, 5 O. Dec. 572; Saylor *v.* Bushong, 100 Pa. 23, 45 Am. Rep. 353; Tibby Bros. Glass Co. *v.* Farmers', etc., Bank, 220 Pa. 1, 15 L. R. A., N. S., 519, 69 Atl. 280; Planters' Bank *v.* Merritt, 54 Tenn. (17 Heisk.) 177.

86. National Bank *v.* Eliot Bank (Mass.), 5 Am. L. Rep. 711, 20 L. Rep. 138; Saylor *v.* Bushong, 100 Pa. 23, 45 Am. Rep. 353; Planters' Bank *v.* Merritt, 54 Tenn. (7 Heisk.) 177.

87. Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897. See post, "Acceptance of Check," § 140 (3).

88. Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897.

89. Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897.

90. Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6; Exchange Bank *v.* Rice, 98 Mass. 288; Exchange Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1.

91. Privity of contract.—Laclede Bank *v.* Schuler, 120 U. S. 511, 30 L. Ed. 704, 7 S. Ct. 644; Marine Bank *v.* Fulton County Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785; Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897; First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229. And see Thompson *v.* Sioux Falls Nat. Bank, 150 U. S. 231, 37 L. Ed. 1063, 14 S. Ct. 94.

So held, where a check of a treasurer of the United States upon a national bank, duly designated as a depositary of the public money, having been paid upon an unauthorized indorsement of the name of the payee, suit to recover the amount of the check was brought by its true owner against the bank. First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229.

The rights of the parties in such a case are not changed by the fact that, on a settlement of accounts between the treasurer and the bank, the check, on the supposition that it had been properly paid, was credited to the bank. Such an error does not affect the real state of the accounts. When it is discovered, they are open to correction. First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229. See, also, Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657; Leather Mfg'rs Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 32 L. Ed. 342, 9 S. Ct. 3.

New York.—Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743; Bank *v.* Merchants' Nat. Bank, 91 N. Y. 106; Van Allen *v.* American Nat. Bank, 52 N. Y. 1, affirming 3 Lano 517; Ætna Nat. Bank

has no contract with the bank on which it is drawn and no legal right to exact its payment.[92] He takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction.[93] The right of a payee or holder of a check to sue the bank on which it is drawn can not be sustained under the doctrine whereby one for whose benefit a contract is made may sue thereon; to sustain such right would be an unwarranted extension of the doctrine involved.[94]

§ 140 (1hbc) Check Charged against Drawer.—If the bank had charged the check on its books against the drawer, and settled with him on that basis, it might be that the payee or holder could recover on the count for money had and received, on the ground that the rule ex æquo et bono would be applicable, as the bank, having assented to the order and communicated its assent to the drawer, would be considered as holding the money thus appropriated for the use of payee or his transferee, and therefore, under an implied promise to him to pay it on demand.[95]

§ 140 (1hbd) Check Containing Words of Assignment or Transfer.—When the check is so framed as to assign any portion of the fund on deposit, the payee or holder has a right of action against the bank and may sue in his own name.[96]

§ 140 (1hbe) Payee of Check Deposited for Collection.—The payee of a check who has deposited the same for collection can not maintain an action against the bank on which it is drawn without any showing that he is the owner of the check, or that the right of action of the one to whom it was assigned for collection has been assigned to him.[97]

§ 140 (1hbf) Check Payable in Exchange.—No action against a bank can be maintained upon a check payable in exchange.[98]

v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314.

Ohio.—Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 O. St. 60, 42 N. E. 700, 31 L. R. A. 653, 56 Am. St. Rep. 700.

92. National Bank *v.* Berrall, 70 N. J. L. 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821.

93. Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897.

94. Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 O. St. 60, 42 N. E. 700, 31 L. R. A. 653, 56 Am. St. Rep. 700, in which it was urged that privity between the bank and the payee or holder of the check was not essential to the latter's right of action, but that such right might be sustained under the doctrine above set forth. And see Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6.

95. Effect of charging against drawer.—Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897; St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390.

96. Check containing words of assignment or transfer.—Gamer *v.* Thomson, 35 Tex. Civ. App. 283, 79 S. W. 1083, citing Harris *v.* Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; Texas Builders' Supply Co. *v.* National Loan, etc., Co., 22 Tex. Civ. App. 349, 54 S. W. 1059; Clark *v.* Gillespie, 70 Tex. 513, 8 S. W. 121; Houser *v.* Kountze, 17 Tex. Civ. App. 402, 43 S. W. 561. See ante, "Doctrine Generally," § 140 (1ha).

97. Payee of check deposited for collection.—Carley *v.* Potter's Bank (Tenn.), 46 S. W. 328.

98. Check payable in exchange.—Hogue *v.* Edwards, 9 Ill. App. 148.

§ 140 (1hbg) Check against Deposit of Drafts Not Yet Paid.—The holder of a check has no cause of action against the bank for failure to pay it where the credit of the drawer at the bank is derived from a deposit of drafts not yet paid, and which were only collected by the bank by a subsequent resort to bills of lading attached.[99]

§ 140 (1hbh) Deposit Levied on by Execution against Drawer.—A bank is not liable to the holder of a check drawn upon it by a general depositor for its refusal to pay the check, though the bank has sufficient funds of the drawer wherewith to pay it, where such funds have been levied on by execution against the drawer.[1]

§ 140 (1hbi) Deposit of Drawer Garnished.—A bank is not liable for damages to the payee of a check for failure to pay it, payment having been refused when he presented it because the deposit of the drawer had been garnished, the bank and the payee having then agreed that it should not be paid till the bank was released from the garnishment, the release to be granted by the officer issuing the writ, and it not having been granted; and this though the writ was void.[2] The refusal by a bank to pay a check is proper, where it appears that the funds in its hands had prior to the presentation of the check been made subject to a judgment against it as garnishee, and a second refusal to pay such check is justified, even though such judgment had been satisfied before the bank had actually paid out the funds, where the satisfaction was made in contemplation of the bank's payment of the amount thereof.[3]

§ 140 (1i) Duty to Retain Deposit to Meet Check.—The knowledge on the part of a bank that checks have been drawn does not render it obligatory upon the bank to retain the deposit to meet them.[4] The payee of a check given for a valuable consideration, and operating as an assignment pro tanto of the defendant's funds, can not impose on a nonconsenting depositary or bank, by notice or otherwise, any duty to protect the payee's equitable rights, or prevent the bank or depositary from paying out the funds of the depositor, either in whole or in part, to others, as the depositary may refuse to consent to a partial transfer of the fund.[5]

When payment of a check is refused because the drawer has no funds, there is no presumption that the check remains outstanding for pay-

99. Check against deposit or drafts not yet paid.—Jacob *v.* First Nat. Bank, 3 Wkly. L. Bull. 274, 5 O. Dec. 572.

1. Deposit levied on by execution against drawer.—Satterwhite *v.* Melczer, 3 Ariz. 162, 24 Pac. 184.

2. Deposit of drawer garnished.—Kent & Co. *v.* Bank (Ark.), 94 S. W. 700.

3. Brown *v.* Oakland Nat. Bank, 131 Ill. App. 61.

4. Duty to retain deposit to meet check.—Imboden *v.* Perrie, 81 Tenn. (13 Lea) 504; Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921.

A check drawn by a depositor, never accepted and not accounted for, is no obstacle to a suit for the deposit. Jackson Ins. Co. *v.* Cross, 56 Tenn. (9 Heisk.) 283.

5. Raesser *v.* National Exch. Bank, 112 Wis. 591, 88 N. W. 618, 56 L. R. A. 174, 88 Am. St. Rep. 979.

ment, and no duty devolves on the bank to reserve from a future deposit an amount sufficient to satisfy it.[6]

In Kentucky.—A check is an absolute appropriation of so much of the drawer's funds in the bank's hands as is called for by it, so that, after notice to the bank, it can not be withdrawn by the drawer, the money becoming the absolute property of the holder, and this notwithstanding the drawer may afterwards deliver another check to an innocent holder without notice of the first, who by first presenting his check may defeat the claim of the first check holder.[7]

§ 140 (1j) Priorities—§ 140 (1ja) As to Assignment of Deposit.—Where a debtor to several persons has a sum of money on deposit in a bank, and gives to one creditor a check for a particular sum, to be paid out of the fund, and immediately afterwards assigns to another all the funds in the bank to his credit, and the assignment is first presented, no recovery can be had by the assignee against the bank for the whole sum of the deposit, because it first paid to the holder the amount represented by the check, provided the assignee at the time of the assignment knew that it was the intention of the depositor to assign only the amount left after the payment of the check.[8] Whether such was the intention and known to the assignee were questions of fact to be determined by the jury.[9]

§ 140 (1jb) Priorities between Check Holder and Attaching Creditor.—In many jurisdictions among which are Pennsylvania,[10] Tennessee,[11] and Washington[12] a judgment creditor of a depositor who gar-

6. **Payment refused because of want of funds.**—Gilliam *v.* Merchants' Nat. Bank, 70 Ill. App. 592.

Plaintiff presented a check to the bank on which it was drawn, and payment was refused for want of funds. The drawer deposited sufficient funds to meet the plaintiff's check the next day, and the day after that made a general assignment, and the assignee entered upon his duties. Plaintiff then presented his check for payment. Held, that the bank was not liable to him. Gilliam *v.* Merchants' Nat. Bank, 70 Ill. App. 592.

7. **In Kentucky.**—Commonwealth *v.* Kentucky Distilleries, etc., Co., 132 Ky. 521, 116 S. W. 766.

8. **As to assignment of deposit.**—Atlanta Nat. Bank *v.* George, 109 Ga. 682, 34 S. E. 998.

9. Atlanta Nat. Bank *v.* George, 109 Ga. 682, 34 S. E. 998.

10. **Priority between check holder and attaching creditor.** — *Pennsylvania.* — Where a bank is garnished, and admits the amount due the defendant, a check drawn by the defendant some days before, but not presented till after the garnishment, though on the same day, will not have preference. Harry *v.* Wood (Pa.), 2 Miles 327.

An attachment execution was served on a bank, as garnishee, on October 28, 1886, at which time there was a sum of money on deposit to the credit of defendant. On October 29, 1886, a check was presented, given by defendant on October 23, 1886. Held, that the holder of the check had no claim or lien on the fund. Kuhn *v.* Warren Sav. Bank (Pa.), 11 Atl. 440, 7 Sad. 435.

11. *Tennessee.*—The rights of plaintiff, who has defendant garnish the bank wherein B. has funds, are paramount to those of one to whom, before suit brought, defendant gave a check, which was not presented at the bank until after service of the garnishee process. Imboden *v.* Perrie, 81 Tenn. (13 Lea) 504.

12. *Washington.*—Where checks on a general deposit are not presented to the bank till after it has been garnished by a judgment creditor of the depositor, though drawn before garnishment, the

nishees the deposit of the latter has priority over a check holder whose check was drawn before garnishment, but not presented till thereafter; but in Kentucky[13] and Texas[14] the check holder has priority over the attaching creditor.

§ 140 (1jc) Priority as to Assignee for Creditor—§ 140 (1jca) Assignee of Drawer.—See post, "Assignment by Drawer for Creditors," § 140 (1m).

§ 140 (1jcb) Assignee of Bank.—Where the payee of a check, drawn upon a bank holding sufficient funds of the drawer to pay the check, presented such check to the bank in proffered payment of a note due by such payee to the bank, and the bank refused to pay the check or to accept it in payment of the note, and thereafter made an assignment, in an action by the assignee upon the note against the payee of the check, the latter was entitled to have the amount of the check set off against the note.[15]

§ 140 (1k) Effect of Agreements, Rules and Customs of Clearing Houses.—The rules of a clearing house do not affect the relations between the payee of a check presented for payment through the clearing house and the bank on which the check is drawn.[16] The holder of a check can not avail himself of a custom and an agreement existing between the drawee and the bank which acted as its agent, at the clearing house, that checks drawn on the former bank which were not returned to the holder before banking hours of the next day should be paid by the drawee. The

fund is liable to the satisfaction of the judgment. Commercial Bank *v.* Chilberg, 14 Wash. 247, 44 Pac. 264, 53 Am. St. Rep. 873.

13. *Kentucky.*—The drawing of a check by a depositor on a part of the fund to his credit is a pro tanto assignment and appropriation, and the claim of the check holder is superior to that of a creditor attaching the fund before the check is presented for payment. Deatheridge *v.* Crumbaugh, 8 Ky. L. Rep. 592.

Funds deposited after delivery of check.—Where the drawer of a check has no funds in the bank when the check is drawn, but subsequently deposits money, it is appropriated to the payment of the check, as though it had been on deposit when the check was drawn, and the right of the check holder is superior to that of a creditor who attaches the fund before the check is presented for payment. Rosenbaum & Co. *v.* Lytle & Co., 8 Ky. L. Rep. 607.

14. *Texas.*—An assignment of a bank deposit by the execution by the depositor of a check or draft thereon as payment on an existing indebtedness is good as against a garnishment served at suit of other creditors of the depositor, after the execution of the draft and before presentation and acceptance. New York Life Ins. Co. *v.* Patterson, 35 Tex. Civ. App. 447, 80 S. W. 1058.

Where a debtor, having funds to his credit in a bank, drew a check thereon in favor of one of his creditors before garnishment of the bank by another creditor, the delivery of the check operated as an equitable assignment of so much of the fund, although the bank had no notice thereof at that time, and the bank was authorized to make payment of the check after the garnishment had been served upon it. Neely *v.* Grayson County Nat. Bank, 25 Tex. Civ. App. 513, 61 S. W. 559.

15. **Assignee of bank.**—McGregor *v.* Loomis, 1 Disn. 247, 12 O. Dec. 602.

16. **Effect of agreements, rules and customs of clearing houses.**—People *v.* St. Nicholas Bank, 77 Hun 159, 28 N. Y. S. 407; S. C., 77 Hun 611, 28 N. Y. S. 421, 423, 59 N. Y. St. Rep. 881.

holder is a stranger to the contract, and no consideration moved from him.[17]

§ 140 (1l) Death of Payee.—See ante, "Death of Payee," § 138 (14c); "Death of Payee," § 140 (11).

§ 140 (1m) Assignment by Drawer for Creditors.—Where a debtor, having a fund in a bank, gives checks on the fund, but assigns for the benefit of his creditors before the checks are presented for payment, the payees named in the checks are entitled to have the checks paid out of the fund before such fund is turned over to the assignee.[18]

When the drawer makes an assignment for the benefit of creditors, after drawing a check or draft for part of his balance, and notice of the assignment is received by the drawee before the check or draft is presented for acceptance or payment, the title to the whole amount standing to the credit of the drawer at the time of the assignment passes to the assignee for the equal benefit of all the creditors, and the holder of the check or draft is not entitled to priority over the other creditors.[19]

§ 140 (1n) Drawers Filing Petition in Bankruptcy.—See ante, "Effect of Filing Petition in Bankruptcy," § 138 (14ab).

§ 140 (1o) Assignment by Bank for Creditors.—The holder of a check drawn upon a bank, but not presented prior to the failure of the bank, is not entitled to have the check paid by the liquidators out of the dividend assigned to the drawer.[20]

17. Overman *v.* Hoboken City Bank, 30 N. J. L. 61.

18. **Assignment by drawer for creditors.**—First Nat. Bank *v.* Coates, 8 Fed. 540, 3 McCrary 9; Voorhes *v.* Hesket, 1 O. C. C. 1, 1 O. C. D. 1.

19. **When the drawer makes an assignment.**—Covert *v.* Rhodes, 48 O. St. 66, 27 N. E. 94.

A bank has no authority to pay a check drawn after it has received notice of the assignment of the drawer; and it has been held that a bank paying a check of a depositor, who to their knowledge has made an assignment for the benefit of creditors before the presentment of the check, is liable to make payment again to the assignee if it turns out that the check was given after the assignment, although in fact it was antedated and appeared to have been given several days before the assignment was made. Chaffee *v.* Bank 40 O. St. 1.

A check was drawn on a bank in which the drawer had funds enough deposited to pay it. Before the check was presented, the drawer made an assignment for the benefit of creditors. The check was presented, and payment refused, and the assignee for creditors received the entire bank deposit as assets. The holder of the check sued the assignee. Held, that the check was pro tanto an equitable assignment of the deposit, and hence the holder was entitled to the payment of the check in full. Voorhes *v.* Hesket, 1 O. C. C. 1, 1 O. C. D. 1.

In Gardner *v.* National City Bank, 39 O. St. 600, it was held that a draft by a creditor for the exact amount due by the debtor, which was discounted by a bank for the creditor, operated as an equitable assignment of the fund represented by the draft, as between the drawer and the discounting bank.

20. **Assignment by bank for creditor.**—State *v.* Bank, 49 La. Ann. 1060, 22 So. 207; Hawes *v.* Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870.

The drawer of a check had a deposit more than sufficient to pay it when drawn. Before it was presented, the bank had assigned for the benefit of creditors, as had also the drawer of the check, and payment was refused. Held, that the holder could not recover judgment against the bank or its assignees, or the assignees of the drawer, with an adjudication that the dividends

§ 140 (1p) Right of Receiver of Payee.—A receiver of the payee of a check can not enforce the same against the drawee bank unless the bank has accepted it.[21]

§ 140 (2) Check Paid on Unauthorized Indorsement.—Effect as acceptance, "Payment on Forged or Unauthorized Indorsement," § 140 (3bgf). A bank at its peril pays checks drawn upon it to any other than the person to whose order they are made payable.[22] A bank, paying a check upon the unauthorized indorsement of the payee and charging the amount thereof to the drawer's account, is liable to the payee for the amount of the check,[23] unless the payee's conduct excuses such payment or prevents

paid by the bank's assignee on account of the deposit be applied pro rata to the payment of the judgment. Hawes *v.* Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870.

21. Right of receiver of payee.—An executor deposited funds in a bank to the credit of the estate of his testator, and thereafter apportioned the same among the legatees, giving one of them a check for his distributive share. Before payment or acceptance of the check by the bank, a receiver was appointed for the legatee, and he brought action to recover the fund. Held, that the check conferred no right that was capable of enforcement against the bank, and that, therefore, the receiver could not recover. O'Connor *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816, reversing 54 Hun 272, 7 N. Y. S. 380, 27 N. Y. St. Rep. 1.

22. Check paid on unauthorized indorsement.—Sinclair & Co. *v.* Goodell, 93 Ill. App. 592.

Title to a check payable to H. B., intended for N. B., can not be obtained under indorsement by H. B., made fraudulently, though the indorsee be deceived, and pay value. Sioux Valley State Bank *v.* Drovers' Nat. Bank, 58 Ill. App. 396.

23. McFadden *v.* Follrath (Minn.), 130 N. W. 542.

A clerk of the plaintiffs, having received from certain of their debtors checks payable to their order in payment of the amounts due, wrongfully and without authority indorsed on them the names of the plaintiffs, and transferred them to other persons, appropriating the proceeds to his own use. Subsequently, these checks were deposited with a bank, which in good faith collected the checks, and paid over the proceeds to the depositors. In an action by the plaintiffs to recover from the bank the amount so collected by it, held, that they were entitled to recover. Johnson *v.* First Nat. Bank, 6 Hun 124.

Plaintiffs were copartners doing business as the "Peerless Garage." S. drew his check to the order of the "Peerless Garage" on the defendant bank. Plaintiffs had no account with the defendant, but M., plaintiff's manager, indorsed the check with a stamp, "Peerless Garage," by himself as manager, and also indorsed the check individually, and deposited it to his individual account with defendant. There was no proof that M. had authority to indorse checks for plaintiff, though he had authority to receive cash or checks in payment of bills. Held, that defendant was liable to the plaintiff for the amount of the check. Burstein *v.* People's Trust Co., 143 App. Div. 165, 127 N. Y. S. 1092.

A check drawn to C. was indorsed by B. in C.'s name without authority. The bank paid the check to B., deducted the amount of the check from the drawer's account, and settled with him on that basis. Held, that C. could recover the amount of the check from the bank. Seventh Nat. Bank *v.* Cook, 73 Pa. 483, 13 Am. Rep. 751; Saylor *v.* Bushong, 100 Pa. 23, 45 Am. Rep. 353.

A commercial traveler, employed to sell and take orders for goods, collect accounts, and receive money and checks payable to the order of his principal, is not authorized by implication to indorse his principal's name on the checks; and a bank paying a check on such indorsement will be responsible to the principal. Jackson *v.* National Bank, 92 Tenn. 154, 20 S. W. 802, 18 L. R. A. 663, 36 Am. St. Rep. 81.

Where an attorney, who is authorized to receive a check in the name of his client, but not to indorse it, indorses it in the name of the payee, and the drawee has settled with the drawer, and charged up the amount against him, there is sufficient privity between

him from asserting such liability,[24] as, for instance, where the payee is paid in full and nobody injured thereby.[25]

Burden of Proof.—The burden of showing the authority of a stranger to a check to indorse the same for the payee is upon the drawee if he would escape liability to pay it over again to the payee.[26]

Rule in United States Supreme Court.—The payee of a check which has been wrongfully paid by the drawee to another on an unauthorized indorsement can not maintain an action on the check against the drawee bank, as such wrongful payment creates no privity of contract between them.[27]

§ 140 (3) Acceptance of Check—§ 140 (3a) In General.—All the authorities, both English and American, hold that a check may be accepted, though acceptance is not usual.[28]

§ 140 (3b) What Constitutes, Form and Sufficiency—§ 140 (3ba) Definitions and Requisites.—An "acceptance" is an engagement to pay according to the term of the acceptance.[28a]

Meeting of Minds.—An acceptance is a contract, and does not differ from other contracts in the essential requirement of a meeting of minds.[29]

Person Obtaining.—Whether the certificate of acceptance be obtained

the parties to enable the payee to recover the amount from the drawee on a count for money had and received. Millard *v.* National Bank, 3 MacArthur (10 D. C.), 54.

24. McFadden *v.* Follrath (Minn.), 130 N. W. 542.

25. A firm assigned to a brick company, its creditor, accounts against third parties, as collateral security, and they were given by the company to a partner of the firm to collect. He was also made the sales agent of the company in the city where the firm was located, and without express authority from it indorsed in its name checks given in settlement of the accounts, and deposited the checks to his individual account in his local bank, and paid the brick company with checks on such account, and was given a receipt in full by the brick company. Held, that such company could not subsequently recover from the bank the value of the checks as having been converted by it by its payment of them on an alleged unauthorized indorsement, it being manifest from the complaint that the brick company had been paid in full and that nobody was injured thereby. Judgment in 105 App. Div. 623, 85 N. Y. S. 557, 42 Misc. Rep. 31, affirmed in New York Brick, etc., Co. *v.* Bronx Borough Bank, 186 N. Y. 559, 79 N. E. 1112.

26. Burden of proof.—Commercial Nat. Bank *v.* Lincoln Fuel Co., 67 Ill. App. 166.

27. Rule in United States supreme court.—Payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of the check, so as to authorize an action by the real owner to recover its amount as upon an accepted check. First Nat. Bank, etc., *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229.

It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act, the other an actual performance. A banker or an individual may be ready to make actual payment of a check or draft when presented, while unwilling to make a promise to pay at a future time. Many, on the other hand, are more ready to promise to pay than to meet the promise when required. The difference between the transactions is essential and inherent. First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229.

28. Acceptance of check.—First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229.

28a. First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229.

29. Meeting of minds.—Myers *v.* Union Nat. Bank, 27 Ill. App. 254, affirmed in 128 Ill. 478, 21 N. E. 580.

by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance.[30]

Return of Check.—An acceptance is not complete until the instrument has been returned to the holder. So long as the check remains in the hands of the drawee bank, although it may have written an acceptance upon it, the acceptance is not fully binding; and it may, at least where it has not communicated the effect of its acceptance to the holder, obliterate it, and redeliver the check, without incurring any liability as acceptor.[31] The remittance may even be recovered from the post office.[32]

Question of Fact.—Acceptance is a question of fact for the jury.[33]

§ 140 (3bb) Form Generally.—The acceptance is usually evidenced by the word "accepted" written on the check and signed by the drawee bank.[34] Whatever the form or mode of acceptance employed, there must be enough to indicate the acceptance of the particular check.[35]

§ 140 (3bc) Verbal Acceptance.—The acceptance need not be in writing, but may be by parol or verbal,[36] since any act or word evidencing a promise to pay is sufficient.

Drawer Acting for Another.—A verbal acceptance of a check is valid where the drawee knows that the drawer is acting for another, and he has funds of the other sufficient to pay it.[37]

Drawer Having No Funds on Deposit.—A parol promise of bank to pay a check drawn on it, the drawer having no funds on deposit, does not amount to a parol acceptance, so as to bind the bank, but is within the statute of frauds.[37a]

Statutes Requiring Written Acceptance.—A statute requiring a written acceptance to charge the acceptor of a draft or bill of exchange

30. Person objecting.—First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229.

31. Return of check.—Guthrie Nat. Bank *v.* Gill, 6 Okl. 560, 54 Okl. 434.

32. A check was forwarded to the bank on which it was drawn for collection. When received by this bank, the maker's account was overdrawn, and the cashier directed his assistant to refuse payment, but by mistake he stamped it paid, and mailed a remittance, which action was revoked by the cashier, and the remittance recovered from the post office, and the check protested. The account at the bank was never charged with the check. Held, that the bank was not liable. Carley *v.* Potter's Bank (Tenn.), 46 S. W. 328.

33. Question of fact.—First National Bank *v.* McMichael, 106 Pa. 460, 51 Am. Rep. 529.

34. Form generally.—Home Nat. Bank *v.* First State Bank (Tex. Civ. App.), 133 S. W. 935.

35. Kahn *v.* Walton, 46 O. St. 195, 20 N. E. 203.

36. Verbal acceptance.—Kahn *v.* Walton, 46 O. St. 195, 20 N. E. 203.

In Nebraska, under the common law, a verbal acceptance of a check by a bank is binding on it. Farmers', etc., Bank *v.* Dunbier, 32 Neb. 487, 49 N. W. 376.

New Hampshire.—The acceptance of a check may be by parol. Barnet *v.* Smith, 30 N. H. 256, 64 Am. Dec. 290.

37. Drawer acting for another.—Leach *v.* Hill, 106 Iowa 171, 76 N. W. 667.

37a. Drawer having no funds on deposit.—Morse *v.* Massachusetts Nat. Bank, Fed. Cas. No. 9,857, 1 Holmes 209; Home Nat. Bank *v.* First State Bank (Tex. Civ. App.), 133 S. W. 935.

applies to the acceptance of a check.[38]

§ 140 (3bd) Statement That Check "Good," etc.—A bank may accept a check by certifying the check upon presentation, as by the writing of the word "good" thereon, or any similar words which indicate a statement by it that the drawer has funds in a bank applicable to the payment of the check, and that it will so apply them.[39]

Affirmative Answer to General Question.—While an affirmative answer by the bank to a general inquiry whether checks of a person named for a specified sum are good, is information that such person has on deposit, subject to check, money to that amount, it does not constitute an acceptance, or otherwise create an obligation on the bank to pay checks which the inquirer may then hold;[40] aliter in New Hampshire.[41] A statement by a bank officer that checks drawn by a depositor are all right if the signatures are all right is not equivalent to a promise to accept or certify the checks.[42]

Check Not Taken on Faith of Statement.—Where a bank officer has stated to the payee or holder of checks drawn by a depositor that they are all right, the bank is not estopped to resist liability where the checks were not taken on the faith of such statement.[43]

§ 140 (3be) Acceptance by Telegraph or Telephone.—A bank is not bound to accept by telegram the checks or drafts of its depositors, although in possession of funds to pay. Its duty in such cases is to accept a

38. **Statutes requiring written acceptance.**—Since a bank check is a bill of exchange, within 1 Rev. St., p. 768, § 6, requiring a written acceptance, a bank is not liable as drawee and acceptor of a check which one of its clerks has orally informed the holder was in order, and would be paid; the fund having been afterwards attached as the property of the drawer, before the check was presented for payment. Duncan *v.* Berlin, 60 N. Y. 151.

Under the Act of May 10, 1881 (P. L. 17), which provides that no person shall be charged as an acceptor on an order drawn for the payment of money unless his acceptance shall be in writing, no action can be maintained against a bank, on an unaccepted order drawn on it by a depositor, though the order is for the entire balance due him, and amounts to an equitable assignment of the fund. Maginn *v.* Dollar Sav. Bank, 131 Pa. 362, 18 Atl. 901.

Under P. L. 1881, p. 17 (Purd. Dig., p. 188, pl. 2), declaring that no one shall be charged as an acceptor of a bill, draft, or order for over $20, unless his acceptance be in writing, where, on presentation of a check for a greater amount, the president orally promised payment if the holder retained it a few days, he has no action against the bank. National State Bank *v.* Lindeman, 161 Pa. 199, 28 Atl. 1022.

Payment on forged or unauthorized indorsement.—See post, "Payment on Forged or Unauthorized Indorsement," § 140 (3bgf).

39. **Statement that check "good," etc.**—First Nat. Bank, etc., *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229.

It seems that on the presentment of a check to the cashier of a bank his statement that it is "good" will amount in law to an acceptance. Barnet *v.* Smith, 30 N. H. 256, 64 Am. Dec. 290.

The signature of a bank teller to an indorsement on a check reciting that it is good for the amount named therein constitutes an acceptance of the check. State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

40. **Affirmative answer to general question.**—Kahn *v.* Walton, 46 O. St. 195, 20 N. E. 203.

41. Kahn *v.* Walton, 46 O. St. 195, 20 N. E. 203.

42. Home Nat. Bank *v.* First State Bank (Tex. Civ. App.), 133 S. W. 935.

43. **Statement not relied on.**—Home Nat. Bank *v.* First State Bank (Tex. Civ. App.), 133 S. W. 935.

draft, or pay a check, only on presentment.[44] One relying on a telegram as an acceptance should see to it that the language used will, at least, fairly bear the meaning; where a bank promises in positive terms to pay a check it will be liable for breach of such promise;[45] if it desires to add a condition it should fully express it.[46] A bank may appropriate the funds of a depositor to pay an indebtedness to itself, after receiving notice by telegram that the holder of checks of such depositor has sent a messenger to present them.[47] A telegram by a bank to the holder of checks of a depositor, stating that "drafts named are good now," is not an acceptance.[48] Where the intention to accept is not expressed but on the contrary it is plainly implied that the bank will not agree to hold the depositor's balance for any time to meet the paper, the telegram is not an acceptance.[49]

§ 140 (3bf) Acceptance Subject to Clearing House Rules.—A conditional acceptance of a check, subject to the right of the bank under the rules of the clearing house, to revoke it and return the check before a certain hour, is not an acceptance rendering the drawee bank liable to the holder.[50]

44. Acceptance by telegraph or telephone.—Myers *v.* Union Nat. Bank, 27 Ill. App. 254, affirmed in 128 Ill. 478, 21 N. E. 580.

45. Myers *v.* Union Nat. Bank, 27 Ill. App. 254, affirmed in 128 Ill. 478, 21 N. E. 580; Coffman *v.* Campbell & Co., 87 Ill. 98; Henrietta Nat. Bank *v.* State Nat. Bank, 80 Tex. 648, 16 S. W. 321, 26 Am. St. Rep. 773.

Plaintiff telegraphed to defendant, "Will you pay I.'s check for $1,800 on presentation?" and defendant wired back, "Yes; will pay the I. Check." Held, that the telegrams sufficiently identified the check to sustain an action for breach of the promise to pay. Henrietta Nat. Bank *v.* State Nat. Bank, 80 Tex. 648, 16 S. W. 321, 26 Am. St. Rep. 773.

46. Expressing condition.—Myers *v.* Union Nat. Bank, 27 Ill. App. 254, affirmed in 128 Ill. 478, 21 N. E. 580; Coffman *v.* Campbell & Co., 87 Ill. 98.

Plaintiff, holding checks drawn by S. on a distant bank, telegraphed the bank to know if they would be paid, and the bank replied, "Drafts named are good now." Immediately afterwards the bank telegraphed S., inquiring if he was in trouble, and, upon his replying that he was, set off his deposit against his demand note payable to itself, although in the meantime it had received another telegram from plaintiff stating that a messenger had been sent to present the checks. Held, that the bank's telegram to plaintiff was not an acceptance of the checks, and that the latter had no cause of action against the bank for the amount of the checks. Myers *v.* Union Nat. Bank, 27 Ill. App. 254, affirmed in 128 Ill. 478, 21 N. E. 580.

47. Myers *v.* Union Nat. Bank, 27 Ill. App. 254; First Nat. Bank *v.* Pettit, 41 Ill. 492.

48. Myers *v.* Union Nat. Bank, 27 Ill. App. 254, affirmed in 128 Ill. 478, 21 N. E. 580.

49. Myers *v.* Union Nat. Bank, 27 Ill. App. 254, affirmed in 128 Ill. 478, 21 N. E. 580.

50. Acceptance subject to clearing house rules.—A check was drawn on one bank on a second, and in favor of a third. The payee deposited it for collection with a fourth. At the clearing house, of which the drawee and the holder for collection were members, it was passed to the drawee, and the holder credited with its amount. The drawee, by its officers, filed it, and entered it on its journal. The clearing house had a rule that all banks had until 1 o'clock to rectify mistakes. Before that time, the drawee received notice not to pay the check, and returned it to the holder, who brought action for its face on the theory that the filing and entry were an acceptance. Held, that they were not an acceptance, and the drawee was not liable. German Nat. Bank *v.* Farmers' Deposit Bank, 118 Pa. 294, 12 Atl. 303.

§ 140 (3bg) Inferred Acceptance—§ 140 (3bga) In General.—A bank, although not expressly accepting it, may so deal with a check that the law will infer an acceptance on its part, but the general rule relative to such an acceptance is that only such language or conduct on the part of the bank as justifies the holder in believing that it consents to pay the check will operate to bind it as an acceptor.[51]

§ 140 (3bgb) Detention or Failure to Return Check.—A failure to return a check by the drawee is not of necessity an acceptance of it. The circumstances of the case must determine whether the retention of the check amounted to an acceptance.[52] Whether or not the check was accepted is a question for the jury.[53]

§ 140 (3bgc) Cancelling Check by Mistake.—The fact that a cashier places a check, drawn on his bank, on the cancelling fork by mistake, does not amount to an acceptance of the check, or prevent his declining to pay it or returning it on finding that it is not in proper form, or that the drawer has no funds to meet it.[54]

§ 140 (3bgd) Marking Check "Paid."—The word "paid" stamped upon a check by the cashier of a bank does not indicate a promise. It implies none of the elements of an agreement, and, if it did, it would be incomplete to make an acceptance.[55] Acceptance and payment are essentially and inherently different. The one is an agreement or promise to do something. The other is the actual doing of that which had been previously promised.[56]

§ 140 (3bge) Holding Check to Await Deposit.—An agreement by a bank official to hold a check and see that it was paid out of the first unappropriated fund of the drawer is not an acceptance of the check and does

51. **Inferred acceptance.**—Guthrie Nat. Bank *v.* Gill, 6 Okl. 560, 54 Pac. 434.

52. **Detention or failure to return check.**—Overman *v.* Hoboken City Bank, 30 N. J. L. (1 Vr.) 61.

A check drawn upon the defendant, a bank in New Jersey, was deposited with a bank in the city of New York for collection, and transmitted by such bank to the defendant. The check was kept by the defendant for about twenty-four hours, and then returned dishonored. Held, that such delay did not of itself constitute an acceptance. Overman *v.* Hoboken City Bank, 31 N. J. L. (2 Vr.) 563.

The fact that a bank upon which a check was drawn retained it in its possession for six days after it was presented, does not show an acceptance by the bank if it was not informed that the detention of the check would be considered as an acceptance. Colorado Nat. Bank *v.* Boettcher, 5 Colo. 155, 40 Am. Rep. 142.

53. **Question for jury.**—Where a bank, receiving a check on funds which it had on deposit, retained the same for several days without objection, when, at the request of the drawer, the bank returned it to the sender protested, the court was warranted in submitting to the jury the question whether the check had been accepted, and the jury finding that it had. First Nat. Bank *v.* McMichael, 106 Pa. 460, 51 Am. Rep. 529.

54. **Cancelling check by mistake.**—National Bank *v.* Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236.

55. **Marking check paid.**—Guthrie Nat. Bank *v.* Gill, 6 Okl. 560, 54 Pac. 434; Carley *v.* Potter's Bank (Tenn.), 46 S. W. 328.

56. Guthrie Nat. Bank *v.* Gill, 6 Okl. 560, 54 Pac. 434.

not entitle the holder to recover from the bank where there were no misappropriated funds in the bank which held the check.[57]

§ 140 (3bgf) Payment on Forged or Unauthorized Indorsement.—Payment of a check, made by the bank to a stranger, upon an unauthorized indorsement, does not operate as an acceptance of the check, so as to authorize an action by the real owner to recover its amount as upon an accepted check.[58] This is the rule in the supreme court of the United States, and in Michigan,[59] Illinois,[60] New York,[61] Ohio[62] and Tennessee.[63]

57. Holding check to await deposit.—Plaintiff left at his bank a check for $1,500, drawn in his favor by B. There were no funds of B. at the bank at that time, and the check was left there under an agreement with the bank officials that they would see that it was paid out of the first unappropriated funds of B. coming in. Large sums were subsequently deposited by B., but they were never unappropriated. Held, that plaintiff was not entitled to recover. Johnston *v.* Parker Sav. Bank, 101 Pa. 597.

58. Payment on forged or unauthorized indorsement.—First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229.

59. *Michigan.*—S. & Co., being indebted to plaintiffs, on two different occasions gave checks in settlement of the account to D., who was plaintiff's drummer. D., without authority, indorsed the names of the payees on the back of the checks and received the money from the bank, which charged the checks to S. & Co., and returned them, marked "Paid," in the ordinary course of business. The drummer subsequently absconded, without accounting for the money. Held, that the checks did not operate as a payment of the money by S. & Co. to the bank for plaintiff's use, and that plaintiffs were therefore not entitled to recover against the bank as for money received. Lonier *v.* State Sav. Bank, 149 Mich. 483, 112 N. W. 1119.

60. *Illinois.*—Proof that a bank had paid a check to an unauthorized indorsee, and had charged it to the account of the drawer, who at the time of such payment had sufficient funds on deposit to meet it, constitutes sufficient proof of an acceptance of the check by the bank, and renders it liable to the payee for the amount thereof. Commercial Nat. Bank *v.* Lincoln Fuel Co., 67 Ill. App. 166.

61. *New York.*—Burstein *v.* People's Trust Co., 143 App. Div. 165, 127 N. Y. S. 1092; Johnson *v.* First Nat. Bank, 6 Hun 124.

62. *Ohio.*—Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648.

63. *Tennessee.*—Where a bank has paid a check drawn on it to one not the payee or his indorsee, and charged and deducted the amount on settlement with the drawer, its conduct amounts to such acceptance as will enable the payee to sue upon it. Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. Rep. 900.

In the case of Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. Rep. 900, the supreme court of Tennessee declined to follow First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229, and it was decided "that acceptance of a bank check, and promise to pay it in accordance with its directions, will be inferred where the drawee bank receives and retains the check, and charges it to the account of the drawer, who had sufficient funds on deposit to meet it, and subsequently lifted the check on settlement with the bank, although the check may have been presented to the bank by, and the money paid on it to, an unauthorized person." Jackson *v.* Bank, 92 Tenn. 154, 20 S. W. 802.

The fact that the bank, through mistake, received the check from and paid it to an unauthorized person, will not, in such case, prevent the inference of an acceptance of and promise to pay the check according to its directions. The bank will not be permitted to set up its own negligence as a defense. Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. Rep. 900.

It had no right to charge it to the drawer and to settle his account, unless it had either paid the check to the payee named in the check or on his order; or, having accepted the check, held the fund of the drawer subject to the demand of the payee. It has not paid the check; it must therefore be held to hold the amount of the check for the payee. It can not escape this consequence by saying that what it has done in receiving the check and in paying it, and in debiting to the account of the drawer, is all through mistake. That would be to suffer it to escape the consequence of its

Pennsylvania.—This was formerly the rule in Pennsylvania, but it was changed by the Act of May 10, 1881, P. L. 17.[64]

§ 140 (3bgg) Retaining Amount at Request of Drawer.—Where, after a bank had refused payment of a check because of suspension, it settled with the depositor, who directed the amount of the check to be retained by the bank, which was done, there was an implied acceptance by the bank, on which it could be held liable to the holder, though the amount was not formally charged against the depositor and creditor to the holder of the check.[65]

§ 140 (3bgh) Offer to Pay in Depreciated or Confederate Funds.—An offer by a bank to pay a check in such funds as the drawer then has on deposit, which is refused by the payee, is not such an acceptance as will make the bank liable for the check.[66]

§ 140 (3c) Effect of Acceptance.—The drawee, when he accepts the check, makes himself the guarantor thereof.[67] An acceptance written upon a check renders the bank liable to the holder and payee thereof. In such case it stands to the holder in the position of a drawer and acceptor of a bill of exchange. It is a contract recognized by the law, valid in its character, which essentially changes the position of the parties. The privity of contract with the drawee, which before pertained to the drawer alone, is now imparted to the payee, and the duty which before existed only to the drawer now exists to the payee.[68] An acceptance discharges the drawer.

own mistake by pleading its own negligence as a defense. To allow it to plead its own negligence in answer to the natural inference from its receipt and retention of this check, and its subsequent charge to the drawer, might enable it to shelter itself behind the technical defense of want of privity; but, on the other hand, it may result in the loss to the complaint of his debt by remitting him to his action against his original debtor, whom he may be unable to coerce into payment. Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. Rep. 900.

64. *Pennsylvania.*—Seventh Nat. Bank *v.* Cook, 73 Pa. 483, 13 Am. Rep. 751; Saylor *v.* Bushong, 100 Pa. 23, 45 Am. Rep. 353.

A third person indorsed the payee's name without his authority, and received the money, and the bank deducted the check from the drawer's account, and settled with him on that basis. Held, that the payee could recover the amount of the check from the bank. The bank was bound as if by acceptance of a certified check. Seventh Nat. Bank *v.* Cook, 73 Pa. 483, 13 Am. Rep. 751.

Since the Act of May 10, 1881 (P. L. 17).—The act of a bank in paying a check on a forged indorsement, and its subsequent act of charging the check against the account of the drawer, is not an acceptance in writing signed by the acceptor, within the meaning of Act May 10, 1881 (P. L. 17), which declares "that no person within this state shall be charged as an acceptor on a bill of exchange, draft, or order drawn for the payment of money, exceeding twenty dollars, unless his acceptance shall be in writing, signed by himself or his lawful agent." Howard H. Clark & Co. *v.* Warren Sav. Bank, 31 Pa. Super. Ct. 647.

65. **Retaining amount at request of drawer.**—Saylor *v.* Bushong, 100 Pa. 23, 45 Am. Rep. 353.

66. **Offer to pay in depreciated or confederate funds.**—Lester *v.* Georgia R., etc., Co., 42 Ga. 244.

67. **Effect of acceptance.**—Farmers', etc., Bank *v.* Bank, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817.

68. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Espy *v.* First Nat. Bank (U. S.), 18 Wall. 604, 21 L. Ed. 947; First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229.

The legal effect of acceptance is an

As to him it amounts to a payment.[69]

§ 140 (3d) Necessity.—See ante, "Right of Payee to Sue Bank," § 140 (1hb).

§ 140 (3e) Promise to Accept.—A promise by a bank to accept a check drawn on it if the payee would pass the check through the clearing house is without consideration, the drawer having no funds on deposit.[70] In an action on a check, where it was shown that by the custom of banks and the clearing association, any check drawn on any of the banks in the city, and received for collection by any other bank, and presented by such bank through the clearing house to the bank against which it was drawn, should be returned if not paid to the bank presenting the same on the same day or the next after it was presented, the holder thereof can not recover against the drawee under an allegation of an express promise on the part of the drawee to pay the check if not returned within the specified time, the promise being without consideration.[71]

Postdated Check.—A bank, whose teller, with the cashier's knowledge, receives after banking hours a postdated check, which he promises to pay when due, and enter the amount as a deposit to the credit of the holder, who is not a depositor, is liable to him in an action for money had and received, where the drawer's deposit was sufficiently large to pay it on the morning when it became due, but his account was overdrawn at the close of banking hours on that day.[72]

Promise by Telegram.—See ante, "Acceptance by Telegraph or Telephone," § 140 (3be).

Promise to Accept Future Checks.—A promise or agreement by a bank to accept future checks is valid and binding on the bank.[73] Under the rule that where a contract is made for the benefit of a person not a party thereto, such third party may bring action thereon, the endorsee of a check may sue a bank which had promised the maker to pay his checks.[74] A prom-

obligation on the part of the bank to the payee to pay the check, thus creating the privity between them essential to a right of action by the payee against the bank. Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 O. St. 60, 42 N. E. 700, 31 L. R. A. 653, 56 Am. St. Rep. 700; Kahn *v.* Walton, 46 O. St. 195, 20 N. E. 203.

69. First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229.

70. Promise to accept.—Morse *v.* Massachusetts Nat. Bank, Fed. Cas. No. 9,857 (1 Holmes 209).

71. Overman *v.* Hoboken City Bank, 30 N. J. L. (1 Vr.) 61.

72. Postdated check.—Second Nat. Bank *v.* Averell, 2 App. D. C. 470, 25 L. R. A. 761.

73. Promise to accept future checks.—Leach *v.* Hill, 106 Iowa 171, 75 N. W. 667.

Plaintiff testified that he telephoned defendant, inquiring whether thereafter checks drawn by S., a live-stock buyer, would be paid, and the response was, "It will be all O. K. to cash checks from S. to the amount of stock he gets." Defendant testified that this response was to an inquiry as to specific checks. Held, that the jury was warranted in finding that it referred to future checks. Leach *v.* Hill, 106 Iowa 171, 76 N. W. 667.

74. Right of endorsee to sue bank.—Leach *v.* Hill, 106 Iowa 171, 76 N. W. 667.

A promise by a bank to a drawer to pay his checks for the purchase of a

ise to accept future checks is only binding for a reasonable time, which depends upon the nature of the business in the course of which the checks were to be drawn.[75]

Firm Check.—The holders of checks of a firm can maintain an action upon a contract made by the bank with the firm to pay such checks.[76]

§ 140 (4) Estoppel of Bank to Resist Liability to Pay.—A bank which represents to the payee of a check drawn on it that the drawer has funds therein will be bound to pay on presentation.[77] The refusal of a bank to pay a check drawn on it is, in effect, notice to the holder that the drawer has no funds on deposit, so that the accompanying promise of the bank to pay it if the payee will pass it through the clearing house does not estop the bank from denying liability.[78]

cargo of corn, on the faith of which, communicated by the drawer to the payees, they had sold the corn to the drawer, and taken his checks therefore, held to be binding upon the bank, and to sustain an action for a breach. Nelson *v.* First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510, distinguishing First Nat. Bank *v.* Pettit, 41 Ill. 492.

One who has an agreement with a bank to allow him to overdraw his account when purchasing, and secure the overdraft by drawing on his principal factor or commission merchant, and who takes a check on the bank at the time of a sale, is sufficiently in privity with the purchaser to enforce the liability of the bank resulting from such arrangement, although he is not suing on the contract. York *v.* Farmers' Bank, 105 Mo. App. 127, 79 S. W. 968. See, also, Falls City State Bank *v.* Wehrli, 68 Neb. 75, 93 N. W. 994; Parkersburg Mill Co. *v.* Farmer's, etc., Nat. Bank, 26 Ky. L. Rep. 964, 82 S. W. 1003.

Plaintiff sold certain lumber to S., who deposited in defendant bank a draft drawn on his customer therefor, attached to a bill of lading, and drew his check, payable to plaintiff, for the lumber, against the draft. On receipt of the check, defendant bank declined to discount the draft as it had previously done, but offered to forward the draft for collection, and, on being advised of payment, to credit S.'s account. Plaintiff consented to this arrangement, advising defendant to hold the check as against the draft; stating that it would expect a remittance on defendant receiving notification of the payment of the draft. Held, that the check was an appropriation of so much of the proceeds of the draft as was required to pay the same, and hence, on payment of the draft, defendant was liable to plaintiff for the proceeds of the check. Parkersburg Mill Co. *v.* Farmers', etc., Nat. Bank, 26 Ky. L. Rep. 964, 82 S. W. 1003.

75. Binding for reasonable time.—Leach *v.* Hill, 106 Iowa 171, 76 N. W. 667.

Where checks are given for the purchase of stock by stock buyers, seventy days is not an unreasonable time for a promise to accept future checks to be binding. Leach *v.* Hill, 106 Iowa 171, 76 N. W. 667.

76. Firm check.—Chanute Nat. Bank *v.* Crowell, 6 Kan. App. 533, 51 Pac. 575.

77. Estoppel of bank to resist liability to pay.—Morse *v.* Massachusetts Nat. Bank, Fed. Cas No. 9,857 (1 Holmes 209).

Where a drawee bank, probably through negligence, induced the payee of a check, by its acts, as well as by its silence, to believe that it had in its possession and on deposit the sum of money claimed by him, when it ought to have advised him to the contrary, in accordance with facts particularly within its knowledge, and permitted him to act in that belief without an intimation that the depositor's funds had been paid out on other checks; it is estopped to resist liability to the payee. Rostad *v.* Union Bank, 85 Minn. 313, 88 N. W. 848.

In an action by the payee of a check against the bank on which it was drawn, and in which the maker had sufficient funds when payment was demanded, but which funds had been garnished in an action against the maker, facts held to estop the bank to deny its liability for the amount of the check. Rostad *v.* Union Bank, 85 Minn. 313, 88 N. W. 848.

78. Morse *v.* Massachusetts Nat. Bank, Fed. Cas. No. 9,857 (1 Holmes 209).

§ 140 (5) Obligation of Bank Where Check in Excess of Deposit.—A bank is under no obligation to pay anything on a check to the drawee or holder when the drawer has not sufficient money on deposit to his credit to pay the check in full, and can not be held liable in an action by the payee or holder thereof.[79] A check for a greater amount than one has on deposit does not pass to the holder any title to the deposit,[80] nor does it create a lien upon or give the payee a right to the actual balance, until the bank has agreed to pay it pro tanto.[81]

Funds Must Be in Bank at Time of Presentment.—As between the payee of a check and the bank on which it is drawn, the check does not create any liability against the bank unless the drawer has on deposit, at the time the check is presented, funds sufficient to pay it, even though at the time the check was drawn there was such a deposit in the bank.[82] The relation between a bank and a depositor is that of debtor and creditor, and as long as that relation exists the bank must honor drafts or checks of the depositor in the order in which they are presented to the extent of the deposit; but when, on account of any legitimate transaction, the balance of the account is against the depositor, the bank is not required to pay a check which was drawn before this altered condition, but of which the bank had no notice till afterwards.[83]

Contracts, Custom and Usage.—The right of the payee of a check to recover its amount from the drawee bank does not depend absolutely on the question whether the drawer had a cash credit to meet it; the bank may create some different arrangement by contract.[84] Where a person obtains a credit with a bank upon a promise to deliver to it a cargo of corn of a certain value which he proposes to purchase, and the bank pays his checks until his account, including this credit, is overdrawn, it is under no obliga-

79. Obligation of bank where check is in excess of deposit.—*Illinois.*—Jacobson *v.* Bank, 66 Ill. App. 470.

A bank is not bound to pay a part of a check payable to the drawer's order, and by him assigned, where there is not enough money on deposit to pay the check in full. Coates *v.* Preston, 105 Ill. 470.

A bank may properly refuse payment of a check where the drawer has not sufficient funds to meet the same, unless it appears that the bank is apprised of and is a party to a trust arrangement between the drawer and the payee of such check. Troike *v.* Cook County Sav. Bank, 127 Ill. App. 413.

Prior to Act June 5, 1907, a bank was only liable to the holder of a check if it had on deposit subject to the drawer's order sufficient bankable funds to pay it. Rauch *v.* Bankers' Nat. Bank, 143 Ill. App. 625.

Nebraska.—A bank will not be obligated to pay, in whole or in part, a check in a sum greater than the amount to the credit of the drawer in his account with the bank, such a check not operating as a transfer or an assignment of the lesser amount of the account. Henderson & Co. *v.* United States Nat. Bank, 59 Neb. 280, 80 N. W. 898.

Oklahoma.—Guthrie Nat. Bank *v.* Gill, 6 Okl. 560, 54 Pac. 434.

80. Pabst Brew. Co. *v.* Reeves, 42 Ill. App. 154.

81. Dana *v.* Third Nat. Bank (Mass.), 13 Allen 445, 90 Am. Dec. 216.

82. Fund must be in bank at time of presentment.—Bank *v.* Union Trust Co., 149 Ill. 343, 36 N. T. 1029, 23 L. R. A. 611.

83. Herndon *v.* Louisville Banking Co., 10 Ky. L. Rep. 584.

84. Contracts, custom and usage.—Springfield Marine Bank *v.* Mitchell, 48 Ill. App. 486.

tion to pay any further checks of such person, although drawn in favor of persons who have contributed to this same cargo of corn.[85]

Drawer Formerly Allowed to Overdraw.—A bank is not liable to the drawee of a check drawn upon it when the drawer has no funds on deposit merely because it has many times allowed the drawer to overdraw his account, and has constantly paid checks given by him for stock purchased, in the absence of an agreement that such a course should be continued without change.[86]

Payee Offering to Take Smaller Sum.—Where the payee of a bank check offers to take a smaller sum than the amount called for, the bank should pay to him whatever funds the drawer may have to his credit, and indorse the payment on the check.[87]

Charging Back to Holder.—It is fraud in the holder of a check to present it for payment when he knows the drawer has no funds in the bank to meet it. In such case the bank may charge it back to the holder;[88] aliter, where the holder was ignorant of the worthlessness of the check.[89]

§ 140 (6) Setting Off Debts Owing to Bank by Drawer—§ 140 (6a) Matured Demands.—As between a bank holding a note which is due and the payee of a check, drawn by the maker of the note, the equities are in favor of the bank.[90] Where, at the time a check is drawn or presented, the drawer is indebted to the bank on past-due paper, the bank may treat such cross demand as compensated, so far as they equal each other, and credit the demands accordingly; and, if there is not then sufficient balance standing to the credit of the drawer, payment of the check may be refused for want of funds.[91]

85. First Nat. Bank *v.* Pettit, 41 Ill. 492.

86. **Drawer formerly allowed to overdraw.**—Schoonmaker *v.* Gilmore, 84 Ill. App. 17.

87. **Payee offering to take smaller sum.**—Bromley *v.* Commercial Nat. Bank (Pa.), 9 Phila. 522.

88. **Charging back to holder.**—A check was deposited by the holder in the bank upon which it was drawn, with knowledge that the drawer had no funds there. The bank credited the holder with it, and charged it to the drawer's account. The next day the bank charged it back to the holder. Held, that he was guilty of fraud in presenting the check, and could not recover the amount of it from the bank. Peterson *v.* Union Nat. Bank, 52 Pa. 206, 91 Am. Dec. 146.

89. Levy *v.* Bank (Pa.), 1 Bin. 27, 36, 4 Dall. 234, 236, 1 L. Ed. 814.

"In the case of a check, the cashier is called upon to pay away the funds of the bank. If the drawer has no funds there, it is the folly of the bank's officer to pay it; whereas the payee is in no default, and therefore he should not be bound to refund, since it would be hard to turn him round to the drawer, who may no longer be solvent." Bank *v.* Craig, 33 Va. (6 Leigh) 399.

90. **Matured demands.**—Schuler *v.* Laclede Bank, 27 Fed. 424.

91. Bank *v.* Windischmuhlhauser Brewing Co., 50 O. St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660.

Past due note.—A bank may properly refuse to honor the check of a depositor who is indebted to it on a past due note for an amount greater than the sum on deposit. Mt. Sterling Nat. Bank *v.* Green, 99 Ky. 262, 18 Ky. L. Rep. 178, 35 S. W. 911, 32 L. R. A. 568.

A bank which holds and owns a depositor's past-due note, the amount of which exceeds the amount he has on deposit, may hold the deposit account against the note, and refuse to pay checks drawn against it. Ehlermann *v.* St. Louis Nat. Bank, 14 Mo. App. 591.

Demand note.—A commission firm sold cattle for plaintiff, and deposited

Illinois.—If, at the time of presenting a check, the deposit has been lawfully applied on a past due or demand debt of the drawer, the drawer or holder can not compel payment.[92] The fact that the depositor has made a voluntary assignment before the presentation of the check, and before the application of the deposit by the bank, is immaterial.[93]

Louisiana.—Where A delivered to B a check on the C bank for an amount equal to the balance of his deposit, and the bank, by virtue of a by-law, sought to apply this balance to A's indebtedness to the bank, B was entitled to the amount.[94]

Depositor Keeping Two Separate Accounts.—Where a depositor kept two separate accounts in a bank, and the bank was accustomed to pay checks drawn on one, though the other was overdrawn, and without regard to the fact that notes of the depositor were past due, the bank could not set up as a defense, in an action by the holder of a check drawn on the account which was not overdrawn, the past-due notes, and the balance against the depositor on the other account, without having given notice to the depositor before the check was drawn.[95]

Bank's Passing into Hands of Comptroller.—That a bank has passed into the hands of the comptroller when a check is presented by a bona fide

proceeds to their own credit, giving plaintiff a check for the amount less charges. The bank had no knowledge as to the source of the deposit, and paid it out on checks of the firm, and when plaintiff's check was presented it refused payment for want of funds. Held, that the fact that, between the time of the deposit and presentation of the check, the bank had collected a draft in favor of the firm exceeding the check, and had credited the proceeds to the firm, at the same time charging it with the amount of a demand note held against the firm, did not render it liable for the amount of plaintiff's check, where the draft was deposited at the time the note was given, and as collateral. Pederson *v.* South Omaha Nat. Bank, 52 Neb. 95, 71 N. W. 973.

Dishonored draft.—A firm drew and delivered a check to the payee for $500. When the check was drawn and presented for payment, the firm had $800 to their credit in the bank. After the check was drawn, but before the bank had any notice of its existence, the bank cashed for the firm a draft for $3,000, which, when presented to the drawee for payment, was dishonored. The payee of the check sued the bank because of nonpayment. Held, that the firm became indebted to the bank for the amount of the draft when it was presented for payment and was dishonored, and hence the bank had the right to retain the $800 then on the credit side of the firm's account as a credit on said indebtedness. Herndon *v.* Louisville Banking Co., 10 Ky. L. Rep. 584.

92. Merchants' Nat. Bank *v.* Maple, 65 Ill. App. 484.

A bank which holds a demand note, or a note passed due, has the right to charge such obligation up against the maker's deposit account, as against the holder before a check previously drawn by the depositor but not presented for payment, until after the application was made. Wyman *v.* Fort Dearborn Nat. Bank, 181 Ill. 279, 54 N. E. 946, 48 L. R. A. 565, 72 Am. St. Rep. 259; Niblack *v.* Park Nat. Bank, 169 Ill. 517, 48 N. E. 438, 39 L. R. A. 159, 61 Am. St. Rep. 203.

93. Ft. Dearborn Nat. Bank *v.* Blumenzweig, 46 Ill. App. 297.

Necessity for demand.—A bank holding the demand notes of a depositor may apply the deposit in payment of such notes without first making a demand for payment of the notes, as against a person holding a check of such depositor on the bank. First Nat. Bank *v.* Kelsay, 54 Ill. App. 660.

94. Gordon *v.* Muchler, 34 La. Ann. 604, overruling Case *v.* Henderson, 23 La. Ann. 49, 8 Am. Rep. 590.

95. **Depositor having two separate accounts.**—Simmons Hardware Co. *v.* Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700.

holder does not transfer a deposit of the maker to the payment of a note due from him, so as to defeat holder's claim.[96]

§ 140 (6b) Unmatured Demands.—A bank holding funds of a depositor can not retain the same against the check holder under claim of an equitable lien for a debt by the drawer not yet matured,[97] although the bank knows the drawer to be insolvent.

§ 140 (6c) General Deposit against Individual Debt of Partner.—Where a bank agrees to pay checks given by any member of a firm for stock bought by him for said partnership, and receive the proceeds arising from the sale of such stock to reimburse it therefor, it can not refuse to pay such checks, and apply such proceeds to the individual debt of one member.[98] Where a bank, a drawee, for the purpose of indemnifying itself against possible loss on the drawer's unmatured paper discounted by it, sequestrates the drawer's deposit, and refuses to pay his check, that the check holder does not sue on the check until after the drawee has adjusted its claim in bankruptcy against the drawer does not estop the holder from recovering on the check against the drawee.[99]

§ 140 (6d) Application of Collateral.—Where a bank, which has funds on deposit in another, and is also indebted to such other on a demand obligation, which is secured by collateral, fails, after drawing a check in favor of a third person against the funds on deposit, and the creditor bank, before presentation of the check, and without knowledge of its having been drawn, applies the money on deposit to the part payment of the debt due it, the holder of the check is entitled to be subrogated to the rights of the

96. **Bank's passing into hands of comptroller.**—Judgment, Park Nat. Bank *v.* Niblack, 67 Ill. App. 583, reversed in Niblack *v.* Park Nat. Bank, 169 Ill. 517, 48 N. E. 438, 39 L. R. A. 159, 61 Am. St. Rep. 203.

97. **Unmatured demands.**—Zelle *v.* German Sav. Inst., 4 Mo. App. 401.

98. **Deposit to individual debt of partner.**—Chanute Nat. Bank *v.* Crowell, 6 Kan. App. 533, 51 Pac. 575.

A bank on which a check is drawn though knowing that the drawer is insolvent, can not, as against the payee, set off against the deposit its indebtedness from the drawer, not yet due. Merchants' Nat. Bank *v.* Robinson, 97 Ky. 552, 17 Ky. L. Rep. 368, 31 S. W. 136, 28 L. R. A. 760.

Where a depositor becomes insolvent, the bank holding notes not due, which it had discounted for him, and the proceeds of which had gone into his deposit account, the bank can not, as against bona fide holders of checks for value, withhold enough of the deposits to protect such notes. Skunk *v.* Merchants' Nat. Bank, 16 Wkly. L. Bull. 353, 9 O. Dec. 684.

As against the holder of a check against an account of a depositor, the bank of deposit may not apply the amount of the account to the payment of the indebtedness of the depositor to the bank which is not yet due although the depositor may be insolvent. Columbia Nat. Bank *v.* German Nat. Bank, 56 Neb. 803, 77 N. W. 346.

Deposit proceeds of note discounted by bank.—Where a party procured his own note to be discounted at a bank, and the money received was placed in the bank as a deposit to his credit, and he afterwards became insolvent before the maturity of his note, held, that the bank might be entitled to an equitable set-off of its debt against the deposit as against the depositor, but not as against the rights of third parties, holders of the depositor's checks presented for payment. Fourth Nat. Bank *v.* City Nat. Bank, 68 Ill. 398.

99. State Sav. Ass'n *v.* Boatmen's Sav. Bank, 11 Mo. App. 292.

drawee bank to the extent of the amount of his check, in the collateral, after the balance of the creditor bank's claim is paid.[1]

§ 140 (6½) Application to Debt of Payee or Holder.—A bank has no right to take and apply a check indorsed in blank[2] as one payable to a named payee or bearer[3] to the debt of the payee or person presenting it, where the money it represents belongs to a third person. In such case the owner of the check need not tender his check to the bank when he demands payment, as the drawer's check is a receipt against his deposit account.[4]

§ 140 (7) Order of Payment and Priority between Checks—§ 140 (7a) In General.—As between different check holders, the one who first presents his check for payment is entitled to priority,[5] for checks are payable in the order of their presentation at the bank on which they are drawn.[6] Presentment of a check for payment fixes the rights of the par-

1. **Application of collateral.**—Wyman *v.* Fort Dearborn Nat. Bank, 181 Ill. 279, 54 N. E. 946, 48 L. R. A. 565, 72 Am. St. Rep. 259.

2. **Application to debt of payee or holder.**—Plaintiff, having received a check to his order for $150, indorsed it in blank, and delivered it to his father, with instructions to obtain the cash on it, and remit in payment of a debt owed by plaintiff. The father also indorsed the check in blank, and presented it to the defendant, the bank on which it was drawn, where there were funds to meet it. Defendant, being without notice that the check did not belong to the father, insisted on deducting an indebtedness of the father from the amount of the check, which the father finally consented to, and received the balance, remitting it as instructed. Held, that plaintiff was entitled to recover the amount so deducted, since defendant parted with nothing on the faith of the check. Percival *v.* Strathman, 112 Iowa 747, 84 N. W. 929.

3. A check on defendant bank, made payable to plaintiff's husband "or bearer," was given in payment of goods of plaintiff sold by her husband as her agent, and was by him delivered to a third person to collect. Such third person, on presenting it, informed the bank that it belonged to the husband; whereupon the bank, to whom the husband was indebted in a larger amount, credited his account with the amount of the check. Plaintiff had no knowledge of the terms of the check, or of its disposition. Held, that she could recover the amount thereof from the bank. Citizens' Bank *v.* Harrison, 127 Ind. 128, 26 N. E. 683.

4. Plaintiff was the owner of certain wheat, and her husband, acting as her authorized agent, sold it, and received a check payable at defendant's bank to her husband or bearer. The husband delivered the check to a third person, with directions to present it to the defendant bank for payment and defendant cashed it and deposited the amount to the credit of the husband, and refused to pay over the proceeds to plaintiff on her request. Held, that plaintiff was not bound to tender her check when she demanded payment, as the bank already held the check of the drawer as a receipt against his deposit account. Citizens' Bank *v.* Harrison, 127 Ind. 128, 26 N. E. 683.

5. **Order of payment and priority between checks.**—Jacobson *v.* Bank, 66 Ill. App. 470.

6. National Safe, etc., Co. *v.* People, 50 Ill. App. 336.

In Myers *v.* Union Nat. Bank, 27 Ill. 254, affirmed in 128 Ill. 478, 21 N. E. 580, the court said: "The sound doctrine in such cases is set forth in Morse on Banks and Banking, p. 266, as follows: 'The rule with checks is, "first come first served." If payment is demanded at noon upon a check which the depositor's unincumbered balance at that hour is sufficient to pay in full, the obligation of the bank to pay it in full is at once mature and perfect. It is no matter how many checks may be presented at later hours, or how much the sum of all the checks presented in the course of the day may exceed the amount of the customer's balance. This is no concern of the bank, not even if it has been informed that such checks have been drawn and will be presented for payment. Its perfectly simple duty is

ties, and the bank can not thereafter pay other checks or demands in preference.[7] It can not be presumed that all the persons ahead of the holder of a check in line in front of the paying teller's window presented and obtained the certification of checks of the sum drawn as that held by the said holder, in the absence of any evidence to that effect.[8]

§ 140 (7b) Checks Simultaneously Presented—§ 140 (7ba) Checks Presented by Different Check Holders.—The mere priority in the drawing of a check does not give it any priority of right to the funds of the drawer over holders of checks subsequently drawn; and where checks are presented by different individuals, at the same time, of an amount greater than the fund of the drawer in the bank, the officers of the bank are not bound to settle the conflicting claims of the holders of the different checks to priority of payment.[9]

§ 140 (7bb) Checks Presented Through Clearing House.—Where a number of checks variously dated are presented to a bank simultaneously through the clearing house for payment, and the aggregate amount of the checks is greater than the amount of the deposit, the bank is bound to pay the checks, but in any order that it may choose, until the deposit is exhausted, if there is no rule of the clearing house or custom of the banking community to the contrary.[10]

§ 140 (8) Order of Application of Deposits.—Where a bank keeps a general account with a depositor, placing to his credit his deposits, and charging his checks in the order in which they are drawn, the legal presumption is that the checks are paid in the order in which they are drawn, out of the earlier, instead of the later, deposits.[11]

to pay in full each check presented, at the time of presentment, so long as the unincumbered credit of the depositor suffices to enable it to make such payments in full.'"

Where either natural or artificial persons hold themselves out as bankers by merely accepting a deposit without any express agreement, the usages of trade imply a contract to pay, in the order of their presentment, the checks of the depositor drawn upon the fund so long as it remains unincumbered. Chambers *v.* Northern Bank, 4 Ky. L. Rep. 1002; Chambers *v.* Northern Bank, 5 Ky. L. Rep. 123.

7. Clark *v.* Chicago Title, etc., Co., 85 Ill. App. 293, affirmed in 186 Ill. 440, 57 N. E. 1061, 52 L. R. A. 232, 78 Am. St. Rep. 294.

8. In an action against the drawee of a check, defendant claimed that when the check was presented other checks had been certified, exhausting the drawer's funds. The messenger of the plaintiff was present when the drawee's doors were opened on the morning of presentment, and stood seventh in line in front of the paying teller's window, and from this defendant argued that at least six checks of the drawer had been certified before this one was presented. Held, that it can not be assumed that the persons who stood ahead of plaintiff's agent in the line presented and obtained the certification of the checks of said drawer, in the absence of evidence to that effect. American Exch. Nat. Bank *v.* Chicago Nat. Bank, 27 Ill. App. 538.

9. **Checks presented by different check holder.**—Dykers *v.* Leather Mfg'rs Bank (N. Y.), 11 Paige 612.

10. **Check presented through clearing house.**—Reinisch *v.* Consolidated Nat. Bank, 45 Pa. Super. Ct. 236.

11. **Order of application of deposits.**—Peter Adams Co. *v.* National Shoe, etc., Bank, 44 Hun 629, 9 N. Y. S. 75, 23 Abb. N. C. 172.

Title to One of Several Deposits in Dispute.—Where several deposits in bank have been made on the same account, and the title to one of the deposits is disputed, checks drawn on the account will be first applied to the deposits not in dispute.[12]

Trust and Personal Funds Mingled.—Where a person deposits in bank money held by him in a fiduciary capacity, mixing it with his own moneys, and afterwards draws checks against his account, such checks will be applied first to the moneys belonging to the drawer, and in such case the rule that checks will be applied to the deposits in the order in which the deposits were made does not apply.[13]

§ 141. —— Mode and Sufficiency.—As to medium of payment, see ante, "Medium of Payment," § 133 (3j).

§ 141 (1) Placing to Credit of Holder—§ 141 (1a) In General.—Crediting a payee or holder of with the amount of a check as a deposit by the bank upon which it is drawn is in effect a payment of the check in money, and a redeposit thereof.[14] The transaction is the same in effect as if the cash had been handed to the payee, and by him returned to the bank. This result does not depend on the amount of cash in the bank being equal to the check, nor on the financial condition of the bank, as shown later on a settlement of its affairs after insolvency.[15]

§ 141 (1b) Effect as Payment of Check.—In ordinary transactions, a check on a specie-paying bank, payable on demand, is payment. And, if the holder of the check present it to the bank, and direct the amount to be placed to his credit as a deposit, and the bank should fail, the loss would be the depositor's. The deposit was at his option and for his benefit.[16] Where a bank holding a draft for collection accepts in payment a

12. Title to one of several deposits in dispute.—Hauptmann *v.* First Nat. Bank, 83 Hun 78, 31 N. Y. S. 364, 63 N. Y. St. Rep. 847, judgment affirmed in 146 N. Y. 376, 41 N. E. 89.

13. Trust and personal funds mingled.—Heidelbach *v.* National Park Bank, 87 Hun 117, 33 N. Y. S. 794, 67 N. Y. St. Rep. 438; Importers', etc., Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319.

14. Placing to credit of holder.—Bartley *v.* State, 53 Neb. 310, 73 N. W. 744; Consolidated Nat. Bank *v.* First Nat. Bank, 129 App. Div. 538, 114 N. Y. S. 308; American Nat. Bank *v.* Miller, 185 Fed. 338.

The action of a bank on which a check is drawn in transferring the amount of the check from the account of the maker and crediting it to the account of the payee constitutes an acceptance of the check. Second Nat. Bank *v.* Gibboney (Ind. App.), 87 N. E. 1064.

15. Montgomery County *v.* Cochran, 126 Fed. 456.

16. Effect as payment of check.—Check ordinarily equivalent to payment. Downey *v.* Hicks (U. S.), 14 How. 240, 14 L. Ed. 404; Consolidated Nat. Bank *v.* First Nat. Bank, 129 App. Div. 538, 114 N. Y. S. 308; American Exch. Nat. Bank *v.* Gregg, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171, reversing 37 Ill. App. 425.

Where the defendant agreed to loan the plaintiffs a sum of money, and in exchange for their note, gave his check on a private banker, who was indebted to him and who had agreed to pay his check, and plaintiffs did not accept the check as payment but presented it to the banker, who, although he was insolvent at the time, had the money with which to pay it, and requested him to place the amount to their credit, which was done, it was held, that the defendant was released from further liability thereon

check by the drawee against funds in the bank to his credit, and the bank having on hand money to the amount of the check, charges the amount to the drawee, the status of the funds in the bank and the relation of the bank and drawer are the same as though the bank had received money in payment.[17]

§ 141 (1c) Rescission or Recalling.—Where a check is offered and received by the drawee bank as a deposit, credited to the holder's account, and charged to the account of the drawer, the transaction is irrevocably closed[18] and can not be rescinded or recalled[19] by the bank or the drawer without the consent of the person to whom payment was made,[20] except for fraud or mistake.[21] Where a check credited by the drawer to an indorsee's agent's account was afterwards charged back, the indorsee did not waive any of its rights as against the drawee by failing to appear in a subsequent suit by the drawer's assignee to have ownership of the deposit de-

and the plaintiffs became the creditors of the bank. Hubbard *v.* Pettey, 37 Tex. Civ. App. 453, 85 S. W. 509, affirmed in 101 Tex. 643, no op.

17. Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977; Hubbard *v.* Pettey, 37 Tex. Civ. App. 453, 85 S. W. 509, affirmed in 101 Tex. 643, no op., citing Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103, affirmed in 95 Tex. 680, no op.

18. Rescission or recalling.—American Nat. Bank *v.* Miller, 185 Fed. 338; Consolidated Nat. Bank *v.* First Nat. Bank, 129 App. Div. 538, 114 N. Y. S. 308.

Where a bank paid a check, crediting it to the indorsee's agent's account, and charging it to the drawer's account, the transaction was irrevocably closed. Consolidated Nat. Bank *v.* First Nat. Bank, 129 App. Div. 538, 114 N. Y. S. 308.

19. American Nat. Bank *v.* Miller, 185 Fed. 338.

A bank which receives from a depositor a check drawn on itself by another person, and gives the depositor credit therefor, thereby pays the check, and can not afterwards deduct the amount of such check from the depositor's account without his consent. American Exch. Nat. Bank *v.* Gregg, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171, reversing 37 Ill. App. 425.

Where a bank has paid a check to one who has taken it in good faith and for value, neither the bank nor the drawer of the check can recall it. Albers *v.* Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355.

A check, having passed through the clearing house, the bank on which it was drawn canceled it as paid, and charged the amount to the drawer. Afterwards, at the request of the drawer, it was returned to the bank through which it had passed, marked "Canceled by mistake," and the charge against the drawer was erased. Held, that the bank, after having paid the check from funds of the drawer, can not, at his request, rescind its act, and that its attempt to do so gave the drawer no right to claim the amount thereof against it. Albers *v.* Commercial Bank, 9 Mo. App. 59.

The drawee of a check having credited the indorsee's agent's account with the amount thereof and charged it against the drawer's account, before the drawer's assignee sued to have ownership of the drawer's deposit declared to be in him, judgment for the assignee in that suit did not preclude the indorsee from suing the drawee for the amount of the check, which after being so credited was charged back; the effect of the judgment merely contemplating that all money to the drawer's account should be paid to his assignee. Consolidated Nat. Bank *v.* First Nat. Bank, 129 App. Div. 538, 114 N. Y. S. 308.

20. Consent of holder receiving payment.—Where a bank pays a check to the holder, cancels and charges up the check to the maker, such payment can not be rescinded by the maker without the consent of the person to whom payment was made. Albers *v.* Commercial Bank, 85 Mo. 173, 5 Am. Rep. 355.

21. Fraud or mistake.—American Nat. Bank *v.* Miller, 185 Fed. 338.

clared to be in him, where the only allegation in the complaint touching the check was that the indorsee claimed an interest in the deposit, and where no notice was given in the complaint that the validity of the transaction would be attacked.[22]

§ 141 (2) Sending Money by Mail.—Where a bank received a check by mail, with directions to send "cash for same," it should have adopted the usual method of transmitting money to the point indicated, which was by registered package; and therefore the deposit of the money in the postoffice without having the package registered or taking a receipt for it did not constitute a payment, though the bank may have notified the postmaster that it wished to have the package registered.[23]

§ 141 (3) Payment by Check on Another Bank.—Where checks on a bank not paid in cash but the check of the drawee bank on another bank is accepted in lieu thereof, there is a substitution of the direct liability of the drawee bank on its check given in payment to the holder for the liability on the check drawn on it and surrendered.[24]

§ 141 (4) Offer to Pay Confederate Funds.—Where a bank offers to pay a check in such funds as the drawer has on deposit, and the payee refuses to receive them, the offer is not such an appropriation of the funds of the drawer pro tanto as would preclude the bank from paying over to the drawer the balance found due him on the closing up of his account.[25]

§ 141 (5) Retention of Check.—Where the maker of a note gives the indorsers a check upon a bank holding the note, and the indorsers present the check to the bank and request the bank to apply the proceeds of the check upon the note, whereupon the bank, not being indebted to the drawer in an amount sufficient to pay the note, attaches the check to the note and holds it until the maturity of the note, such transaction does not constitute a payment of the check.[26]

22. **Check credited to indorsee's agent.**—Consolidated Nat. Bank *v.* First Nat. Bank, 129 App. Div. 538, 114 N. Y. S. 308.

23. **Sending money by mail.**—Clay City Nat. Bank *v.* Conlee, 106 Ky. 788, 21 Ky. L. Rep. 419, 51 S. W. 615.

24. **Payment by check on another bank.**—In an action by a national bank against the assignees for creditors of a trust company to recover the amount of certain checks, it appeared that on a certain day the plaintiff bank presented to the trust company, which was under no suspicion of insolvency, certain checks drawn on the company. Instead of requiring payment thereof, the check of the trust company on another national bank, which had funds to meet it, was accepted by plaintiff. The check was not presented to the other national bank until the following day, and after the trust company had assigned for benefit of creditors. The check was refused payment. It did not appear that there was any custom that checks presented for payment by a bank on behalf of its depositors were payable by check of the trust company. Held, that there was a substitution of the direct liability of the trust company on its check given in payment to the bank for the liability of the trust company on the checks drawn on it and surrendered. Farmers', etc., Nat. Bank *v.* Cuyler, 18 Pa. Super. Ct. 434.

25. **Offer to pay confederate funds.**—Lester *v.* Georgia, R., etc., Co., 42 Ga. 244. See ante, "Deposit of Confederate Currency," § 133 (3jd).

26. **Retention of check.**—Chaffee *v.* Bank, 40 O. St. 1.

Retention of Check without Notice That It Is Not Good.—If a check drawn upon the bank to which it is presented for deposit by a customer is retained by the drawee without notice to the depositor that it is not good, such retention amounts to payment, and the drawee bank becomes accountable to the depositor for the amount, especially where, during the time the check is retained without notice, the circumstances of the drawer of the check have changed, so that the depositor would be prejudiced by treating the check as unpaid.[27]

§ 141 (6) Payment to Agent of Holder—§ 141 (6a) In General.—Where the amount of a check is paid to an agent of the payee the question whether such payment, in legal effect, is a payment to the payee resolves itself into a mere question of agency. Where the agent has authority in fact to receive the money there can be no doubt that such payment is payment to the payee; but where he was only a special agent the rule that an agent constituted for a particular purpose, and under a limited power, can not bind his principal if he exceeds that power, applies. The courts, however, will not adhere so closely to the literal terms of this rule as to do injustice to a bank which has acted on the confidence of an apparent authority for which the payee is justly responsible. But in order to bind the payee he must, by his words or acts, have fully authorized the bank to believe that the agent had authority, and in applying this rule to payments of checks to agents of the payee they must be used to distinguish clearly between the act of the principal and a mere act of the agent. If the agent by his act assumes an appearance of authority which induces the bank to believe he has, in fact, authority, it is not sufficient. It is the payee's own act only that gives to the agent an appearance of authority which becomes binding on him.[28]

27. **Retention of check without notice that it is not good.**—Walnut Hill Bank *v.* National Reserve Bank, 65 Misc. Rep. 315, 121 N. Y. S. 892.

28. **Payment to agent of holder.**—Bristol Knife Co. *v.* First Nat. Bank, 41 Conn. 421, 19 Am. Rep. 517.

Check paid without authority to agent of payee.—The treasurer of plaintiffs, a manufacturing corporation, sent by a messenger a check for goods sold to a bank in another town, in which they kept an account, indorsing the check to the order of the cashier of the bank. The check was inclosed in a sealed envelope, with a deposit ticket, but the messenger broke open the envelope, and presented the check to the teller of the bank, stating that the plaintiffs wished him to get the amount in currency to pay their hands. The teller, after consultation with the cashier, and further inquiry of the messenger, gave him the bills, and he absconded with the money. Plaintiffs had in former cases obtained currency from the bank upon their own checks, and once upon a note discounted, but in no instance upon the check of a third person, and the payment in this case was not in the usual course of business. Held, in a suit brought by plaintiffs against the bank for the amount of the check, that they were entitled to recover. Bristol Knife Co. *v.* First Nat. Bank, 41 Conn. 421, 19 Am. Rep. 517.

The endorsement, "pay to the order of the cashier," was unnatural, if the payee intended to have the bank pay the money to the receiver. The object of this special endorsement was, undoubtedly, to prevent the bank from paying the check to any one except the payee, and it precluded everybody except the bank itself from collecting it; and the presentation of the check at the bank, by a perfect

§ 141 (6b) Check Indorsed to Bearer.—Where the owner of a check indorses the same so that it is payable to bearer and delivers it to another, the bank, in the absence of notice of any limitation upon the authority of the holder, is justified in paying the same, though only delivered for the purpose of being placed to the credit of the owner's account.[29]

§ 141 (7) Payment by Insolvent Bank.—If a bank, though insolvent, is still conducting its business and pays a check of a depositor in the usual course of business, and the depositor has no notice of the insolvency of the bank, the payment is good and the depositor will be protected;[30] aliter, where depositor has notice that the bank is insolvent.[31]

§ 141 (8) Presumption of Payment from Possession by Drawee.—Possession, by the drawee bank, of a bank check made payable to a particular person or order, raises a prima facie presumption of its payment by the bank, in accordance with its terms.[32] But this presumption is disputable, and, in this case, is rebutted by the evidence.[33]

§ 142. —— Rights of Bank Paying Check—§ 142 (1) Rights against Drawer.—A bank will be protected, as against the depositor, in paying out money on such terms as he has authorized.[34] If free from fraud or other vitiating circumstances affecting its rights, a bank, by paying checks on it, extinguishes its liability to the depositor to the extent of the sums so paid.[35] The currency delivered by a bank in payment of a check is the money of the bank, and not the money of the drawer.[36]

§ 142 (2) Rights against Payee or Holder—§ 142 (2a) Payment Where Insolvent Depositor Indebted to Bank.—A bank paying a check of a depositor who is a debtor, in ignorance of the depositor's insolvency at the time, may not recover the amount paid to the holder in order that its right of set-off against the depositor may be utilized, each party

stranger, who called for the currency on it, ought to have aroused suspicion. Bristol Life Co. *v.* First Nat. Bank, 41 Conn. 421, 19 Am. Rep. 517.

29. **Checks indorsed to bearer.**—Peerrot *v.* Mt. Morris Bank, 120 App. Div. 247, 104 N. Y. S. 1045.

30. **Payment by insolvent bank.**—McGregor *v.* Battle, 128 Ga. 577, 58 S. E. 28.

31. Where a depositor is paid, not in the usual course of business, but at a time when he has notice or knowledge that the bank is insolvent, and that the intent of the bank is to create a preference in his favor over creditors, the payment is not good, and such depositor is liable to repay to the bank, or its representative, such an amount as would be the difference between the amount received by him and his pro rata share of the assets of the bank upon a final winding up of its affairs. McGregor *v.* Battle, 128 Ga. 577, 58 S. E. 28.

32. **Presumption of payment from possession by drawer.**—Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. Rep. 900.

33. Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. Rep. 900.

34. **Rights against drawer.**—Davis *v.* Lenawee County Sav. Bank, 53 Mich. 163, 18 N. W. 629.

35. Southern Hardware, etc., Co. *v.* Lester, 166 Ala. 86, 52 So. 328.

36. Southern Hardware, etc., Co. *v.* Lester, 166 Ala. 86, 52 So. 328.

concerned acting in good faith, and the depositor, when drawing the check, having funds in the bank.[37]

§ 142 (2b) Depositor Having Insufficient Funds—§ 142 (2ba) In General.—In the absence of a fraud on the part of the holder, the payment of a check by a bank is regarded as a finality, and the fact that the drawer has not funds on deposit will not give the bank any remedy against the holder.[38]

§ 142 (2bb) Check Paid without Authority from Directors.—Where checks of a person who has no deposit in the bank are paid by direction of its president without authority, the amount of the checks cashed can be recovered by the bank from the drawer of the checks, in an action for money paid out.[39]

§ 142 (2bc) Payment Obtained by Fraud of Holder.—Where payment of a check is obtained by the fraud of the person presenting it, the bank may recover the amount thereof from him.[40]

§ 142 (2bd) Mistake as to Amount of Deposit.—A mistake in regard to the amount of a customer's deposit is not such a mistake of fact as entitles a bank paying a check to recover back the amount from the payee. Such transaction is not a mistake of fact in a legal sense, only laches.[41] Banks are supposed to be informed of a depositor's financial standing, and to know the condition of his account with them at the time of presentation of checks for payment. They are required, and for their own safety are compelled, to know at all times the balance to the credit of each individual customer, and they accept and pay checks at their own risk and peril. If from negligence or inattention to their own affairs banks improvidently pay when the account of a customer is not in a condition to warrant it, and if by mistake a check is paid when the drawer has no funds, the bank must look

37. **Payment where insolvent depositor indebted to bank.**—National Exch. Bank *v.* Ginn & Co., 114 Md. 181, 78 Atl. 1026.

38. **Depositors having insufficient funds.**—Manufacturers' Nat. Bank *v.* Swift, 70 Md. 515, 17 Atl. 336; Oddie *v.* National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Levy *v.* Bank (Pa.), 1 Bin. 37, 4 Dall. 234, 1 L. Ed. 814; Bank *v.* Bank (U. S.), 10 Wheat. 333, 6 L. Ed. 334; Bank *v.* Bank, 30 Md. 19.

A bank must know the state of its depositor's account, and, where a check by a depositor is paid on presentation, the rights of the payee are conclusively settled, in the absence of fraud on his part, though the depositor had no funds on deposit. National Exch. Bank *v.* Ginn & Co., 114 Md. 181, 78 Atl. 1026.

39. **Check paid without authority from directors.**—Dowd *v.* Stephenson, 105 N. C. 467, 10 S. E. 1101.

40. **Payment obtained by fraud of holder.**—In an action by a bank to recover money paid through fraud, evidence held to support findings that defendant, drawing a check against the bank, falsely and fraudulently represented to the teller thereof that he had that sum on deposit there, with the intent to deceive the bank officials, and that upon such representation the bank paid him the amount of the check, received the check, and marked it paid as of a certain date, and that defendant did not have such sum on deposit. James River Nat. Bank *v.* Weber (N. Dak.), 124 N. W. 952.

41. **Mistake as to amount of deposit.**—Boylston Nat. Bank *v.* Richardson, 101 Mass. 287.

to the customer for rectification, not to the party to whom the check was paid.[42] Where the supposed mistake, as stated in the pleading and shown in evidence, was the direct result of carelessness and inattention to its own affairs, there can be no relief at law, and a court of equity will seldom, if ever, relieve a bank from the result of a mistake attributable to negligence or lack of diligence in its own affairs.[43] Where an overdraft is inadvertently paid, the holder not being a bona fide holder and having notice that the drawer's account is overdrawn, the bank may recover the amount paid from him.[44]

§ 142 (2be) Stale Checks.—Where a bank pays stale checks, it can not recover from the payee on the grounds that the drawer had a less sum to his credit in bank. A bank which takes a check long overdue having on its face a time appointed for its payment, the drawer of which had paid the money called for by it to the payee before it was payable, is not liable

42. First Nat. Bank *v.* Devenish, 15 Colo. 229, 25 Pac. 177, 22 Am. St. Rep. 394.

The payee of a check is not responsible to the bank for the amount of it, paid to him without fraud on his part, although the payment was made to him under a mistake, the bank supposing that it had funds of the drawer, when in fact it had not. Hull *v.* State Bank, Dud. L. 259.

A debtor drew and delivered to his creditor a check in usual form, payable to bearer, under an agreement that the payee should not present it for payment without giving the drawer one or two days' notice. On giving such notice a few days afterwards, the drawer replied that he had no funds in bank. About two years afterwards, the creditor, without repeating the notice, collected the check, the teller not observing that the drawer's account had not been sufficient to meet it for more than three months. Held, that there was no such mistake of fact as to enable the bank to recover of the payee. Boylston Nat. Bank *v.* Richardson, 101 Mass. 287.

43. First Nat. Bank *v.* Devenish, 15 Colo. 229, 25 Pac. 177, 22 Am. St. Rep. 394.

Defendant banker paid checks of a depositor to a correspondent of the holder by draft. The following day the banker requested the correspondent to return the draft, because the checks were paid through a mistake as to the amount of the drawer's balance. The correspondent had forwarded the draft to his principal, but promised to return it, and defendant stopped payment thereon. Held, in an action on the protested draft, that defendant's special defense that, relying on the correspondent's promise, he neglected to protect himself by deducting the amount of the checks from subsequent deposits of the drawer, is unavailing where defendant's testimony is that, at the time those deposits were made, he knew that the draft had been protested, that it was not returned, and that he was liable for its payment. First Nat. Bank *v.* Devenish, 15 Colo. 229, 25 Pac. 177, 22 Am. St. Rep. 394.

Note payable at bank.—The payment of a note by the bank at which it is made payable, although made under misapprehensions of the state of the maker's account, with the bank, concludes the bank as against the holder of the paper who has surrendered it, and the payment can not be recovered back of the holder. Riverside Bank *v.* First Nat. Bank, 20 C. C. A. 181, 74 Fed. 276.

44. Defendant, the secretary and manager of a corporation, drew a check in the name of the corporation, payable to himself, on plaintiff bank, with knowledge that the corporation had no funds on deposit. He deposited the check with another bank, which presented it for payment. Payment was twice refused, and defendant was notified thereof. The check was presented a third time, when plaintiff inadvertently paid it, and defendant received the money thereon. Held, that plaintiff was entitled to recover the money from defendant, as having been paid by mistake. Iowa State Bank *v.* Cereal Refund, etc., Co., 132 Iowa 248, 109 N. W. 719.

thereon to the bank on which it was drawn which, more than a year after it was due, paid out of its own funds on the credit of the drawer, the latter not having funds in the bank to pay it when it became due, or when it was paid by the bank, and not having given to the said bank notice of its payment by himself. Proof of a usage of the bank to pay overdrafts would not alter the case. If such a custom exists it should not be encouraged, and has no authority in sound usage or law.[45]

§ 142 (3) Payment by Mistake—§ 142 (3a) In General.—Money paid on check by a bank under mistake of fact may be recovered back, if there has been no laches, and the situation of the other party remains unchanged; as, for instance, where a bank pays a check on the telegraphic order of a person of the same name as one of its depositors.[46]

§ 142 (3b) Mistake as to Amount.—See ante, "Mistake as to Amount of Deposit," § 142 (2bd).

§ 142 (3c) After Check Countermanded.—Where a bank receives in the ordinary course of business a check drawn upon it, presented by a bona fide holder, without notice of the fact that payment has been stopped, and pays the amount of the check to such holder, it can not afterwards recover back the money as paid by mistake.[47]

45. **Stale checks.**—Lancaster Bank *v.* Woodward, 18 Pa. 357.

A person drew a check on a bank for $600, payable on a day stated therein, and sold it. On the day it became payable he paid the amount of it to the cashier. Long afterwards it was presented at the bank, and paid. When it was drawn, and when paid, the drawer had but a few dollars to his credit on the books of the bank. Held, that the drawer was not liable. Lancaster Bank *v.* Woodward, 18 Pa. 357.

46. **Payment by mistake.**—A passbook showing a balance to the credit of a depositor named G. B., and containing a check drawn by him and paid by the bank, was sent to him by mail, and by mistake forwarded to one G. W. B., a former resident of the place to which the book was sent. The book was received by the wife of G. W. B., and exhibited by her to a creditor of G. W. B., who finally persuaded him to give a draft on the bank in payment of his debt, although he insisted that he never transacted any business with the bank, that the book was not his, and that he knew nothing about it. The draft was not paid but on a telegraphic order from the son of G. W. B whose name was the same as that of the real depositor the bank forwarded the money to a bank in the town where G. W. B. lived and it paid a check drawn by G. W. B. in favor of the creditor. The bank of deposit, on discovering that the money had been paid to the wrong person, took the note of G. W. B. for the amount of the check and received payments thereon. Held that the acceptance of the note and payments was not an election to accept G. W. B. as the bank's debtor, but that, as the creditor had knowledge of facts putting it upon inquiry, it was liable to the bank of deposit for the money. Merchants' Bank *v.* Superior Candy, etc., Co., 41 Wash. 653, 84 Pac. 604.

47. **After check countermanded.**—National Bank *v.* Berrall, 70 N. J. L. 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821.

The payee of a check on a bank in B. indorsed it generally, and deposited it in a bank in W., which bank forwarded it to the bank in B. for collection, and the latter paid it, as alleged, by mistake. Held, that there was no privity between the bank in B. and the payee of the check, to support an action by the former against the latter to recover the amount of the check as for money paid by mistake. National Bank *v.* Berrall, 70 N. J. L. 757, 58 Atl. 185, 66 L. R. A. 599, 103 Am. St. Rep. 821.

§ 142 (4) Payment from Trustee Account.—The payment of a check which a trustee drew on a trust fund in payment of a debt which had no connection with that fund, but which was a debt against another estate, of which also the drawer was trustee, is, as between the payee and the bank, a finality and does not give the bank any remedy against the payee.[48]

§ 142 (5) Check Obtained by Fraud.—Where a check is obtained from the drawer by fraud of the person presenting it, the bank, paying it to the person for whom it was intended, has no right of recovery against the payee.[49]

Overpaying Check.—A bank overpaying a check from a general deposit has a right of action to recover back the sum in its own name, and not in that of the depositor's.[50]

Cashing Check on Another Bank.—Where one requests a bank in which he is not a depositor to cash a check on a bank in another city, and he takes the cash, though warned of the maker's bad credit, and that he will be held liable on his indorsement if it is returned, and the bank acting without negligence and in good faith transmits it through its usual channels for collection, and it is returned unpaid, it may recover its amount from the indorser, though it appears one of the intervening banks taking advantage of facts revealed by the check entered up a judgment note against the maker and attached the whole deposit before it was received by the bank on which it is drawn.[51]

§ 142 (6) Check Put Through Clearing House.—Where a note was payable at a certain bank, payment at the clearing house is provisional only, becoming complete when paid in the usual course of business; and, if not so paid, payment at the clearing house is to be treated as under a mistake of fact, to the same extent, although the note has been retained until after

48. **Payment from trustee account.**—Manufacturers' Nat. Bank *v.* Swift, 70 Md. 515, 17 Atl. 336, 14 Am. St. Rep. 381.

A trustee drew a check on the trust fund, and gave it to defendant in payment of a debt which had no connection with that fund, but which was a debt against another estate, of which also the drawer was a trustee. Defendant, in good faith, and without notice of the misappropriation, presented the check to the bank, and obtained the money. The bank, having been compelled to make good the misappropriation, brought this action to recover the amount of the check from defendant. Held that, as between them, the payment of the check by the bank was a finality, and conclusively binding on the bank. Manufacturers' Nat. Bank *v.* Swift, 70 Md. 515, 17 Atl. 336, 14 Am. St. Rep. 381.

49. **Check obtained by fraud.**—A., falsely representing himself as B., who was the owner of certain land, obtained a loan on a mortgage executed by him in B.'s name on the land; the lender giving him a check therefor drawn to the order of B. He indorsed it, in the name of B., to defendant; and the latter indorsed it, and obtained the money thereon of the bank on which it was drawn. Held that, it having been given to the person intended, the drawer had no claim against the bank, and therefore the bank had no claim against defendant. Land, etc., Trust Co. *v.* Northwestern Nat. Bank, 196 Pa. 230, 46 Atl. 420, 50 L. R. A. 75.

50. **Overpaying check.**—Keene *v.* Collier (Ky.), 1 Metc. 415.

51. **Cashing check on another bank.**—Savings Institution *v.* Folk, 38 Pa. Super. Ct. 54.

business hours, as if made without the intervention of the clearing house; and even if the bank at which the note is payable had funds of the maker on deposit, the retention of the note until after business hours does not amount to payment, in the absence of evidence that he had authorized the bank to pay his notes out of his money on deposit.[52]

§ 142 (7) Liabilities between Banks.—In an action by one bank to recover from another the amount of a check of one of its depositors paid by mistake to such latter bank through the clearing house, the amount of the recovery should be the difference between such sum and the sum actually on deposit to the drawer's credit.[53]

Transfer of Check by Equitable Owner.—An action for money had and received will not lie by one bank against another to recover the amount paid on a check drawn on plaintiff and transferred by the equitable owner to defendant after indorsing the payee's name.[54]

52. **Check put through clearing house.**—National Exch. Bank v. National Bank, 132 Mass. 147.

Where, under clearing-house rules, a bank had the right to consider a check paid, and to treat it so in its dealings with others, unless the check were returned by 1 o'clock, and there was a delay in its return, occasioned by a mistake on the part of the messenger, the failure to present it before the time named did not work an absolute forfeiture of a bad check, where there was no change of circumstances after the time when the bank had a right to treat the check as paid, and before it was returned, which subjected the bank to damage or loss. Merchants' Nat. Bank v. National Eagle Bank, 101 Mass. 281, 100 Am. Dec. 120.

A private banker had an arrangement with the F. Bank, whereby the F. Bank agreed to receive at the clearing house, and pay, checks upon him, subject to his approval, each day. A check drawn on the private banker by defendants, who had a balance with him to meet it, reached the clearing house the following morning, and was kept by the F. Bank beyond the usual time of day for making settlement with the banker, who that morning had absconded, being insolvent. Held, that the only risk the F. Bank took by retaining the check was that the bank who sent the check to the clearing house had, by the delay, changed its position so that the subsequent return worked an injury that would not have happened if the check had been returned with the time limited: and, as there was no change in this case, the F. Bank was entitled to recover. Madderom v. Heath, etc., Mfg. Co., 35 Ill. App. 588.

A bank shows itself entitled to return a check where, on its face, the depositor's account appeared to show due to him an amount equal to the amount for which the check was drawn, by reason of his deposit, as his own, of a check which really belonged to the bank, and which had been received in payment for merchandise held by the bank as collateral, and sold by the depositor as the bank's agent; nor is the right of the bank to return the check lost because, at the time of its return, the bank has not discovered the precise character of its depositor's conduct; nor because it trusted the depositor to sell the merchandise, and to properly apply the proceeds, previous dealings having justified such confidence. Merchants' Nat. Bank v. National Bank, 139 Mass. 513, 2 N. E. 89, distinguishing Preston v. Canadian Bank, 23 Fed. 179.

53. **Liabilities between banks.**—Merchants' Nat. Bank v. National Bank, 139 Mass. 513, 2 N. E. 89.

54. **Transfer of check by equitable owner.**—Illinois, etc., Sav. Bank v. Felsenthal, 26 Ill. App. 624.

The agent of plaintiff, having made a mortgage loan on a certain lot, gave the borrower as part of such loan two checks, payable to persons stated by the borrower to have building claims against a building standing on the lot. In fact, there was no building on the lot. The borrower indorsed on the checks the names of the payees, and delivered them to defendant bank, which collected them through the clearing house. Held that, since there was

§ 142 (8) Knowledge of Personal Transaction of Officer as Knowledge of Bank.—The general rule is that a bank is held to know all that its officer or agent knows in any transaction connected with the payment of a check in which the agent acts for it. This rule is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject matter of negotiation, and the presumption that he will perform that duty.[55] To this general rule there are exceptions, among others, that the agent's knowledge is not that of the bank when the former is engaged in an attempt to defraud the latter.[56] Nor is the agent's knowledge that of the bank when the interest or conduct of the agent is such as to make it certain he would not disclose his knowledge to the bank.[57] In accordance with this principle the knowledge of the agent is not imputable to the bank where the agent is acting for himself in his own interest, adversely to the bank, because: First, in such case he would naturally act for himself rather than for the bank; and, second, he would not be likely to communicate to the bank a fact which he is interested in concealing.[58] The interest of an agent of a bank dealing with it on his own business is adverse to the interest of the bank, and the presumption in such case is that he will not disclose anything detrimental to his own interest.[59] Therefore if the transaction is partly for the benefit of the agent, although the latter is representing, but not exclusively, the bank, there is no presumption that his information derogatory to his own right to transact such business will be communicated to the bank.[60]

no building on the lot, the payees named in the checks had no claim on the money represented thereby, and, as between them and the borrower, the latter had an equitable title to the checks which he passed to defendant, so that plaintiff could not recover from defendant the money paid thereon as money had and received. Illinois, etc., Sav. Bank *v.* Felsenthal, 26 Ill. App. 624.

The endorsement of names of payees may be entirely disregarded and treated as mere forgeries. The rights of the defendants are the same as though the checks had been sold without endorsement, which would have amounted to an equitable assignment. The defendants' equitable title to the check gave them an equitable right to the moneys payable thereon, a right which they could doubtless have enforced by proper proceeding. The plaintiff then having the defendants' money which the latter were equitably entitled to receive, there is no ground upon which said money can be recovered back. Illinois, etc., Sav. Bank *v.* Felsenthal, 26 Ill. App. 624.

55. Knowledge of personal transactions of officer as knowledge of bank.—American Nat. Bank *v.* Miller, 185 Fed. 338. See ante, "Notice Received in Private Business or Outside Scope of Duties," § 116 (4).

56. American Nat. Bank *v.* Miller, 185 Fed. 338.

57. American Nat. Bank *v.* Miller, 185 Fed. 338.

58. American Nat. Bank *v.* Miller, 185 Fed. 338.

59. American Nat. Bank *v.* Miller, 185 Fed. 338.

60. American Nat. Bank *v.* Miller, 185 Fed. 338.

Knowledge of personal transactions of president.—The president of the M. National Bank, being largely indebted to it on account of clearing house balances against a private bank, which he owned, and having a credit in defendant bank amounting to more than $3,000, drew a check on defendant in favor of the M. bank for $3,000, which, with certain other items, was received and accepted toward such clearing house transactions. At the time of executing the check, the president was hopelessly

§ 143. —— Liability of Bank to Drawer for Refusal to Pay.—Actions for deposits, see post, "Actions by Depositors and Others for Deposits," § 154.

§ 143 (1) In General—§ 143 (1a) General Rule.—A bank is legally bound to honor checks drawn on it by a depositor if it has sufficient funds belonging to the depositor when the check is presented and the funds are not subject to any lien or claim, and for its refusal or neglect to do so it is liable to an action by the depositor;[61] but a bank is under no legal obligation to pay the check of a depositor who has not money to his credit on deposit sufficient to meet the same, and its nonpayment by the bank gives rise to no claim for damages to the drawer's credit.[62]

Where Holder Has Right of Action against Bank.—The fact that the holder of a check has a right of action against the bank for dishonoring the check does not deprive the drawer of his action for damages.[63]

§ 143 (1b) Check of Former Convict.—The refusal of a bank to pay the check of a former convict drawn against a fund sufficient to pay it

insolvent and knew it, and on the second succeeding day both the private bank and the M. Bank failed. In the meantime the check had been deposited in defendant bank to the credit of the M. Bank, defendant having no knowledge of the president's insolvency or the failure of the banks and the proceeds credited to the M. Bank and charged to the individual account of the president. Held that, since the president in settling the clearing house balances against his private bank in part by the check was acting for himself and not in the interest of the M. Bank, the latter was not charged with knowledge of his insolvency and was under no obligation to inform defendant thereof on presenting the check for payment, and hence defendant was not entitled to rescind such payment and credit the president's deposit against indebtedness to it. American Nat. Bank *v.* Miller, 185 Fed. 338.

61. *United States.*—**General rule.**—St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390.

Georgia.—Hilton *v.* Jesup Banking Co., 128 Ga. 30, 57 S. E. 78.

Kentucky.—American Nat. Bank *v.* Morey, 113 Ky. 857, 24 Ky. L. Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379; Mt. Sterling Nat. Bank *v.* Green, 99 Ky. 262, 18 Ky. L. Rep. 178, 35 S. W. 911, 32 L. R. A. 568; National Bank *v.* Boles, 12 Ky. L. Rep. 422.

One who draws a check on a bank in which he has sufficient funds for its payment, not incumbered by an earlier lien in favor of the bank, may sue such bank for damages, on its refusal to pay the check to the drawee. Mt. Sterling Nat. Bank *v.* Green, 99 Ky. 262, 18 Ky. L. Rep. 178, 35 S. W. 911, 32 L. R. A. 568.

Massachusetts.—National Mahaiwe Bank *v.* Peck, 127 Mass. 298, 34 Am. Rep. 368; Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6; Dana *v.* Third Nat. Bank (Mass.), 13 Allen 445, 90 Am. Dec. 216; Wiley *v.* Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

Minnesota.—Svendsen *v.* State Bank, 64 Minn. 40, 65 N. W. 1086, 31 L. R. A. 552, 58 Am. St. Rep. 522.

New York.—If a bank, without sufficient reason, refuses to pay a check, the drawer has a right of action. Citizens' Nat. Bank *v.* Importers', etc., Nat. Bank, 44 Hun 386, 9 N. Y. St. Rep. 201; S. C., 49 Hun 607, 1 N. Y. S. 664, 17 N. Y. St. Rep. 430, affirmed in 119 N. Y. 195, 23 N. E. 540.

Texas.—Where the deposit of the drawer is sufficient to cover the payment of a check, the bank refusing to pay it will be liable for damages. First Nat. Bank *v.* Randall, 1 Tex. App. Civ. Cases, § 971, citing Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

62. McKnight *v.* Bank, 114 La. 289, 38 So. 172.

63. Where holder has right of action against bank.—National Bank *v.* Boles, 12 Ky. L. Rep. 422.

may result in even more injury than similar treatment might inflict upon a better citizen.[64]

§ 143 (1c) Nature and Sufficiency of Deposit.—Check Drawn against Deposit of Check, Draft, etc.—On a deposit being made by a customer in a bank, in the ordinary course of business, of money, or of drafts or checks received and credited as money, the title thereto is immediately vested in and becomes the property of the bank, and the depositor is entitled to draw checks against the credit. The subsequent failure of the bank to realize upon drafts so deposited and credited will not excuse a failure to pay a check drawn and presented before the dishonor of such drafts.[65]

Deposit Money of Another than Depositor.—A bank is not liable for nonpayment of the check of a depositor where, although the account stood in his name, it was not his money but that of another which he sought to appropriate to his own use, the bank having notice thereof.[66]

A debt due from a bank to a contractor is not a deposit for dishonoring a check against which it is liable to the drawer in damages.[67]

64. **Check of former convict.**—It is not error for the trial court, in an action against a bank for the wrongful dishonor of plaintiff's checks, to instruct the jury that records of previous convictions for forgery of a person claimed by the defendant to have been the plaintiff are entitled to no consideration if the jury believe that the plaintiff is another and different person, and, even if they believe that he is the same person, such records constitute no defense to the suit; and to refuse to instruct the jury, at the request of the defendant, that, if they find that the financial standing of the plaintiff was such that he could not have been injured by the wrongful refusal of the defendant to honor his checks, then he is not entitled to recover. The refusal to pay the check of a former convict may result in even more injury than similar treatment might inflict upon a better citizen. Columbia Nat. Bank *v.* MacKnight, 29 App. D. C. 580.

65. **Check drawn against deposit of check, draft, etc.**—American Exch. Nat. Bank *v.* Gregg, 37. Ill. App. 425, judgment reversed in 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171.

A bank which receives an indorsed order or check from its regular customer, and gives him credit on its books for the amount thereof, is a purchaser, and vested with title to the check; and its loss in the course of its transmission through the mail to the drawee bank for payment, and a noncompliance by the drawer and indorser with a request to furnish a duplicate check, will not authorize the purchasing bank to charge the amount to the customer's account without first fixing his liability as indorser, and the bank is liable to the customer on failing to honor the latter's check drawn against a balance partly composed of the check so deposited. Kavanaugh *v.* Farmers' Bank, 59 Mo. App. 540.

66. **Deposit money of another than depositor.**—Where, under an agreement between plaintiff and defendant bank, each of whom held a chattel mortgage on certain property, plaintiff was to sell the property and divide the proceeds with defendant according to the amount of their claims, defendant, on the proceeds being deposited with it, had an interest outside of the relation of banker and depositor, and was not liable for failure to pay a check drawn by plaintiff in excess of the amount he was entitled to under the agreement. Winklebleck *v.* Butler County Bank (Mo. App.), 131 S. W. 905.

67. **Bank indebted to contractor.**—An indebtedness of a bank to a contractor, being a balance retained by the bank pending the settlement of claims for materials furnished, does not, on becoming exigible by the contractor, constitute funds in the hands of the bank subject to be checked, so that the nonpayment of the contractor's checks by the bank in such case is not a legal basis for a claim for damages to the drawer's credit. McKnight *v.* Bank, 114 La. 289, 38 So. 172.

Existence of Dispute as to Balance.—Where a dispute exists between a bank and a depositor as to the balance to his credit, and the depositor withdraws by check the balance admitted by the bank to be due him, and afterwards draws a check for the disputed amount, which is dishonored by the bank, he has no right of action against the bank for injury to his credit because of the bank's refusal to pay the check, although he may have the right in a proper action to recover the disputed amount from the bank.[68]

Where Bank Applied Deposit on Past Due Indebtedness of Drawer.—Where a bank refused to pay a check drawn by a depositor in favor of a third party in absence of notice to the depositor that the bank had applied the fund on deposit in extinguishment of past-due claims held against him by the bank, when he had deposited with the bank a sum sufficient to make payment of the check, the bank was liable to the depositor for the resulting damages.[69]

Deposit Applied under Agreement with Depositor.—A depositor has no right of action against a bank for nonpayment of his check where his deposit had been applied by the bank according to a previous agreement as to its disposition.[70]

Insolvent Depositor Indebted to Bank.—A bank is not liable for damages arising from its nonpayment and protest of a depositor's checks, if the depositor was insolvent, and was indebted to the bank in a greater sum than the amount of the deposit.[71]

§ 143 (1d) Form, Requisites and Sufficiency of Check.—Check Drawn to Order of Drawer's Attorney.—In an action against a bank for the wrongful refusal to pay plaintiff's check, it is not error for the trial court to refuse to instruct the jury, at the request of the defendant, that a check drawn by the plaintiff to the order of his attorney and presented by the attorney is the same as if presented by the plaintiff himself, and that

68. **Existence of dispute as to balance.**—Jaselli *v.* Riggs Nat. Bank, 36 App. D. C. 159.

69. **Where bank applied deposit on past due indebtedness of drawer.**—Callahan *v.* Bank, 69 S. C. 374, 48 S. W. 293.

70. **Deposit applied under agreement with depositor.**—In an action against a bank for damages to business and credit, consequent on the bank's refusal to honor checks, it appeared that plaintiff was a stock dealer, and obtained money from the bank from time to time on his checks to enable him to purchase hogs suitable for the market, the proceeds of which, when sold, were deposited in the bank to meet his overdrafts, and that to meet a large overdraft plaintiff executed a note for a portion thereof payable within a certain time. There was evidence that at the time the note was given plaintiff expressly directed the cashier of the bank, to apply the deposits that might be made from time to time, as the hogs should be sold, as a credit on the note, notwithstanding it might not be due when the sales were made. Held, that it was proper to instruct that if the above facts were so, and afterwards and before the maturity of the note the bank received money from plaintiff, which was credited on the note, and plaintiff had no other money in the bank at the time of the protest of his checks, then the verdict should be for defendant. Roe *v.* Bank, 167 Mo. 406, 67 S. W. 303.

71. **Insolvent depositor indebted to bank.**—Owen *v.* American Nat. Bank, 36 Tex. Civ. App. 490, 81 S. W. 988.

the refusal by the bank to pay such check does not entitle the plaintiff to recover.[72]

§ 143 (1e) Indorsement and Presentment.—A bank's failure to pay a check of a depositor drawn in favor of another does not render it liable, unless the check was presented at the proper time and place, properly indorsed, and, if transferred by the payee, properly indorsed by the transferee.[73]

Check Fraudulently Indorsed by Clerk of Payee.—In an action by the drawer of certain checks against the drawee, where a clerk of the payees, having authority to indorse the checks for business purposes, fraudulently indorses them for other purposes, no arrangement between the payees and the clerk can avail defendant, the right of action of the drawer arising on the refusal of the drawee to pay the checks to the rightful holder, and defendant having nothing to do with what afterwards became of the checks.[74]

§ 143 (1f) Acts Constituting a Refusal to Pay.—The refusal to pay a depositor's check due to the mistake of a clerk,[75] and the refusal to pay a draft which had been paid on a forged indorsement after its redelivery by the drawer to the payee,[76] are acts constituting a refusal to pay.

§ 143 (2) Nature and Form of Action Therefor.—Where a check is drawn by a depositor to the order of a named payee the drawer has no right of action upon the same. His remedy against the bank is an action for damages for dishonoring his check,[77] or he can bring assumpsit for the

72. **Check drawn to order of drawer's attorney.**—Columbia Nat. Bank *v.* McKnight, 29 App. D. C. 580.

73. **Indorsement and presentment.**—Harden *v.* Birmingham Trust, etc., Bank, 1 Ala. App. 610, 55 So. 943.

74. **Check fraudulently indorsed by clerk of payee.**—Citizens' Nat. Bank *v.* Importers', etc., Nat. Bank, 49 Hun 607, 1 N. Y. S. 664, 17 N. Y. St. Rep. 430.

75. **Acts constituting a refusal to pay.**—Where a check, properly indorsed, was sent by due course of mail, for collection, to the bank on which it was drawn, the drawer having sufficient funds on deposit to pay the check, and was returned unpaid through the negligent mistake of an employee of the bank, it constituted a refusal to pay. Atlanta Nat. Bank *v.* Davis, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139.

Plaintiff drew checks on defendant bank, which, on presentment, defendant refused to pay, on the ground of insufficient funds. As a matter of fact, plaintiff had more than enough money in the bank, and unappropriated, to meet the checks, the apparent lack of funds being due to an error of defendant's clerk. Plaintiff subsequently brought suit against defendant for damages for dishonoring the checks. Held, that defendant was liable. Birchall *v.* Third Nat. Bank, 15 Wkly. Notes Cas. 174.

76. After a bank draft which had been paid to one who held it under a forged indorsement was returned to the drawer, the latter redelivered it to the payee, who demanded payment, which was refused, whereupon the drawer paid the draft after protest. Held, that the drawer had a right of action against the drawee for its refusal of payment. Citizens' Nat. Bank *v.* Importers', etc., Nat. Bank, 119 N. Y. 195, 23 N. E. 540, following Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743.

77. **Nature and form of action.**—First Nat. Bank *v.* Shoemaker, 117 Pa. 94, 11 Atl. 304, 2 Am. St. Rep. 649.

The cause of action, though sometimes spoken of as in the nature of a tort, arises out of a breach of the contract implied from the relation of the parties that the banker will honor the checks of the depositor. Wiley *v.* Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

amount of his deposit.[78]

Action for Slandering Credit.—Where a bank without sufficient justification refuses to pay the check of a customer, he has an action for the impeachment of his credit.[79] Where a check is drawn by a person in trade in favor of and delivered to a third person, who presents the same to the bank on which it is drawn for payment, and is refused payment for want of funds, when there are ample funds in the bank belonging to the drawer of the check and applicable to its payment, such refusal is wrongful, and entitles the drawer of the check to an action for wrongfully slandering his credit in his business.[80] A refusal by a bank to pay a depositor on his own demand can not be said to constitute a publishing of the discredit of the depositor, so as to entitle him to an action for slandering his credit, as such action is a private matter between the bank and the depositor, to which no publicity or injury to the reputation would necessarily attach.[81]

§ 143 (3) Time to Sue and Limitation.—When Right of Action Complete.—A check in favor of a third person signed by a trustee as agent and presented by the payee is a sufficient demand for the repayment of the deposit, and upon refusal to pay the trustee's right of action becomes complete.[82]

Action for Slandering Credit.—An action by a depositor against a bank for refusal to honor checks is not an action of slander, within the meaning of Shannon's Code, § 4468, providing that "actions for slanderous words spoken shall be commenced within six months after the words spoken."[83]

§ 143 (4) Pleading.—A complaint which contains a plain and concise statement of the facts constituting the cause of action is sufficient.[84] A

78. Assumpsit.—First Nat. Bank *v.* Shoemaker, 117 Pa. 94, 11 Atl. 304, 2 Am. St. Rep. 649.

The depositor can bring assumpsit for the breach of the contract to honor his checks. Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897.

79. Action for slandering credit.—Jaselli *v.* Riggs Nat. Bank, 36 App. D. C. 159.

80. Hanna *v.* Drovers' Nat. Bank, 92 Ill. App. 611, judgment affirmed in 194 Ill. 252, 62 N. E. 556.

81. Hanna *v.* Drovers' Nat. Bank, 92 Ill. 611, judgment affirmed in 194 Ill. 252, 62 N. E. 556.

Refusal of bank to pay over county funds on deposit.—Upon the refusal of a banker to pay over money which has been "collected for any county purpose whatever" and deposited with him by the county treasurer or tax collector, the ordinary or other proper county authorities may, under the provisions of §§ 523, 524, 526 of the Code, issue execution against the banker for the purpose of collecting from him the amount thus placed in his hands. Hobbs *v.* Dougherty, 98 Ga. 574, 25 S. E. 579.

82. When right of action complete.—Munnerlyn *v.* Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159.

83. Action for slandering credit.—James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

84. Pleading.—In a suit by the drawer of a bank draft against the bank for refusal to pay the draft, a complaint which, after describing the draft, and the proceedings up to protest, alleges that, at the time of defendant's refusal to pay, it had on deposit enough of plaintiff's money to pay such draft, and that, by reason of such refusal, plaintiff has been compelled to pay the amount due, though seeming to ground the action upon the draft itself, instead of upon the refusal to pay, is sufficient, as

petition which states that a bank in which plaintiff had money on deposit neglected or refused to honor his check, or pay it on demand, states a cause of action.[85]

Slander of Credit.—An allegation that plaintiffs had money on deposit in defendant bank, including money belonging to their customers, and that they demanded such money and were refused, does not state a cause of action for slander to their credit. An action for slander to the credit of a depositor can not be maintained for a refusal to pay over the money on deposit upon a mere parol demand by the depositor. The gist of the action for refusal to pay the check is the publication of the depositor's drawing checks to customers when he had no funds on deposit.[86]

Allegation of Indorsement by Payee.—In an action by a depositor for a refusal to pay a check drawn to the order of a third party, the complaint must allege that the check was duly indorsed by the payee at or before presentment for payment. An omission to allege such indorsement renders the complaint fatally defective and demurrable.[87] An averment that a check was presented for payment in the usual course of business is not a sufficient allegation that the check was indorsed by the payee when presented for payment.[88]

Allegation That Acts Willful and Wanton.—An allegation in a declaration, to recover for a failure of a bank to pay checks of a depositor properly drawn on funds on deposit, that certain acts and omissions which constitute the cause of action were "wrongs repeatedly committed against the plaintiff," is a sufficient charge that they were willful and wanton, and will warrant a finding of exemplary damages.[89]

Necessity to Negative Claim of Lien on Deposit by Bank.—In an action against a bank for refusal to honor plaintiff's checks drawn on deposits, it is not necessary to allege that defendant had no lien on the money belonging to plaintiff, since, if such lien existed, it would be matter of defense.[90]

containing "a plain and concise statement of the facts constituting the cause of action," as required by Code Civ. Proc., § 481. Citizens' Nat. Bank v. Importers', etc., Nat. Bank, 119 N. Y. 195, 23 N. E. 540.

85. Kleopfer v. First Nat. Bank, 65 Kan. 774, 70 Pac. 880.

86. Slander of credit.—Judgment, 92 Ill. App. 611, affirmed in Hanna v. Drovers' Nat. Bank, 194 Ill. 252, 62 N. E. 556.

87. Allegation of indorsement by payee.—Judgment 20 Misc. Rep. 90, 45 N. Y. S. 68, reversed in Eichner v. Bowery Bank, 24 App. Div. 63, 48 N. Y. S. 978, 5 N. Y. Ann. Cas. 106.

In an action against a bank by a depositor, to recover damages for failure to pay a check drawn by him in favor of a third person, the complaint was fatally defective in failing to allege that the check had been indorsed by the payee. Rowley v. National Bank, 63 Hun 550, 18 N. Y. S. 545, 45 N. Y. St. Rep. 331.

88. Judgment, Eichner v. Bowery Sav. Bank, 18 Misc. Rep. 749, 44 N. Y. S. 332, reversed in Eichner v. Bowery Bank, 20 Misc. Rep. 90, 45 N. Y. S. 68, reversed on another point in 24 App. Div. 63, 48 N. Y. S. 978, 5 N. Y. Ann. Cas. 106.

89. Allegation that acts willful and wanton.—Wood v. American Nat. Bank, 100 Va. 306, 40 S. E. 931.

90. Necessity to negative claim of lien on deposit by bank.—James Co. v. Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

Pleading Damages.—Under a declaration which avers that the plaintiff, a trader engaged in the mercantile business, was injured by the wrongful act of his banker in failing and refusing to pay checks drawn upon an ample deposit, there may be a recovery of substantial damages without any averment or proof of special damages. The averment that "plaintiff is a trader," if supported by proof, entitles him, in such case, to substantial damages.[91] An averment in an action against a bank for wrongfully refusing to honor a depositor's checks that "plaintiff is a trader" is sufficient, without allegations of special damages, since the wrong is actionable per se.[92]

§ 143 (4½) Issues and Proof.—A recovery of damages for the wrongful dishonoring of a check can not be had on grounds not sought by the pleadings or made by the evidence. One suing a bank improperly dishonoring a check drawn on it for damages for the mortification and humiliation of mind and injury to reputation consequent on his arrest on a charge of swindling may not recover damages for loss of time or credit founded on the negligent breach of contract by the bank in dishonoring the check.[93]

Financial Standing.—To arrive at temperate damages, evidence relating to the customer's financial credit and standing is allowable, though there be no claim for special damages.[94]

Special Damages.—It is not competent for plaintiff to prove the loss of the patronage or confidence of particular persons, in an action to recover of a banker for injury resulting to the former's credit from the wrongful refusal of the latter to pay checks drawn upon a deposit amply sufficient to meet them unless it is averred as special damages.[95] But, in such case, it is competent to prove general impairment of the plaintiff's credit by the defendant's wrongful dishonor of plaintiff's check, without specific averment of that fact.[96]

Conversations with Representatives of Business Houses.—In an action on the case against a bank for wrongful refusal to pay a check, it is competent for the plaintiff to show conversations by him with representatives of business houses with which he had been doing business and from whom he sought to obtain credit after the dishonor of such check, notwithstanding the declaration did not aver special damages.[97]

91. **Pleading damages.**—James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

92. James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

93. **Issues and proof.**—Western Nat. Bank *v.* White (Tex. Civ. App.), 131 S. W. 828.

94. **Financial standing.**—Hilton *v.* Jesup Banking Co., 128 Ga. 30, 57 S. E. 78.

95. **Special damages.**—James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

96. James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

97. **Conversations with representatives of business houses.**—Metropolitan Supply Co. *v.* Garden, etc., Trust Co., 114 Ill. App. 318.

§ 143 (5) Evidence—§ 143 (5a) Presumptions and Burden of Proof.—Sufficiency of Funds.—In order to hold a bank liable for the refusal to pay a check, it is necessary to show that at the time of presenting the check the bank had on deposit to the drawer's credit a sufficient amount of money to pay the check; and it is not sufficient to show merely that the drawer made adequate deposits on the same day as they may have been made subsequent to the presentment of the check.[98] Where a person deposited a sum adequate to pay a check on the day it was presented, and the bank, supposedly in possession of evidence as to the time of presentment of the check, gives no information thereon, a proper inference is that there were funds sufficient to pay the check on presentation.[99]

Burden of Showing Rightfulness of Charge.—In a suit against a bank for the wrongful dishonor of his check, a depositor makes out a prima facie case when he shows funds on deposit sufficient to pay the check but for a particular charge to his account; the burden being on the bank to establish the rightfulness of the charge in question.[1]

Inference of Malice.—Where the defendant bank dishonored the checks of the plaintiff on four successive occasions, and without reasonable excuse, when the plaintiff had funds deposited in the bank, and great injury resulted to the credit of the plaintiff from such action, such facts are sufficient to justify the legal inference that the bank acted with malice.[2]

§ 143 (5b) Admissibility.—Motive.—Where the measure of recovery in action of tort to recover for a failure of a bank to pay checks of a depositor properly drawn on funds on deposit is determined by the motive with which an act was done, all circumstances tending to show the presence or absence of such motive are admissible in evidence.[3]

Reputation of Drawer—Particular Instances of Misconduct.—While in an action against a bank for failure to pay the plaintiff's checks at a time when he had sufficient money on deposit to meet them the plaintiff's reputation is in issue, particular instances of his misconduct, such as drawing checks on the defendant bank after his deposit had been exhausted, are not admissible in evidence, especially where such specific acts were committed subsequent to the matters in suit.[4]

Dishonor of Subsequent Checks.—In an action against a bank for wrongfully dishonoring the plaintiff's checks, evidence is admissible, on behalf of the plaintiff, relating not only to the first check dishonored, but to all subsequent checks dishonored, although the latter were drawn by the

98. **Sufficiency of funds.**—International Bank *v.* Jones, 15 Ill. App. 594.

99. International Bank *v.* Jones, 20 Ill. App. 125.

1. **Rightfulness of charge.**—Dycus *v.* Commonwealth Nat. Bank (Tex. Civ. App.), 148 S. W. 1127.

2. **Inference of malice.**—Davis *v.* Standard Nat. Bank, 50 App. Div. 210, 63 N. Y. S. 764.

3. **Motive.**—Wood *v.* American Nat. Bank, 100 Va. 306, 40 S. E. 931.

4. **Reputation of drawer—Particular instances of misconduct.**—Columbia Nat. Bank *v.* McKnight, 29 App. D. C. 580.

plaintiff after the bank had notified him that it would not honor them.[5]

Testimony of Plaintiff's Secretary.—In a depositor's action against a bank for dishonoring checks, testimony of plaintiff's secretary showing a general impairment of plaintiff's credit by reason of such dishonor was competent.[6]

Motion to Require Security for Costs as Evidence of Insolvency.—In an action against a bank for damages to plaintiff's business and credit, consequent on the bank's refusal to honor his checks, it is proper to refuse to admit in evidence a motion filed by defendant, to require plaintiff to give security for costs, for the purpose of showing that the plaintiff was insolvent, and that defendant admitted it, for such insolvency was of the time of bringing the suit, and bore no relevancy to the issue joined.[7]

Offer to Buy Plaintiff's Claim against Bank.—In an action against a bank for damages to plaintiff's business and credit, consequent on the bank's refusal to honor his checks, evidence as to whether or not a person offered to buy plaintiff's claim against the bank is wholly immaterial and foreign to the issues, and an objection to asking plaintiff in regard to the person making him such an offer is well taken.[8]

Evidence of Financial Standing of Customer.—See ante, "Issues and Proof," § 143 (4½).

§ 143 (5c) Weight and Sufficiency.—Proof by the drawer of a check that, when presented, he had a sufficient deposit with the drawee subject to check to pay it, and that subsequently he was compelled to pay the amount of the check to the holder because of the unwarranted refusal of the drawee to pay it, sustains a judgment for the amount paid out by the drawer and such other damages as are alleged and proved;[9] but evidence that plaintiffs never opened an account in the bank in their own right, but that the account was carried as that of their predecessor in business, so as to render plaintiffs responsible for an overdraft in such account pending, when plaintiffs commenced to transact business with such bank is insufficient to sustain a judgment against the bank for refusing to pay plaintiff's check.[10]

Evidence That Deposit Belonged to Another as Trustee for Plaintiff and Creditors.—In an action against a bank for damages for refusal to pay checks drawn by plaintiff when there was sufficient money to pay them on deposit in plaintiff's name, evidence which shows that such money at the time the checks were drawn belonged to another as trustee for plain-

5. **Dishonor of subsequent checks.**—Columbia Nat. Bank *v.* McKnight, 29 App. D. C. 580.

6. **Testimony of plaintiff's secretary.**—James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

7. **Motion to require security for costs as evidence of insolvency.**—Roe *v.* Bank, 167 Mo. 406, 67 S. W. 303.

8. **Offer to buy plaintiff's claim against bank.**—Roe *v.* Bank, 167 Mo. 406, 67 S. W. 303.

9. **Weight and sufficiency.**—First Nat. Bank *v.* Railsback, 58 Neb. 248, 78 N. W. 512.

10. Bank *v.* Shrimpton, 5 Neb. 4, 96 N. W. 1002.

tiff and its creditors, and not to plaintiff will not sustain a judgment for the plaintiff.[11]

§ 143 (6) Trial—§ 143 (6a) Instructions.—In an action by a depositor against a bank for damages for its failure to pay the depositor's checks, an instruction following plaintiff's pleading, and requiring him, in order to prevail, to prove the facts alleged—that he was a banker and merchant, that he was entitled to credit, that he was solvent, and that defendant's act in refusing to pay his checks and having the same protested injured plaintiff in his financial standing, in his credit, and in forcing him into bankruptcy—was not erroneous.[12] Since the natural effect of dishonoring a depositor's checks is to injure his credit as far as knowledge of the fact exists, it was error, in an action against a bank for refusal to honor plaintiff's checks, to instruct that the only damages to be considered by the jury were such as resulted from an impairment of plaintiff's credit with the holders of the particular checks dishonored.[13]

As to Damage to Trader.—Where the complaint in an action against a bank for wrongfully dishonoring checks drawn by plaintiff alleged that plaintiff was a trader, it was error to instruct that, in order to recover, plaintiff must satisfy the jury "that it was damaged by the refusal of the bank to pay its checks, and how it was damaged, and the amount of the same, where it was subject to definite proof," since the law conclusively presumes that a trader will suffer damages by such dishonor.[14]

Reasonableness of Request for Time to Examine Account.—Where, in an action against a bank for refusal to honor a depositor's checks, there was no evidence that the alleged refusal was but a request for time to examine the depositor's account, and no pretense that time was needed for such examination, it was error to instruct on the reasonableness or unreasonableness of such request.[15]

11. France Mill Co. *v.* First Nat. Bank, 138 App. Div. 645, 122 N. Y. S. 736.

12. **Instructions.**—Owen *v.* American Nat. Bank, 36 Tex. Civ. App. 490, 81 S. W. 988.

13. James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

14. **As to damage to trader.**—James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

In an action by a trader against a bank for injury to plaintiff's credit by the defendant's wrongful dishonor of checks drawn upon an ample deposit, the law conclusively presumes damage from proof of the relation of the parties and wrongful dishonor of plaintiff's checks, and it is error for the court to charge that the jury must, in addition, ascertain how plaintiff was damaged by defendant's act. The court should have instructed the jury that, if the facts as to the relation of the parties and the dishonor of the checks were as averred, the law conclusively presumed damages, and that their sole remaining duty was to ascertain the amount. James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

15. **Reasonableness of request for time to examine account.**—James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

In an action against a bank for injury to a depositor's credit, resulting from a bank's wrongful refusal to pay checks out of an ample deposit, it is error for the court to instruct the jury, in the absence of any proof to justify it, in re-

Instruction as to Elements and Amount of Damages.—Charges in action to recover damages against a bank for causing loss of credit and failure in business by a depositor by refusing to honor drafts on his deposit, should not require proof of unnecessary elements of plaintiff's case in order to entitle him to recover.[16] Where plaintiff in an action for tort for injury to his credit had deposited a note with the defendant bank for discount, and thereafter, and subsequent to the maturity of the note, drew several checks on the bank, which were dishonored because the note deposited had not been paid at maturity, an instruction that if the jury believed the note was discounted, and that the defendant bank acted through malicious, wrongful, and improper motives, it was liable for the actual money loss of the plaintiff, and also for such substantial damages for the impairment of his credit, and for his feelings and mental anxiety over the matter, as directly resulted from such wrongful acts, was proper.[17]

§ 143 (6b) Questions for Jury.—Whether or not the payee of money orders deposited in bank had authorized a third person to indorse them and whether the bank had been diligent in notifying the depositor of them of an advance claim upon the deposit are questions for the jury.[18]

Ratification.—In an action against a bank for failure to honor a check against plaintiff's account as agent, the question whether the plaintiff had ratified the act of bank in charging to plaintiff's account as agent the amount of a note given to the bank by plaintiff individually is for the jury.[19]

The extent of the injury to a depositor resulting from the dishonoring

gard to the distinction between the absolute refusal of the bank to pay the checks and its request for a reasonable delay to examine the state of the depositor's account. James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

16. **Instruction as to elements and amount of damages.**—Owen *v.* American Nat. Bank, 36 Tex. Civ. App. 490, 81 S. W. 988, affirmed in 98 Tex. 627, no op. The charges in this were held not to require proof of unnecessary elements of damage.

17. Davis *v.* Standard Nat. Bank, 50 App. Div. 210, 63 N. Y. S. 764.

18. **Questions for jury.**—A bank accepted from a depositor postal money orders indorsed in blank by the payee, a person other than the depositor, and credited them to the depositor's account. About a year and a half later, a postal inspector notified the bank that the signatures of the payee were not genuine, and that it would have to refund the money, and thereafter caused the orders to be sent to the bank through the clearing house, whereupon the bank paid them, charging their amount to the depositor's account. After the notice from the inspector, the bank ascertained by telephone to the local address of the depositor that he was not there. Later it wrote him, by letter addressed to the local post office, but the depositor was in Baltimore, from which place he had theretofore sent a deposit to the bank, and he failed to receive the letter. In actions by the depositor against the bank for refusing to honor his checks on the ground of insufficient funds on deposit, there was evidence tending to show that the payee of the money orders had authorized a third person to indorse them. Held, that it was a question for the jury whether such authority had been given by the payee, and also whether the bank had been diligent in notifying the depositor of the adverse claim upon the deposit. Jaselli *v.* Rigg Nat. Bank, 36 App. D. C. 159.

19. **Ratification.**—Sprowl *v.* Southern Nat. Bank, 27 Ky. L. Rep. 874, 86 S. W. 1117, held, the evidence sufficient to justify the submission of the question to the jury.

of a check is within the peculiar province of the jury to determine.[20]

§ 143 (7) Damages—§ 143 (7a) Compensatory or Temperate and Nominal Damages—§ 143 (7aa) Liability.—Where a bank dishonors a customer's check against a fund sufficient to pay it, he may recover, as in other cases of a breach of contract, for the damages that are the natural and reasonable consequences of the breach.[21]

§ 143 (7ab) Measure and Elements—§ 143 (7aba) In General.—The damage recovered by a depositor for the refusal of a bank to honor his check against a balance sufficient to pay it must be such as reasonably, fairly, and mutually result from the refusal.[22] A bank's liability is not limited to the amount of the depositor's funds in its hands at the time, or to the amount of the check or checks, payment of which was refused.[23]

Interest.—Interest may be allowed as measure of damages for a bank's wrongful refusal to pay a depositor's check.[24]

Special damages may also be recovered if they are properly alleged and proved.[25]

§ 143 (7abb) Showing of Actual or Special Loss or Injury—§ 143 (7abba) Depositor a Merchant or Trader.—If a depositor, whose check is dishonored by a bank when he has funds on deposit sufficient to meet it, is a merchant or trader, it will be presumed, without further proof, that substantial damages are sustained, and such damages may be recovered,[26] even though the refusal was caused by mistake,[27] and there

20. Extent of injury.—American Nat. Bank *v.* Morey, 113 Ky. 857, 24 Ky. L. Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379.

21. Liability.—Wiley *v.* Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655. See post, "In General," § 143 (7aba).

22. Measure and elements.—Wiley *v.* Bunker Hill Nat. Bank, 183 Mass. 495, 69 N. E. 655; Bank *v.* Goos, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190; Brooke *v.* Tradesmen's Nat. Bank, 69 Hun, 202, 23 N. Y. S. 802, 53 N. Y. St. Rep. 595.

23. Not limited to amount of check.—Wiley *v.* Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

24. Interest.—First Nat. Bank *v.* Randall, 1 Tex. App. Civ. Cases, § 971, citing Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

25. Special damages.—Wiley *v.* Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655. See post, "Special Damages," § 143 (7c).

26. Depositor a merchant or trader.—Third Nat. Bank *v.* Ober, 178 Fed. 678; Schaffner *v.* Ehrman, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192; Wiley *v.* Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655; Svendsen *v.* State Bank, 64 Minn. 40, 65 N. W. 1086, 31 L. R. A. 552, 58 Am. St. Rep. 522; James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

Where, in an action against a bank for refusal to honor a depositor's check, the plaintiff was and had been a trader engaged in business, and there was evidence that his business amounted to $150,000 a year, and that he had sufficient funds in the bank to meet the check, he was entitled to recover substantial damages. Wiley *v.* Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

Damage sustained with payee.—In an action by a trader to recover damages to a banker for injuring his credit by a wrongful refusal to pay his checks, out of an ample deposit, it is error for the court, in its charge, to confine the damages recoverable by plaintiff to such as he may have sustained with the particular persons in

27. Schaffner *v.* Ehrman, 37 Ill. App. 340, affirmed in 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192.

is no evidence of special damage[28] or of actual malice[29] and notwithstanding the depositor is a corporation.[30] This rule proceeds upon the fact, commonly recognized, that the credit of the person engaged in such a calling is essential to the prosperity of his business, and the dishonoring of his check is plainly calculated to impair it and to inflict a most serious injury. In common opinion, substantial damage is the natural and probable consequence of the act, and therefore a substantial recovery may be had, without pleading or proof of special injury.[31]

§ 143 (7abbb) Depositor Not a Merchant or Trader.—The decisions of the courts are in confusion and conflict upon the question whether a depositor, who is not a merchant or tradesman, whose check against a fund sufficient to pay it has been wrongfully dishonored, can recover more than nominal damage unless actual or special damages are alleged and proved.[32] All the cases agree that a depositor, whose check is dishonored by a bank when he has funds on deposit to meet it, has a right of action against the bank for a violation of his legal rights, and is entitled to recover at least nominal damages.[33] In many jurisdictions, among which are Georgia,[34] Kentucky,[35] Massachusetts,[36] Nebraska[37] and the District of Columbia,[38] the measure of damages which a depositor may recover in

whose favor the checks were drawn. The plaintiff is entitled, in such case, to recover the entire damages legitimately resulting to his credit and business from defendant's wrongful act. James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857.

28. Schaffner *v.* Ehrman, 37 Ill. App. 340, affirmed in 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192.

29. Schaffner *v.* Ehrman, 37 Ill. App. 340, affirmed in 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192.

30. In an action on the case for dishonoring a check, it is improper to instruct the jury that the plaintiff is only entitled to nominal damages where the dishonor of the check was due simply to an error in bookkeeping, as the plaintiff has the right to allege and prove special damages, and the jury may likewise take into consideration the natural and necessary consequences of the bank's breach of contract without proof of special damages; and this is true notwithstanding the plaintiff is a corporation. Metropolitan Supply Co. *v.* Garden, etc., Trust Co., 114 Ill. App. 318.

31. Third Nat. Bank *v.* Ober, 178 Fed. 678.

32. Depositor not a merchant or trader.—The confusion and conflict upon this proposition is due in large part to the indiscriminating application of the principles laid down in Roland *v.* Steward, 14 C. B. 595, 23 L. J. C. 148, which was a case of the dishonoring of the checks of merchants or traders, to cases wholly unlike it in this important particular. Third Nat. Bank *v.* Ober, 178 Fed. 678.

33. Third Nat. Bank *v.* Ober, 102 C. C. A. 178, 178 Fed. 678.

"In the case of a trader, injury to his credit may be inferred from the fact that he is a trader, and substantial damages may be found and given upon proof of that fact, without any more. In the case of a person who is not a trader, if no special damages are alleged or proved, nominal damages at least may be recovered." Wiley *v.* Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

34. *Georgia.*—Atlanta Nat. Bank *v.* Davis, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139.

35. *Kentucky.*—American Nat. Bank *v.* Morey, 113 Ky. 857, 24 Ky. L. Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379.

36. *Massachusetts.*—Wiley *v.* Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

37. *Nebraska.*—Bank *v.* Goos, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190.

38. *District of Columbia.*—Columbia Nat. Bank *v.* McKnight, 29 App. D. C. 580.

an action against a bank for dishonoring his check against a fund sufficient to pay it, if there is no showing of any actual[39] or special[40] loss, injury or damage, is such compensatory,[41] general,[42] moderate;[43] substantial,[44] or

39. **Actual damage not necessary.**—The rule that a bank is liable in temperate damages for wrongful dishonor of a customer's check is an exception to the general rule, that, save where a tort is committed maliciously, willfully, or wantonly, proof of actual damages is necessary, to sustain an action ex delicti, brought by a person whose rights under a contract have been wrongfully disregarded by another party thereto. State Mut. Life, etc., Ass'n *v.* Baldwin, 116 Ga. 855, 43 S. E. 262; Hilton *v.* Jesup Banking Co., 128 Ga. 30, 57 S. E. 78.

In 3 Am. & Eng. Enc. Law it is said: "The depositor by proving special loss may recover special damages from a bank for its breach of duty; but, if unable to do so, he may recover such temperate damages as will be a reasonable compensation for the injury he has sustained." Bank *v.* Goos, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190.

"Again, in 2 Morse, Banks, § 458, after a statement of the general rule relating to the bank's duty in the premises, we find the following: 'This duty and this right are so far substantial that if the bank refuses, without sufficient justification, to pay the check of the customer, the customer has his action for damages against the bank. It has been said that if, in such action, the customer does not show that he has suffered a tangible or measurable loss or injury from the refusal, he shall recover only nominal damages. But the better authority seems to be that, even if such actual loss or injury is not shown, yet more than nominal damages shall be given. It can hardly be possible that a customer's check can be wrongfully refused payment without some impeachment of his credit, which must in fact be an actual injury, though he can not, from the nature of the case, furnish independent, distinct proof thereof.'" Atlanta Nat. Bank *v.* Davis, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139.

Tangible pecuniary loss unnecessary.—If a bank, without legal cause, refuses to honor a depositor's check, he is entitled to recover damages for the injury sustained through loss of credit; and such damage need not be immediately connected with a tangible pecuniary loss. Patterson *v.* Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778

Public policy.—This is placed upon the ground of public policy in Patterson *v.* Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778. See also, Schaffner *v.* Ehrman, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192; American Nat. Bank *v.* Morey, 113 Ky. 857, 24 Ky. L. Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379.

40. **Special damage.**—Where a bank refused to pay a check drawn by a customer who had sufficient funds on deposit to pay the same, the customer, though there was no proof of special damages, was not confined to nominal, but was entitled to "temperate," damages. Atlanta Nat. Bank *v.* Davis, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139.

41. **Compensatory damages.**—Svendsen *v.* State Bank, 64 Minn. 40, 65 N. W. 1086, 31 L. R. A. 552, 58 Am. St. Rep. 522; Bank *v.* Goos, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190; Rosewater *v.* Hoffman, 24 Neb. 222, 38 N. W. 857.

42. **General damages** are recoverable against a banker for dishonoring checks when in funds to meet them. Birchall *v.* Third Nat. Bank, 15 Wkly. Notes Cas. 174.

General damages are such as the jury may give and the judge can not point out any measure by which they are to be ascertained except the opinion and judgment of a reasonable man. Special damages are such as by competent evidence are directly traceable to the bank's failure to discharge its contract obligations or such duties as are imposed upon it by law. Bank *v.* Goos, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190; Schaffner *v.* Ehrman, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192.

43. **Moderate damages.**—American Nat. Bank *v.* Morey, 113 Ky. 857, 24 Ky. L. Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379; Wiley *v.* Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

44. **Substantial damages.**—First Nat. Bank *v.* Mason, 95 Pa. 113; Patterson *v.* Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778; Commercial Nat. Bank *v.* Latham, 29 Okl. 88, 116 Pac. 197; Columbia Nat. Bank *v.* McKnight, 29 App. D. C. 580.

Where a bank refuses to honor a depositor's check without legal cause, he

temperate,[45] damages as would be a fair and reasonable compensation for the injury which he must have sustained,[46] but not harsh or inordinate damages. It is almost impossible for a check to be dishonored without reflecting upon the character and credit of the drawer, the extent of the injury being within the peculiar power of the jury to determine.[47] Accordingly the depositor's recovery is not limited or restricted to mere nominal damages,[48] though the refusal was caused by mistake,[49] and without actual malice[50] and certainly not where there is oppression.[51] On the other hand, it is held in a number of jurisdictions, among which are New York[52]

is entitled to recover substantial damages. Patterson *v.* Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778.

45. Temperate damages.—Atlanta Nat. Bank *v.* Davis, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139; Hilton *v.* Jesup Banking Co., 128 Ga. 30, 57 S. E. 78.

Where a depositor draws a check on a bank, having money to his credit the amount of the check, and it is wrongfully dishonored, the damages recoverable are such temperate damages as would be reasonable compensation for the injury. Hilton *v.* Jesup Banking Co., 128 Ga. 30, 57 S. E. 78.

Temporary damages are moderate, showing moderation, not excessive, lavish or inordinate. They are more than nominal damages. Hilton *v.* Jesup Banking Co., 128 Ga. 30, 57 S. E. 78.

46. Amount of verdict.—In Patterson *v.* Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778, a judgment for $300 for dishonoring a check was affirmed.

In Schaffner *v.* Ehrman, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192, a judgment for $450 damages was affirmed where the dishonor of the check was due to the mistake of the bookkeeper in charging the checks of another customer to the account.

A verdict for $500 was not excessive in an action against a bank for damages because of its wrongful refusal to honor the check of a depositor, who was pursuing a course of study in a strange city, it appeared that she lost the confidence of her instructor, was delayed for two months in opening a shop for her art, and expended $2.86 in telegraphing to defendant in trying to induce it to honor her check, and to her relatives to obtain money to meet the dishonored check. American Nat. Bank *v.* Morey, 25 Ky. L. Rep. 2151, 80 S. W. 157.

Where, in a suit against a bank for dishonoring plaintiff's draft, there being at the time funds on deposit to pay it, but which the bank, acting oppressively, caused to be impounded as the property of another, the release and payment of which was procured at an expense to plaintiff of $69, she was entitled to substantial damages, and as the jury had not found punitive damages, nor acted through passion, a verdict for $1,069, will not set aside as excessive. Commercial Nat. Bank *v.* Latham, 29 Okl. 88, 116 Pac. 197.

47. American Nat. Bank *v.* Morey, 113 Ky. 857, 24 Ky. L. Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379.

48. In an action by a physician against a bank for the wrongful dishonor of his check, the plaintiff is not confined to the recovery of nominal damages only, because he is not a trader, but may recover substantial damages, although he does not show special damage. Columbia Nat. Bank *v.* MacKnight, 29 App. D. C. 580.

49. Refusal caused by mistake.—Atlanta Nat. Bank *v.* Davis, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139; Schaffner *v.* Ehrman, 139 Ill. App. 109, 28 N. E. 917, 15 L. R. A. 134, 82 Am. St. Rep. 192; Buchall *v.* First Nat. Bank, 15 Pa. Wkly. Notes Cas. 174.

Mistake as to character of deposit.—Where a bank refuses to pay the check of a depositor having funds to his credit, on the ground that the funds were deposited in the savings department of the bank, which was a mistake, the depositor is entitled to a verdict for temperate damages. Lorick *v.* Palmetto Bank, etc., Co., 74 S. C. 185, 54 S. E. 206.

50. Schaffner *v.* Ehrman, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192.

51. Commercial Nat. Bank *v.* Latham, 29 Okl. 88, 116 Pac. 197.

52. *New York.*—Burroughs *v.* Tradesmen's Nat. Bank, 87 Hun 6, 33 N. Y. S. 864, 67 N. Y. St. Rep. 481, affirmed in 156 N. Y. 663, 50 N. E. 115.

Where a bank, in consequence of an error, fails to pay a depositor's check when presented but discovers the er-

and Texas,[53] and by the federal circuit court of appeals for the eighth circuit,[54] that if the depositor is not a merchant or trader, there is no presumption of substantial injury, and his recovery should be a nominal one, unless he pleads and proves some special loss, injury or damage;[55] as, for instance, loss of credit.[56] Accordingly it has been held that where the act of the bank was without malice, and simply the result of a clerical error, the depositor is entitled to recover only nominal damages, unless special damages are alleged and proved.[57]

§ 143 (7abc) Items of Loss or Injury for Which Damage Allowed.—Where plaintiff, at the time of the dishonor of her check, was pursuing a special study in a strange city, in an action against the bank for damages for its wrongful refusal to honor such check, she may recover for any time she lost, or any expense she incurred, or for any loss of credit, of business, or of instruction that she sustained by reason of the dishonor of the check.[58]

A recovery for humiliation or mortification of feelings can not be had where compensatory damages only are allowed.[59]

The fact that a depositor had a nervous chill when her check was protested and returned to her is not to be considered in estimating the damage, as the chill was not such a thing as should have reasonably been anticipated from persons of ordinary health and strength.[60]

Amount of Damages.—The damages recoverable for the refusal of a bank to pay a check drawn upon it by one who had funds in the bank can not cover injuries caused by the arrest of the drawer at the instance of the payee, and the loss of the drawer's credit and reputation resulting therefrom.[61]

ror and pays the check five days later, the depositor can recover only nominal damages against the bank. Burroughs *v.* Tradesmen's Nat. Bank, 87 Hun 6, 33 N. Y. S. 864, 67 N. Y. St. Rep. 481.

53. *Texas.*—Western Nat. Bank *v.* White (Tex. Civ. App.), 131 S. W. 828.

54. Third Nat. Bank *v.* Ober, 178 Fed. 678.

55. Third Nat. Bank *v.* Ober, 178 Fed. 678; Burroughs *v.* Tradesmen's Nat. Bank, 87 Hun 6, 33 N. Y. S. 864, 67 N. Y. St. Rep. 481, affirmed in 156 N. Y. 663, 50 N. E. 1115.

56. One not a merchant or trader who sues a bank in which he is a depositor for erroneously dishonoring a check must, to recover for loss of credit, allege and prove the loss. Western Nat. Bank *v.* White (Tex. Civ. App.), 131 S. W. 828.

57. Third Nat. Bank *v.* Ober, 178 Fed. 678.

Failure to pay result of clerk's mistake.—In an action against a bank for damages caused by its refusal to pay a check and note of plaintiff, although there was a sufficient deposit to plaintiff's credit, where it appears that the refusal was the result of a clerk's mistake, and there was no allegation of special damage, only nominal damages could be recovered. Judgment, 85 App. Div. 362, 83 N. Y. S. 447, affirmed in Clark Co. *v.* Mt. Morris Bank, 181 N. Y. 533, 73 N. E. 1133.

58. Items of loss or injury for which damage allowed.—American Nat. Bank *v.* Morey, 113 Ky. 857, 24 Ky. L. Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379.

59. Recovery for humiliation or mortification.—American Nat. Bank *v.* Morey, 113 Ky. 857, 24 Ky. L. Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379.

60. Illness of depositor.—American Nat. Bank *v.* Morey, 113 Ky. 857, 24 Ky. L. Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379.

61. Amount of damages.—Bank *v.*

Refusal to Pay Note Payable at Bank.—Where a bank refused to pay a depositor's note made payable there on presentation when he had sufficient funds on deposit to pay it, the bank is liable to him for such damages as might reasonably be expected to arise therefrom; but the immediate entry of judgment for many times the amount of the note, under an agreement of which the bank had no notice, and the seizure of the depositor's business, are not consequences reasonably expected to follow from such refusal for which damages can not be recovered.[62]

§ 143 (7b) Exemplary or Punitive Damages.—If the dishonor of a depositor's check by the bank is willful and malicious, a right to recover exemplary damages would accrue.[63] And if the negligence of a bank is so gross as to evince a culpable indifference to consequences, and the rights of the plaintiff, it would be sufficient ground for the allowance of such damages.[64] In the absence of actual malice, oppression or bad motive on the part of the bank, punitive damages can not be recovered.[65]

Construction of Judgment.—A judgment for one dollar of actual damages, in a suit against a bank by a depositor for injury to his business standing, caused by a refusal to honor his check drawn in favor of a third person, will be regarded as for a nominal sum only, and will not constitute a basis for the allowance of an extra amount as exemplary damages,[66] but where the dishonor of the check is the result of a mistake and the bank, disclaiming all intent to injure the depositor, offers to do all it can to remove any injurious impressions resulting from its mistake, it is not liable to exemplary damages.[67]

Goos, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190; Western Nat. Bank *v.* White (Tex. Civ. App.), 131 S. W. 828.

62. Refusal to pay note payable at bank.—Brooke *v.* Tradesmen's Nat. Bank, 69 Hun 202, 23 N. Y. S. 802, 53 N. Y. St. Rep. 595.

63. Exemplary or punitive damages.—Wood *v.* American Nat. Bank, 100 Va. 306, 312, 40 S. E. 931; Buchall *v.* Third Nat. Bank, 19 Cent. L. J. 390.

64. Wood *v.* American Nat. Bank, 100 Va. 312, 40 S. E. 931.

65. American Nat. Bank *v.* Morey, 113 Ky. 857, 24 Ky. L. Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379.

In an action against a bank for damages for the wrongful refusal to honor a check at a time when the depositor was in a strange city, it is error to give an instruction authorizing an award of punitive damages; there being nothing to indicate actual malice, oppression, or bad motive. American Nat. Bank *v.* Morey, 113 Ky. 857, 24 Ky. L. Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379.

66. Construction of judgment.—First Nat. Bank *v.* Kansas Grain Co., 60 Kan. 30, 55 Pac. 277.

67. Plaintiff's check was wrongfully dishonored by the defendant bank, and, when plaintiff asked defendant's bookkeeper why it was dishonored, the bookkeeper said he knew nothing about the matter. Plaintiff then drew another check for the same amount to the same payee, and went with him to the bank. The teller again refused to pay, saying there were no funds, but after consultation with the bookkeeper, said there had been a mistake, and paid the check. The relations between plaintiff and defendant had always been pleasant, and defendant promptly wrote plaintiff, disclaiming all intent to injure him, and offered to do all it could to remove any injurious impressions arising from its mistake, and authorized plaintiff to use its letter for that purpose. Held, that plaintiff was not entitled to exemplary damages. Wood *v.* American Nat. Bank, 100 Va. 306, 40 S. E. 931.

§ 143 (7c) Special Damages.—If a bank refuses to honor the check of its customer without sufficient justification, he is entitled to recover special damages if they are properly alleged and proved. The depositor by proving special loss is always entitled to recover substantial damages.[68]

§ 143 (7d) Set-Off by Bank.—Where, at the time a bank refused to honor a depositor's checks against funds in its hands subject thereto, no proceedings had been instituted by or against such depositor to have him adjudged insolvent, and he had not made an assignment for the benefit of creditors, and it did not appear that he was not in good standing and credit, the bank was not entitled to an equitable set-off of unmatured notes of such depositor against its liability for damages for such refusal.[69]

§ 143 (8) Liability of Bank for Interest.—Where a bank refuses to pay a check presented for payment, when it has money of the depositor out of which payment should be made, it subjects itself to the payment of interest on the amount of the check until it complies with the demand.[70]

§ 143½. Cashier's Checks.[71]—A cashier's check is the bank's own check which is issued by the cashier at the request of a depositor against whose account it is charged. Such check is strictly commercial paper and every holder is presumed to be a holder for value, and the burden of showing that he is not a bona fide holder rests upon those who assert it.[72]

§ 144. Notes Payable at Bank.—Right of Bank to Pay Note Out of Deposit of Maker.—In some jurisdictions it has been held that where one makes a note payable by its terms at a bank at which he is a general depositor, the bank is thereby authorized to pay it, on presentation when

68. **Special damages.**—Metropolitan Supply Co. v. Garden, etc., Trust Co., 114 Ill. App. 318; American Nat. Bank v. Morey, 25 Ky. L. Rep. 2151, 80 S. W. 157; American Nat. Bank v. Morey, 113 Ky. 857, 24 Ky. L. Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379; Wiley v. Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

Special damages may also be recovered if they are properly alleged. Marzetti v. Williams, 1 B. and Ad. 415; Rolin v. Steward, 14 C. B. 455; Hopkins v. Foster, L. R. 19, Eq. 74; Prehn v. Royal Bank, L. R. 5 Eq. 92; Larios v. Bonany Gurety, L. R. 5 P. C. 546; Fleming v. Bank of New Zealand, A. C. 577; Patterson v. Marine Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778; Schaffner v. Ehrman, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192; James Co. v. Continental Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857; Svendsen v. State Bank, 64 Minn. 40, 65 N. W. 1086, 31 L. R. A. 552, 58 Am. St. Rep. 522; American Nat. Bank v. Morey, 113 Ky. 857, 24 Ky. L. Rep. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379; Robey v. Oriental Bank, 2 S. C. R. (N. S.), New So. Wales, 56; Wiley v. Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

69. **Set-off by bank.**—Wiley v. Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

70. **Liability of bank for interest.**—Helene v. Corn Exch. Bank, 96 App. Div. 392, 89 N. Y. S. 310; First Nat. Bank v. Randall, 1 Tex. App. Civ. Cases, § 971, citing Commercial, etc., Bank v. Jones, 18 Tex. 811.

71. **Cashier's check as guaranty of another's debt.**—See ante, "Torts," § 100; "Cashier's Checks," § 134 (4b); "Cashier's Check," § 139 (2).

72. Penn Bank v. Frankish, 91 Pa. 339.

due, out of any funds of the maker then on general deposit with it,[73] and is entitled to a proper credit in the account of the depositor,[74] and may hold the note as the equitable owner or purchaser, and set it off in a suit to recover a balance due the depositor on a general account.[75] But in other jurisdictions it has been held that a note executed by a depositor, payable at the bank, is not equivalent to a check, and that the bank has no authority to pay such note to a third party in the absence of a usage or of instructions from the maker to that effect;[76] and that a usage to authorize such payment out of deposits of the maker at the bank must be general, uniform and certain, and known to both parties.[77] But a depositor's parol direction to apply his deposit in payment of a note payable at the bank is sufficient to authorize such application.[78] In jurisdictions where it is held that a bank

73. Bank authorized to pay note.—Bedford Bank *v.* Acoam, 125 Ind. 584, 25 N. E. 713, 9 L. R. A. 560, 21 Am. St. Rep. 258; Francis *v.* People's Nat. Bank, 1 N. P. 281, 36 Dec. 383; Griffin *v.* Rice (N. Y.), 1 Hilt. 184; Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82; 7 Am. Rep. 314; Indig *v.* National City Bank, 80 N. Y. 100, 59 How. Prac. 10.

One who has drawn a note or bill payable at a bank must have done so for some purpose; and he can not be heard to say, after his banker had paid a just debt for which he had given a note to which the maker claims no defense, that the payment was wholly voluntary and unauthorized. Bedford Bank *v.* Acoam, 125 Ind. 584, 25 N. E. 713, 9 L. R. A. 560, 21 Am. St. Rep. 258.

74. Bedford Bank *v.* Acoam, 125 Ind. 584, 25 N. E. 713, 9 L. R. A. 560, 21 Am. St. Rep. 258.

75. Right of bank to set off note against balance due depositor.—Bedford Bank *v.* Acoam, 125 Ind. 584, 25 N. E. 713, 9 L. R. A. 560, 21 Am. St. Rep. 258.

76. Bank not authorized to pay note in absence of usage or instructions.—Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669.

The making of a note payable at a particular bank does not amount to a direction or authority to that bank to pay it out of the funds of the maker, but some form of special authority is required before the holder would be authorized to demand payment of the bank, or the bank would be authorized to pay it. Wood *v.* Merchants', etc., Co., 41 Ill. 267.

A bank has no right, without an order from a depositor, to apply money on deposit in payment of a note payable at the bank. Ridgely Nat. Bank *v.* Patton, 109 Ill. 479.

Where it appeared that a note, executed by a depositor, payable at his bank, and paid by such bank without instructions, was an accommodation note, and that the maker had no notice of such payment until after the insolvency of the party primarily liable, and after a settlement had been had between him and such party, in which such note was credited to the latter, the bank had no right to set off the amount of such note in an action against it by the maker to recover a deposit. Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669.

77. When usage will authorize payment.—Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669.

There was evidence that a certain bank was in the habit of paying notes payable at the bank on presentment, without instructions from the maker. But among other banks in the neighborhood the custom was not uniform; some of them so paying only when given for personal property, and others only when the depositor executing the note was engaged in mercantile business. Held, that a depositor of the first-named bank, who had no knowledge of any such custom, was not bound by it. Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669.

78. Parol direction sufficient to authorize application of deposit in payment of note.—First Nat. Bank *v.* Hall, 119 Ala. 64, 24 So. 526.

is authorized to pay a note payable at the bank out of the funds of the maker on general deposit with it, the burden of proof is on the bank to show that the note was payable at the bank, in an action by the maker for the conversion of a portion of his deposit by paying such note without his special authority.[79]

When Deposit Is Appropriated to Payment of Note.—The fact that a depositor has issued a promissory note, drawn payable at a bank, does not, in the absence of an acceptance by the bank, appropriate the deposit, or in any manner change the relations between the depositor and the bank. The former may give a different direction, and the latter is bound to obey it. If the depositor notifies the bank not to pay the note, the bank can not charge him with the amount, if paid contrary to the notice.[80] A deposit of a sum of money with a bank, accompanied by a direction to apply the deposit to the payment of a note of the depositor, payable at the bank, does not so appropriate the amount to the designated purpose that, after it has been applied to the payment of another note of the depositor, also payable at the bank, and past due at the time of the deposit, the holder of the note designated can recover the amount from the bank.[81]

Payment by Bank of Notes Payable at Another Bank.—Under a statute which provides that, where an instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereof, a bank has no authority to pay notes of a depositor made long before and payable at another bank.[82]

Payment of Note under Misapprehension of State of Maker's Account.—The payment of a note by the bank at which it is made payable, although made under misapprehension of the state of the maker's account with the bank, concludes the bank as against the holder of the paper, who

79. **Burden of proof to show note was payable at bank.**—Francis *v.* People's Nat. Bank, 1 N. P. 281, 3 O. Dec. 383.

80. **When deposit is appropriated to payment of note.**—Egerton *v.* Fulton Nat. Bank (N. Y.), 43 How. Prac. 216.

Plaintiff, after giving a note payable at a bank, compromised with creditors and received a release from the holder of the note, of which plaintiff notified the bank, and subsequently defendant bank took over the property, assets, and liabilities of the other bank, including a deposit belonging to plaintiff. Held, that defendant bank was bound to know the terms under which the deposit was held by the other bank, and it had no authority to pay the note on its maturity out of plaintiff's deposit. Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

81. Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314.

82. **Statute not authorizing payment by bank of notes payable at another bank.**—Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. 944, construing Rev. Laws, c. 73, § 104.

Rev. Laws Mass., c. 73, § 104, which provides that, "where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon," applies only, where the instrument is made payable at a particular bank named, and the fact that a note made payable at "any bank in Boston" was sent for collection to a bank there in which the maker had a deposit when the note matured did not authorize that bank to pay the note from such deposit. Carpenter *v.* National Shawmut Bank, 109 C. C. A. 55, 187 Fed. 1.

has surrendered it, and the payment can not be recovered back from the holder.[83]

Effect of Sending Note Through Clearing House.—In the absence of evidence of a uniform custom among banks which are members of a clearing house to treat notes as checks, sending a note through the clearing house to a bank at which it is payable is not a formal demand for immediate payment, made during business hours, but equivalent to leaving it at the bank for collection from the maker on or before the close of banking hours.[84]

Payment at Clearing House.—Where a note is payable at a certain bank, payment at the clearing house is provisional only, becoming complete when paid in the usual course of business; and, if not so paid, payment at the clearing house is to be treated as under a mistake of fact, to the same extent, although the note has been retained until after business hours, as if made without the intervention of the clearing house.[85]

§ 145. Certified Checks or Notes—§ 145 (1) Checks—§ 145 (1a) Certified Check Defined.—A "certified check" is one drawn by a depositor upon funds to his credit in a bank, which a proper officer of the bank certifies will be paid when duly presented for payment.[86] In some respects such a check is not unlike a certificate of deposit payable to the order of the depositor.[87]

§ 145 (1b) Certification Distinguished from Acceptance.—Where the purchaser of a draft made payable to another presents it to the drawee and obtains a promise to pay it in writing indorsed thereon, in case the paper is indorsed by the payee, it is an acceptance which does not release the drawer, and not a certification which does.[88]

§ 145 (1c) Certification Distinguished from Guaranty.—A promise by a bank to pay any checks that may be drawn upon it by a certain person is not a certification of such checks, but a guaranty.[89]

§ 145 (1d) Mode of Certification.—A check may be certified by a bank by writing upon it the word "good," or any similar words which indicate a statement by it that the drawer has funds in the bank applicable to the payment of the check, and that it will so apply them.[90] A parol representation by a bank that a check drawn on it is "all right" is not equiv-

83. **Payment of note under misapprehension of state of maker's account.**—Riverside Bank *v.* First Nat. Bank, 20 C. C. A. 181, 74 Fed. 276.

84. **Effect of sending note through clearing house.**—National Exch. Bank *v.* National Bank, 132 Mass. 147.

85. **Payment at clearing house.**—National Exch. Bank *v.* National Bank, 132 Mass. 147.

86. **Certified check defined.**—Holland *v.* Mutual Fertilizer Co., 8 Ga. App. 714, 70 S. E. 151.

87. Merchants' Bank *v.* Baird, 160 Fed. 642.

88. **Certification distinguished from acceptance.**—Milmo Nat. Bank *v.* Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345.

89. **Certification distinguished from guaranty.**—Bowen *v.* Needles Nat. Bank, 87 Fed. 430.

90. **Mode of certification.**—First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229.

alent to a certification, and binds the bank to nothing more than that the statement was true at the time it was made.[91] While an affirmative answer by the bank to a general inquiry whether checks of a person named, for a specified sum, are good, is information that such person has on deposit, subject to check, money to that amount, it does not constitute a certification of, or otherwise create an obligation on, the bank to pay checks which the inquirer may then hold.[92]

§ 145 (1e) Object of Certification.—The object of certifying a check is to enable the holder to use it as money.[93]

§ 145 (1f) Authority to Certify—§ 145 (1fa) In General.—The authority of a bank officer to certify checks may be express or implied.[94] But without special authority conferred upon him such an officer has no implied authority to certify any but commercial checks, that is, those drawn in commercial form in the usual course of business.[95] Where an agent of a bank certifies a check which he issues, whereby the funds of the bank may be withdrawn for his benefit, the person receiving the check, in order to give it validity, is bound to make inquiry from other officers of the bank in respect to its validity.[96]

§ 145 (1fb) President.—The president of a bank ex officio has implied power to certify a check drawn in the usual course of banking business.[97] But where the face of a check drawn by the president, and certified by him as good, shows his attempt to use his official character for his private benefit, every one to whom it comes is put upon inquiry; and, when

91. **Verbal representation that check is all right not a certification.**—Bank *v.* First Nat. Bank, 30 Mo. App. 271.

92. **Affirmative answer to general inquiry about checks not a certification.**—Kahn *v.* Walton, 46 O. St. 195, 20 N. E. 203.

93. **Object of certification.**—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

"The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to hand large sums of money." Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

The transferee of a certified check takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption and is extinguished by payment. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

94. **Authority to certify may be express or implied.**—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; reaffirmed in United States *v.* State Nat. Bank, 96 U. S. 30, 24 L. Ed. 647, 13 S. Ct. 523.

95. **Implied authority only extends to certification of commercial checks.**—Fidelity, etc., Co. *v.* National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782.

96. **Certification by agent of check whereby funds may be withdrawn for his benefit.**—State *v.* Miller, 47 Ore. 562, 85 Pac. 81, 6 L. R. A., N. S., 365. See post, "President," § 145 (1fb).

97. **Authority of president.**—Fidelity, etc., Co. *v.* National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782.

the certificate is false, no one can recover as a bona fide holder against the bank.[98]

§ 145 (1fc) Cashier.—The cashier is the officer who usually certifies checks. His authority to certify, where the drawer has the funds in the bank, may be implied from his authority to receive all funds and enter them on the books, and hence may be said to be inherent in the office.[99] But without special authority conferred upon him the cashier has no implied authority to certify any but commercial checks, that is, those drawn in commercial form in the usual course of business;[1] and his certification of any other kind of check can not be made binding on the bank by any subsequent acts of ratification by him.[2] A power evidenced by a usage must be considered as defined and limited by that usage; and where it appears that a usage existed among certain banks for the cashier to certify checks upon them, it can not be regarded as evidence that the cashier of another bank had any such authority.[3] The directors of a bank may limit the cashier's

98. Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293, 24 How. Prac. 1, 2 Am. L. Reg., N. S., 92.

99. **Implied authority of cashier.**—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; United States *v.* State Nat. Bank, 96 U. S. 30, 24 L. Ed. 647, 13 S. Ct. 523; Clarke Nat. Bank *v.* Albion Bank (N. Y.), 52 Barb. 592; Cooke *v.* State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667; Fidelity, etc., Co. *v.* National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782.

Where the money is in the bank the cashier has authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do virtute officii. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008, reaffirmed in United States *v.* State Nat. Bank, 96 U. S. 30, 24 L. Ed. 647, 13 S. Ct. 523.

If a cashier is shown to have frequently pledged in writing the credit of his bank for large amounts in the usual course of business, with the knowledge of the bank—borrowing and lending its money, and buying and selling exchange—doing all this usually by cashier's checks, though sometimes by certificates of deposit and sometimes by memoranda, the transactions being uniformly made on faith of the implied powers of the cashier, without inquiry as to special authorization, and such is shown to be the usage of other banks, it is evidence from which a jury may infer that such cashier is authorized to pledge the bank's credit by certifying a check to be "good;" this last method being one not distinct in its nature from the others named, but similar to them, and involving in form and substance the same obligation and consequence to the bank. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008, reaffirmed in United States *v.* State Nat. Bank, 96 U. S. 30, 24 L. Ed. 647, 13 S. Ct. 523.

These principles hold even though it is not shown that any cashier of any bank in the particular place where the transaction which was the subject of the suit arose, ever certified a check to be good. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

1. **Implied authority limited to certification of commercial checks.**—Dorsey *v.* Abrams, 85 Pa. 299, 27 Am. Rep. 657; Fidelity, etc., Co. *v.* National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782.

Therefore, if a check bears upon it a memorandum that it is to be held as collateral, etc., the cashier's certification is not in due course and will not bind the bank unless expressly authorized. Fidelity, etc., Co. *v.* National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782, affirmed, no op.; Dorsey *v.* Abrams, 85 Pa. 299, 27 Am. Rep. 657.

2. Dorsey *v.* Abrams, 85 Pa. 299, 27 Am. Rep. 657.

3. **Usage among other banks not evidence of cashier's authority.**—Merchants' Nat. Bank *v.* State Nat. Bank, Fed. Cas. No. 9,449, 3 Cliff. 203, reversed in S. C., 10 Wall. 604, 19 L. Ed. 1008.

authority as they deem proper,[4] but this will not affect those to whom the limitation is unknown.[5] The fact that a teller is clothed with the power to certify checks will not in itself affect the right of the cashier to do the same thing.[6]

§ 145 (1fd) Assistant Cashier.—If the act of the assistant cashier of a bank in certifying a check is without authority, and unsustained by any prior practice or usage, it will not bind the bank even in favor of a bona fide holder.[7]

§ 145 (1fe) Teller.—The teller of a bank has no inherent, original power to certify checks drawn on the bank, and such power is not implied as incident to the proper performance of the duties of his office.[8] But the teller's authority to certify checks may be implied from previous transactions and acts of the same kind.[9] It has been held, however, that evidence of a usage can imply no original inherent power in a teller to certify checks, however it may bear on the question of binding the bank by the allowance of such a usage;[10] and that a usage for a teller to certify a check to enable the holder to use it at his pleasure is bad.[11] The usage of issuing certificates of deposit by a teller is not evidence to prove the usage of certifying checks.[12] Where the teller of a bank certifies checks of its depositors drawn upon it in the usual form under a general power to certify, such bank is responsible to holders in good faith and for value, notwithstanding private directions not to certify, in the absence of funds, without special permission.[13]

§ 145 (1g) Time of Certification.—An officer of a bank can not certify a check until after the day it is made payable.[14]

4. **Limitation of cashier's authority.**—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

5. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Clarke Nat. Bank *v.* Albion Bank (N. Y.), 52 Barb. 592.

6. **That teller is empowered to certify will not affect cashier's authority.**—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

7. **Assistant cashier has no authority to certify checks.**—Pope *v.* Bank, 57 N. Y. 126, reversing 59 Barb. 226.

8. **Authority of teller.**—Mussey *v.* Eagle Bank (Mass.), 9 Metc. 306.

9. Farmers', etc., Bank *v.* Butchers', etc., Bank, 28 N. Y. 425, 26 How. Prac. 1.

10. Mussey *v.* Eagle Bank (Mass.), 9 Metc. 306.

Evidence that the teller of a bank, during all the time of his holding office, whenever the convenience of the bank or of its customers required it, certified that checks were "good," which were drawn on the bank by its customers, when funds to the amount of such checks were to the credit of the drawers, and that his so doing was, in some instances, known to the bank, and was not forbidden, and that it was the usage of the tellers of other banks to do the same thing, does not warrant a jury to infer that the power of so doing was an original, inherent, implied power of the teller as such. Mussey *v.* Eagle Bank (Mass.), 9 Metc. 306.

11. Mussey *v.* Eagle Bank (Mass.), 9 Metc. 306.

12. Mussey *v.* Eagle Bank (Mass.), 9 Metc. 306.

13. Farmers', etc., Bank *v.* Butchers', etc., Bank, 28 N. Y. 425, 26 How. Prac. 1; S. C., 14 N. Y. 623.

14. **Time of certification.**—Clarke Nat. Bank *v.* Albion Bank (N. Y.), 52 Barb. 592.

§ 145 (1h) Certification of Postdated Checks.—Under the Idaho statutes[15] a bank can not certify a postdated check unless the money is actually on deposit to the credit of the drawer at the time of the certification.[16]

§ 145 (1i) Effect of and Implications Arising from Certification—§ 145 (1ia) In General.—The certification of a check by a bank is equivalent to the acceptance of a draft, or a bill of exchange payable on demand,[17] and like such acceptance, creates an original, actionable liability against the bank,[18] and implies that, when the check is certified. the drawer has sufficient funds with the bank to pay it,[19] that they have been set apart and will be retained for the holder, whoever that holder may be, and whenever the check may be presented,[20] and that when presented being

15 Rev. Codes, §§ 2988, 3469, 3644.

16. **Certification of postdated checks under Idaho statutes.**—Smith *v.* Field, 19 Idaho 558, 114 Pac. 668.

17. **Certification equivalent to acceptance.**—First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229; Smith *v.* Field, 19 Idaho 558, 114 Pac. 668; Muth *v.* St. Louis Trust Co., 88 Mo. App. 596; Meuer *v.* Phœnix Nat. Bank, 94 App. Div. 331, 88 N. Y. S. 83, affirming 183 N. Y. 551, 76 N. E. 1100; Security Bank *v.* National Bank, 67 N. Y. 458, 23 Am. Rep. 129; Andrews *v.* German Nat. Bank, 56 Tenn. (9 Heisk.) 211.

The certification of a check by a bank is in effect merely an acceptance. Thompson *v.* St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66; Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Helwege *v.* Hibernia Nat. Bank, 28 La. Ann. 520; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678; S. C., 28 N. Y. 425, 26 How. Prac. 1; Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331; In re Lathrop, 77 Hun 159, 28 N. Y. S. 407, 58 N. Y. St. Rep. 712; People *v.* St. Nicholas Bank, 77 Hun 159, 28 N. Y. S. 407; S. C., 77 Hun 611, 28 N. Y. S. 421; In re Homans, 77 Hun 611, 28 N. Y. S. 421, 59 N. Y. St. Rep. 881; People *v.* St. Nicholas Bank, 77 Hun 611, 28 N. Y. S. 422, 423, 59 N. Y. St. Rep. 881; Blake *v.* Hamilton Dime Sav. Bank Co., 79 O. St. 189, 87 N. E. 73, 20 L. R. A., N. S., 290.

18 **Creates an original, actionable liability against bank.**—Merchants' Bank *v.* Baird, 160 Fed. 642; Farmers', etc., Bank *v.* Butchers', etc., Bank, 28 N. Y. 425, 26 How. Prac. 1; Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331.

19. **Implies that drawer has sufficient funds.**—Merchants' Bank *v.* Baird, 160 Fed. 642; Thompson *v.* St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66; Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Smith *v.* Branch Bank, 7 Ala. 880; First Nat. Bank *v.* Northwestern Nat. Bank, 40 Ill. App. 640, affirmed on another point in 29 N. E. 884; Continental Nat. Bank *v.* Metropolitan Nat. Bank, 107 Ill. App. 455; American, etc., Sav. Bank *v.* Crowe, 82 Ill. App. 537; Parke *v.* Roser, 67 Ind. 500, 33 Am. Rep. 102; Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; Security Bank *v.* National Bank, 67 N. Y. 458, 23 Am. Rep. 129; Clews *v.* Bank, 89 N. Y. 418, 42 Am. Rep. 303; Cooke *v.* State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667; Irving Bank *v.* Wetherald, 36 N. Y. 335; Farmers', etc., Bank *v.* Butchers', etc., Bank, 28 N. Y. 425, 26 How. Prac. 1; Blake *v.* Hamilton Dime Sav. Bank Co., 79 O. St. 189, 87 N. E. 73, 20 L. R. A., N. S., 290.

20. **Implies that funds have been set apart and will be retained for holder.**—Thompson *v.* St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66; Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Merchants' Bank *v.* Baird, 160 Fed. 642; Smith *v.* Field, 19 Idaho 558, 114 Pac. 668; Wright *v.* MacCarty, 92 Ill. App. 120; Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; Freund *v.* Importers', etc., Nat. Bank, 76 N. Y. 352; Goshen Nat. Bank *v.* Bingham, 44 Hun 622, 7 N. Y. St. Rep. 493, affirmed in 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 16 Am. St. Rep. 765; Farmers', etc., Bank *v.* Butchers', etc., Bank, 11 N.

an unconditional obligation it will be paid.[21] The certification guarantees the genuineness of the drawer's signatures.[22] But it does not guarantee the genuineness of the signatures of the payee or other indorsers,[23] nor does it warrant the genuineness of the body of the check.[24] Upon the certification of a check the bank ceases to be the debtor of the drawer for the amount represented by the check,[25] and becomes the primary debtor to the holder of the check.[26] The drawer's interest

Y. Super. Ct. 219, affirmed in 16 N. Y. 125, 69 Am. Dec. 678; Bank *v.* Merchants' Nat. Bank, 91 N. Y. 166; Farmers', etc., Bank *v.* Butchers', etc., Bank, 28 N. Y. 425, 26 How. Prac. 1; Blake *v.* Hamilton Dime Sav. Bank Co., 79 O. St. 189, 87 N. E. 73, 20 L. R. A., N. S., 290.

By certifying a check the bank engages that funds sufficient to meet it shall not be withdrawn by the drawer to the prejudice of a bona fide holder. Clews *v.* Bank, 89 N. Y. 418, 42 Am. Rep. 303; Security Bank *v.* National Bank, 67 N. Y. 458, 23 Am. Rep. 129.

"By the certification of a negotiable check, properly negotiated, the depositary of the fund checked upon becomes liable to the owner of the certified paper, and is bound to have in readiness the money to meet it from the fund drawn upon." Freund *v.* Importers', etc., Nat. Bank, 76 N. Y. 352.

"When the check is not negotiable, or has not been indorsed, but has by assignment come into the hands of a lawful owner, who has a right to enforce it against the maker, the effect is the same." Freund *v.* Importers', etc., Nat. Bank, 76 N. Y. 352.

21. Implies that check will be paid.—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Thompson *v.* St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66; Farmers', etc., Bank *v.* Butchers', etc., Bank, 28 N. Y. 425, 26 How. Prac. 1; Blake *v.* Hamilton Dime Sav. Bank Co., 79 O. St. 189, 87 N. E. 73, 20 L. R. A., N. S., 290.

A bank by certifying a check creates a simple and unconditional obligation on its part to pay the same to the holder on demand. Willets *v.* Phœnix Bank, 9 N. Y. Super. Ct. 121; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678; Muth *v.* St. Louis Trust Co., 88 Mo. App. 596.

22. Guarantees genuineness of drawer's signature.—First Nat. Bank *v.* Northwestern Nat. Bank, 40 Ill. App. 640, affirmed on another point in 29 N. E. 884; Continental Nat. Bank *v.* Metropolitan Nat. Bank, 107 Ill. App. 455; Parke *v.* Roser, 67 Ind. 500, 33 Am. Rep. 102; Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; Security Bank *v.* National Bank, 67 N. Y. 458, 23 Am. Rep. 129; Clews *v.* Bank, 89 N. Y. 418, 42 Am. Rep. 303.

23. Signatures of payee or other indorsers not guaranteed.—First Nat. Bank *v.* Northwestern Nat. Bank, 40 Ill. App. 640, affirmed on another point in 29 N. E. 884; First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289 43 Am. St. Rep. 247.

24. Genuineness of body of check not warranted.—Continental Nat. Bank *v.* Metropolitan Nat. Bank, 107 Ill. App. 455; Parke *v.* Roser, 67 Ind. 500, 33 Am. Rep. 102; Security Bank *v.* National Bank, 67 N. Y. 458, 23 Am. Rep. 129.

25. Effect or certification upon bank's liability to drawer and holder.—Borne *v.* First Nat. Bank, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312.

26. Bickford *v.* First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436; Drovers' Nat. Bank *v.* Anglo-American Packing, etc., Co., 117 Ill. 100, 7 N. E. 601, 57 Am. Rep. 855; Farmers', etc., Bank *v.* Butchers', etc., Bank, 11 N. Y. Super. Ct. 219, affirmed in 16 N. Y. 125, 69 Am. Dec. 678.

The certification of a check as good by the authorized officer of a bank makes the bank primarily liable to the holder, until discharged by payment, release, or the statute of limitations. Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331.

By the certification of a check the amount thereof is charged against the depositor, and passes to the credit of the check, and renders the bank primarily liable as acceptor for its payment to any bona fide holder thereof. Poess *v.* Twelfth Ward Bank, 43 Misc. Rep. 45, 86 N. Y. S. 857, 14 N. Y. Ann. Cas. 439.

Where a bank certifies a depositor's check, which is delivered by the depositor to his creditor, the bank, by

in the money set aside to pay the check is terminated,[27] or at least such money is withdrawn from his control until payment of the check is refused;[28] and this is so regardless of whether he is actually charged on the books of the bank.[29] He has no longer the right to check out such money.[30] Nor can he or an indorser of the check, after its delivery, revoke it or stop

such certification, loses power to withhold payment from the holder of the check on demand. Herrmann, etc., Cabinet Works *v.* German Exch. Bank, 87 N. Y. S. 462.

Negotiable Instrument Law, Jan. 1897, p. 756, c. 612, § 323, as amended by Laws 1898, p. 977, c. 336, § 29, provides that, where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance. Section 324 (page 756) provides that, where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon. Section 325 (page 756) provides that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless it accepts or certifies the check. Section 79 (page 731) provides that, where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferror had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferror; and § 112 (page 734) provides that the acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance, and admits the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument. The payee of a check given to discharge an indebtedness due her transferred it without indorsement for consideration, and the transferee presented it at the bank, which certified it. Held, that the bank was liable, though it did not know who was the owner of the check when the certification was made. Judgment, Meuer *v.* Phœnix Nat. Bank, 94 App. Div. 331, 88 N. Y. S. 83, affirmed in 183 N. Y. 511, 76 N. E. 1100.

27. Effect of certification upon drawer's interest in money appropriated to pay check.—Wright *v.* MacCarty, 92 Ill. App. 120.

A certified check is supposed to be drawn upon a previous deposit of funds and when certified is an appropriation of such funds to the holder of the check. In such case the money no longer belongs to the drawer. Fidelity, etc., Co. *v.* National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782.

Negotiable Instruments Law (Laws 1897, p. 728, c. 612), § 60, provides that an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder. Section 90, p. 731, authorizes the holder to sue in his own name, and provides that payment to him in due course discharges the instrument. Section 321, p. 756, provides that a check is a bill of exchange, and, except as otherwise provided, the provisions of the act applicable to bills of exchange payable on demand apply to a check. Section 323, p. 756, declares that when a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance; and § 325, p. 756, provides that a check is not an assignment of any part of the funds to the credit of the drawer, and that the bank is not liable to the holder of a check until it accepts or certifies the same; and the effect of acceptance to which, by § 323, certification is made equivalent, is declared by section 112, p. 734, to be that the acceptor engages that he will pay it according to the tenor of the acceptance. Held, that where the drawer of a check himself procured it to be certified before delivery to the payees, and before presentation for payment the bank failed, the bank was not liable thereon to the drawer, but only to the holder in due course at the time of the failure, and hence the drawer on receiving the check from the payees after failure of the bank was not entitled to set off the amount thereof against an indebtedness to the bank. Schlesinger *v.* Kurzrok, 47 Misc. Rep. 634, 94 N. Y. S. 442.

28. Brown *v.* Leckie, 43 Ill. 497.

Where a check drawn by a depositor is certified, in the absence of fraud the amount is as much withdrawn from the depositor's credit as if the money had been paid. Central Guarantee, etc., Deposit Co. *v.* White, 206 Pa. 611, 56 Atl. 76.

29. Brown *v.* Leckie, 43 Ill. 497.

30. Wright *v.* MacCarty, 92 Ill. App. 120.

payment by notice to the drawee.[31] But it has been held that where the drawer of a check payable to a certain person or order has the same certified by the bank on which it is drawn, he may, at any time before any third person acquires a right in such check, alter it, making it payable to bearer; and, when so changed, the bank, by paying it to bearer, will be protected against any claim of the payee first named, or the claim of any person through any private agreement with the drawer, of which the bank had no notice.[32] The certification of a check at the request of the drawer, before delivery, does not discharge him from liability thereon.[33] The certification under such circumstances merely operates as an assurance that the check is genuine and the certifying bank becomes bound with the drawer.[34] But where a check is certified, after delivery, at the request of the holder, the drawer is discharged from further liability,[35] and the check then circulates as the representation of so much money in bank payable on demand to the holder of the check.[36]

§ 145 (1ib) Holder's Position That of a Depositor.—By the certification of a check the deposit which is represented by the check ceases to stand to the credit of the depositor, and passes to the credit of the check holder, who is thereafter a depositor to that amount, with the

31. After delivery check can not be revoked or payment stopped.—Blake *v.* Hamilton Dime Sav. Bank Co., 79 O. St. 189, 87 N. E. 73, 20 L. R. A., N. S., 290; Meridian Nat. Bank *v.* First Nat. Bank, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, 52 Am. St. Rep. 450.

32. Right of drawer to alter check after certification.—Abrams & Co. *v.* Union Nat. Bank, 31 La. Ann. 61.

33. Effect of certification upon drawer's liability.—Borne *v.* First Nat. Bank, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312; Times Square Automobile Co. *v.* Rutherford Nat. Bank, 77 N. J. L. (Vr.), 640, 73 Atl. 479; Davenport *v.* Palmer (App. Div.), 137 N. Y. S. 796.

"The party who accepts a certified check in the usual course of business is not bound to take the risk of the insolvency of the bank upon which it is drawn." Borne *v.* First Nat. Bank, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312.

34. Davenport *v.* Palmer (App. Div.), 137 N. Y. S. 796.

35. First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229; Wright *v.* MacCarty, 92 Ill. App. 120; Borne *v.* First Nat. Bank, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312; Meridian Nat. Bank *v.* First Nat. Bank, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, 52 Am. St. Rep. 450; Times Square Automobile Co. *v.* Rutherford Nat. Bank, 77 N. J. L. (48 Vr.) 649, 73 Atl. 479; Meuer *v.* Phœnix Nat. Bank, 94 App. Div. 331, 88 N. Y. S. 83, affirmed in 183 N. Y. 511, 77 N. E. 1100; National Lafayette Bank *v.* Cincinnati, etc., Fish Co., 10 O. Dec. 94, 18 Wkly. L. Bull. 350, affirmed in 4 O. C. C. 135, 2 O. C. D. 463; Davenport *v.* Palmer (App. Div.), 137 N. Y. S. 796.

"The holder, by procuring the certification of the check after he becomes the owner, voluntarily makes the bank upon which it is drawn his debtor, thus releasing the drawer. It is, in such a case, the holder's own act that changes the relation and situation of the parties." Borne *v.* First Nat. Bank, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312.

Where the holder of a check which is payable immediately, instead of demanding payment, procures the check to be certified, the check is, as between the drawer and holder, regarded as paid, so that a subsequent payment by the drawee after notice of the drawer's insolvency will not make it liable to the drawer's creditors. Strauss *v.* American Exch. Nat. Bank, 72 Ill. App. 314.

36. Wright *v.* MacCarty, 92 Ill. App. 120.

same, but no greater, rights than those of any other.[37] The transfer of a certified check is an assignment of the money to meet it, and the bank making the certification is liable to the holder.[38]

§ 145 (1ic) A Certified Check Not Money—Does Not Operate as Payment.—The certification fixes the liability of the bank, but it does no more. It does not make the check money. And as it is not money, but is simply an accepted order for money, it does not, of its own force and vigor, operate as money. It can not take the place of money without an express agreement to that effect, and therefore can not, by its own intrinsic force, operate as payment.[39]

37. Holder's position that of a depositor.—Girard Bank *v.* Bank, 39 Pa. 92, 80 Am. Dec. 507.

"When the payee, instead of insisting upon immediate payment, causes the check to be certified, he in effect causes the funds to be withdrawn from the control of the maker, and leaves them with the bank for his own accommodation. Such certification operates substantially as a certificate of deposit in favor of the payee." Davenport *v.* Palmer (App. Div.), 137 N. Y. S. 796.

If the holder of a check elects to procure its certification, it becomes, in his hands, substantially a certificate of deposit. By his own act he makes the bank his debtor, and releases the drawer of the check. The reason for this rule is that the moment the check is certified the funds cease to be under the control of the original depositor, and pass under the control of a person who procures the certification of the check drawn in his favor. Borne *v.* First Nat. Bank, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312.

Where a check is certified at the request of the holder, the drawer is discharged from further liability thereon under the express provisions of the New Jersey statute, Negotiable Instrument Act April 4, 1902, § 188 (P. L. p. 614), and a new contract is substituted between the holder and the bank, under which money called for by the check is transferred from the drawer's account to the holder's account, and the bank's obligation is the same as if the funds were actually paid to the holder, by him redeposited to his own credit, and a certificate of deposit issued to him. Times Square Automobile Co. *v.* Rutherford Nat. Bank, 77 N. J. L. (48 Vr.) 649, 73 Atl. 479.

38. Transfer of a certified check an assignment of the money to meet it.—Blake *v.* Hamilton Dime Sav. Bank Co., 79 O. St. 189, 87 N. E. 73, 20 L. R. A., N. S., 290.

Where a bank certifies a check, it is manifest that the bank has sufficient funds of the drawer at the time of the certification on deposit to pay it, and the transfer of the check carries with it, as against the bank, title to the amount named in it. American, etc., Sav. Bank *v.* Crowe, 82 Ill. App. 537.

39. Certified check not money—Does not operate as payment.—Borne *v.* First Nat. Bank, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312.

The agent of a lender of money to be used to take up an existing mortgage requested the mortgagee's agent to state whether he wanted the money in cash or by certified check, to which the latter replied that a certified check would do, whereupon a certified check, payable to the mortgagee, was tendered, to which the mortgagee's agent objected, on the ground that he desired the check payable to his own order, so that he could obtain his fees, whereupon the lender's agent made the check payable to the order of both, and had the change noted on the books of the bank, after which he gave the check to the agent and received satisfaction of the mortgage. Such agent deposited the check within ten minutes after it was received by him; but the bank on which it was drawn closed the following day, and the check was dishonored when presented for payment. Held, that the agent's request for certification of the check did not constitute an election to take the certified check in payment of the debt, and that the delivery thereof did not, therefore, constitute payment. Davenport *v.* Palmer (App. Div.), 137 N. Y. S. 796.

§ 145 (1id) Bank Bound without Regard to State of Drawer's Account.[40]—A certified check in the hands of a bona fide holder for value is valid, though the drawer had no funds in the bank when the check was certified, and the statute prohibits certification under such circumstances.[41] In such case the bank is estopped to deny that it possessed sufficient funds of the drawer to pay the check.[42] But a bank certifying a check without funds is not liable except to a bona fide holder for value.[43] And it has been held that a bank that has certified a check is not estopped to deny that the drawer has sufficient funds deposited with it for payment, as against one who has advanced money on the check on the strength of such certificate, receiving the same without indorsement.[44]

40. As to certification by mistake, see post, "Certification by Mistake," § 145 (1ii).

41. **Certified check valid though drawer had no funds in bank.**—First Nat. Bank *v.* Union Trust Co., 158 Mich. 94, 122 N. W. 547; Union Trust Co. *v.* Preston Nat. Bank, 136 Mich. 460, 99 N. W. 399, 112 Am. St. Rep. 370.

42. **Bank estopped to deny possession of sufficient funds.**—Jackson Paper Mfg. Co. *v.* Commercial Nat. Bank, 99 Ill. App. 198, reversed in Jackson Paper Mfg. Co. *v.* Commercial Nat. Bank, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657, 93 Am. St. Rep. 113; Cooke *v.* State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667; French *v.* Irwin, 63 Tenn. (4 Baxt.) 401, 27 Am. Rep. 769.

In 1862 a clerk of the Bank of Tennessee, who was authorized to certify checks, wrote across the face of a check "good," and soon afterwards, on the approach of the Federal army, the bank was removed south. In 1866 the check was again presented, and payment refused, the bank being insolvent. Held, that the bank was bound for payment of the check without regard to the state of the drawer's account. French *v.* Irwin, 63 Tenn. (4 Baxt.) 401, 27 Am. Rep. 769.

43. **Bank liable only to bona fide holder for value.**—Bowen *v.* Needles Nat. Bank, 87 Fed. 430, affirmed in 36 C. C. A. 553, 94 Fed. 925; Stevens *v.* Corn Exch. Bank (N. Y.), 3 Hun 147, 48 How. Prac. 351, 5 Thomp. & C. 283.

J. drew a check to the order of his wife, May 5, 1862, on a bank, which was on that day certified by the bank (J.'s account there being then good for the amount), but not charged up against J. He gave the check to his wife, who indorsed it, and returned it to him. It was put away and forgotten, and was not used until January 18, 1869, when it was transferred by J. to plaintiff in consideration of an executory agreement by plaintiff to pay a certain sum out of contingent profits from a patented article. At the time the check was drawn and certified, and afterwards, J. was the attorney in fact and agent of his wife, and did business in her name. Before the check was transferred to plaintiff, the deposit of J. in the bank had been reduced to a nominal sum. Held, that plaintiff did not part with value when the check was transferred to him, and only acquired the rights of J.'s wife; that although, by the certification, the wife became entitled to the amount of the check from her husband's deposit, she having assented to her husband's withdrawing that amount, and he having done it, although not by the use of the check, she had, through him, received the benefit of the amount of the check, and had no claim thereon against the bank. Stevens *v.* Corn Exch. Bank (N. Y.), 3 Hun 147, 48 How. Prac. 283, 5 Thomp. & C. 283.

Who is a bona fide holder for value.—The original holder of a check, who procures the certification thereof, may be a bona fide holder for value. First Nat. Bank *v.* Union Trust Co., 158 Mich. 94, 122 N. W. 547.

But the payee of a check, who procures its certification with knowledge that it is not certified on money actually deposited in the bank to the maker's credit, but on collateral deposited with the bank, is not a bona fide holder. First Nat. Bank *v.* Union Trust Co., 158 Mich. 94, 122 N. W. 547.

44. **Bank not liable to one who has advanced money on check, receiving it without indorsement.**—Goshen Nat. Bank *v.* Bingham, 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 16 Am. St. Rep. 765.

§ 145 (1ie) Implication That Check Has Passed from Bank's Custody.—Certification of a check usually implies that the check has passed from the bank's custody into the hands of some other party.[45]

§ 145 (1if) Certification Creates No Trust and Gives No Lien.—The certification of a check creates no trust in favor of the holder, and gives no lien on any particular portion of the assets of the bank.[46]

§ 145 (1ig) Bank's Liability Continues Indefinitely.—A certified check is not deemed dishonored by delay between its date and the time when it is sold to a bona fide purchaser for value, so that such purchaser takes it as overdue, and subject, on that account, to equities. By certifying the check, the bank becomes the primary debtor, and continues liable indefinitely, like an acceptor of a bill, until payment.[47]

§ 145 (1ih) Liability of Bank after Drawer's Funds Have Been Attached.—The obligation of a bank to pay a certified check to one presenting it, after the drawer's funds in the bank have been attached, depends upon the bona fides of the holder. If the bank has notice that this is lacking, it pays the check at its peril.[48]

§ 145 (1ii) Certification by Mistake.[49]—The prima facie admission in the certification of a check that the money drawn for is in the bank, subject to the order of the drawer, may be repelled by proof that the admission was made by mistake.[50] Where such mistake is shown, and the check has not passed out of the hands of the original holder, and

45. **Implication that check has passed from bank's custody.**—Potter *v.* United States, 155 U. S. 438, 39 L. Ed. 214, 15 S. Ct. 144; United States *v.* Heinze, 161 Fed. 425.

46. **Certification creates no trust and gives no lien.**—In re Lathrop, 77 Hun 159, 28 N. Y. S. 407, 58 N. Y. St. Rep. 712; People *v.* St. Nicholas Bank, 77 Hun 159, 28 N. Y. S. 407; S. C., 77 Hun 611, 28 N. Y. S. 421; In re Homans, 77 Hun 611, 28 N. Y. S. 421, 59 N. Y. St. Rep. 881; People *v.* St. Nicholas Bank, 77 Hun 611, 28 N. Y. S. 422, 59 N. Y. St. Rep. 881; S. C., 28 N. Y. S. 423.

47. **Bank's liability continues indefinitely.**—Nolan *v.* Bank (N. Y.), 67 Barb. 24.

A bank, by certifying a check to be "good," creates a simple and unconditional obligation on its part to pay the same on demand, and demand may be made at any time suiting the convenience of the party entitled to the payment, no laches being imputable to him by delay. Willets *v.* Phœnix Bank, 9 N. Y. Super. Ct. 121.

As between the holder of a check certified "good" and the bank which certified it, the bank becomes liable as on an acceptance, and it is as binding as its certificates of deposit or notes of circulation. The bank becomes so far the primary debtor that no delay in presenting, at least not for a year or more, will effect its obligation. Andrews *v.* German Nat. Bank, 56 Tenn. (9 Heisk.), 211.

One who, in good faith, and making all due inquiry, bought, three or four months after its date, a certified check which had been stolen, was held entitled to protection as a bona fide purchaser, and to collect the amount from the bank. Nolan *v.* Bank (N. Y.), 67 Barb. 24.

48. **Liability of bank after drawer's funds have been attached.**—Gibson *v.* National Park Bank, 49 N. Y. Super. Ct. 429.

49. As to certification of forged and altered checks, see post, "Certification of Forged and Altered Checks," § 145 (1ik).

50. **Proof of mistake repels prima facie admission that money is in bank.**—Smith *v.* Branch Bank, 7 Ala. 880.

no rights of third parties have intervened, the bank is liable, under the certification, only for the balance the drawer had on hand when the certification was made.[51] If a bank which has certified a check by mistake gives prompt notice of the mistake, except so far as there has been a change of circumstances by reason thereof, a revocation of such certification can be made.[52] And a bank which has, through mistake certified a check for an amount greater than the drawer has on deposit, may, upon discovering the mistake, and after the check has been delivered by the bank with certification to the holder, upon again getting temporary possession of it, cancel and make the certification of no effect as between the holder and the bank, provided no rights of other parties have intervened, and the situation or rights of the holder, between the certification of the check and its cancellation, has in no way changed.[53] Where a bank has by mistake certified a check drawn by one of its depositors for rents collected by him for his employer when the depositor had not sufficient funds to meet the same, the bare fact that the employer would have discharged the depositor if the check had not been certified, and prevented the collection of further rents by him, whereby further loss might have been prevented, is insufficient, as an element of damages, to render the bank liable to the employer on the certification for more than the amount of the depositor's funds in its hands when the certification was made.[54]

§ 145 (1ij) Certification Obtained by Fraud.—Where a bank is induced by fraud to certify a check of a depositor for an amount in excess of his deposit, it may countermand payment thereof at any time before payment is made to a bona fide holder;[55] and its right to do so is not

51. Bank liable under mistaken certification only for balance drawer had on hand.—Rankin *v.* Colonial Bank, 31 Misc. Rep. 227, 64 N. Y. S. 32.

52. Upon prompt notice of mistake certification can be revoked.—Brooklyn Trust Co. *v.* Toler, 65 Hun 187, 19 N. Y. S. 975, 47 N. Y. St. Rep. 420, affirmed in 138 N. Y. 675, 34 N. E. 515.

A drawee by mistake certified a check drawn to the order of P., chairman of a stock exchange, given as a margin to secure C. on certain stocks. P. deposited it with other moneys of the exchange, and the following day, before 10 a. m., the exchange was notified of the mistake, the drawee demanding the check, and offering to pay any loss suffered by C. Held, that the exchange could not hold the check to cover subsequent losses of the drawer to its members; and the subsequent payment of the check by the drawee through the clearing house, to comply with the rule requiring a certifying bank to pay the check, and settle all questions of validity with the parties to the paper, did not give the exchange any better title to the money than it had before; nor did it give claims for losses of its members against the drawer, in the hands of an assignee, any right to the avails of the check. Brooklyn Trust Co. *v.* Toler, 65 Hun 187, 19 N. Y. S. 975, 47 N. Y. St. Rep. 420, judgment affirmed in 138 N. Y. 675, 34 N. E. 515.

53. Right of bank upon regaining temporary possession of check to cancel certification.—Dillaway *v.* Northwestern Nat. Bank, 82 Ill. App. 71.

54. Damages insufficient to render bank liable for more than amount of drawer's deposit.—Rankin *v.* Colonial Bank, 31 Misc. Rep. 227, 64 N. Y. S. 32.

55. Right of bank to countermand payment.—Bank *v.* Baxter, 31 Vt. 101.

A depositor procured his check on plaintiff bank to be certified by fraud, and used it to pay a debt to H., depositing it, upon the direction of H., in M. Bank, to the credit of R. Bank. The check was paid by plaintiff to M. Bank before the facts relating to its procurement became known to it, but

affected by the fact that it took the drawer's note for the amount of the overdraft and valueless collateral securities, before it discovered the fraud.[56] When a certified check, which was obtained by fraud from a bank is cashed in good faith by a firm, and the payee, by mistake on both his part and that of the firm, fails to indorse it, the firm holds subject to all original defenses, and the bank is not estopped to deny liability from the fact that the check was certified.[57]

§ 145 (1ik) Certification of Forged and Altered Checks.—Where a forged check has been certified, the bank is liable to a bona fide holder who took it in the ordinary course of business.[58] The liability to such holder attaches upon the certification, and it is immaterial whether the indorsement of the check is that of the payee named, or whether a fictitious person is named as payee.[59] But where a bank in which a forged check has been deposited for collection permits the depositor, before the check is certified, to draw the money thereon, it can not recover the amount of the check from the bank on which it is drawn, and which subsequently certified it, unless it suffered loss through the failure of such bank to detect the forgery as soon as the check was presented for certification.[60] The certification of a check does not warrant the genuineness of the body of the check.[61] Therefore, where the amount of a check has been raised before certification, its certification will not entitle the holder, though bona fide, to recover from the bank the excess over the original

thereafter it immediately requested M. Bank to notify by telegraph R. Bank and H. that payment of the check was stopped, which notice reached them before notice of the deposit, which was sent by mail. Held, that the deposit of the check in, and its payment to, M. Bank, did not amount to a payment to H., because this was not done in conformity with any previous arrangement between him and M. Bank, and consequently was no payment to him until he had received notice of the deposit, and had assented thereto; that until then the payment of the check was countermandable by plaintiff; and that, as it was so countermanded, and notice thereof given to R. Bank and to H. before they received notice of the deposit, the right of plaintiff to the money represented by the check was superior to that of H. Bank *v.* Baxter, 31 Vt. 101.

56. Bank *v.* Baxter, 31 Vt. 101.

57. Transfer of check without indorsement—Bank not estopped to deny liability.—Goshen Nat. Bank *v.* Bingham, 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 16 Am. St. Rep. 765, distinguishing Lynch *v.* First Nat. Bank, 107 N. Y. 179, 13 N. E. 775, 1 Am. St. Rep. 803.

58. Liability of bank to bona fide holder of forged check.—Hagan *v.* Bowery Nat. Bank (N. Y.), 64 Barb. 197, 6 Lans. 490.

59. Hagen *v.* Bowery Nat. Bank (N. Y.), 64 Barb. 197, 6 Lans. 490.

60. Liability of bank to another bank paying check before certification.—In an action to recover the amount of certain forged checks certified by the defendant bank, it appeared that the checks had been deposited in plaintiff bank for collection, by one of its customers, who had been permitted before the certification to draw the money thereon, and had afterwards absconded. Plaintiff was promptly notified as soon as the forgery was discovered, and within six hours after the certification. Held, that the plaintiff could not recover, in the absence of anything to show that it could have succeeded in capturing the forger, and recovered the money, if the defendant had detected the forgery as soon as the checks were presented for certification. Louisiana State Bank *v.* Hibernia Bank, 26 La. Ann. 399.

61. See ante, "In General," § 145 (1ia).

amount of the check.[62] And on stronger grounds the holder of a check raised after certification can not recover from the bank, unless it is shown that the bank has been guilty of negligence.[63] And in either case, if the bank pays the check, the amount paid may be recovered back as money paid by mistake.[64] In such case the bank is not estopped from alleging the forgery by the fact that its teller, at the time the check was presented for certification, upon doubts being expressed in regard to it by the person presenting it, stated that it was right in every particular.[65] In such an action by a bank evidence that, by the custom and common understanding of banks and merchants, the word "certified," in certification of checks, is construed to import an obligation on the part of the certifying bank to pay the amount stated in the check, notwithstanding the body of it was forged, is inadmissible.[66]

§ 145 (1il) Certification by Agent or Officer of Bank without Authority or in Violation of Duty.—See ante, "Authority to Certify," § 145 (1f).

62. **Certification will not entitle holder of raised check to recover.**—Parke *v.* Roser, 67 Ind. 500, 33 Am. Rep. 102; Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; Security Bank *v.* National Bank, 67 N. Y. 458, 23 Am. Rep. 129.

But in Louisiana it has been held that a bank is liable to pay to a subsequent bona fide purchaser the amount of a check which it has certified, notwithstanding the check was fraudulently raised, if before certification, from a smaller amount. Louisiana Nat. Bank *v.* Citizens' Bank, 28 La. Ann. 189, 26 Am. Rep. 92.

63. **Negligence of bank warranting recovery by bona fide holder.**—The drawer of a check, after having it certified by the bank on which it was drawn, changed it to a larger amount, disposed of it in the regular course of business to an innocent purchaser, and then absconded. There was nothing in the appearance of the check, when transferred, to excité suspicion. Held, that the bank was negligent in certifying the check without drawing a line with a pen through the blank space following the amount, and was, therefore, liable to an innocent holder for the amount of the check as fraudulently altered. Helwege *v.* Hibernia Nat. Bank, 28 La. Ann. 520; Godchaux *v.* Union Nat. Bank, 28 La. Ann. 516.

In an action on a bill of exchange drawn on defendant bank, it appeared that the bill had been presented to defendant's paying teller, and certified by him, and that a memorandum of the bill and its certification were entered on defendant's register. Shortly afterwards the drawer notified defendant that the bill was lost, and not to pay it, and defendant added to the previous entry on its register the words: "Stop pay. See letter." Thereafter the bill with the name of the payee changed, and for a largely increased amount, but with the original number, was presented to plaintiffs in payment for bonds purchased by a stranger; and plaintiffs, before accepting it, sent it to defendant to ascertain if the certification was good. Held, that an instruction that plaintiffs could not recover if defendant's teller, in good faith, told plaintiff's messenger that the certification was good, was properly refused; as a recovery was warranted if the teller was negligent in failing to ascertain and disclose the facts to plaintiffs' messenger. Clews *v.* Bank, 114 N. Y. 70, 20 N. E. 852, affirming 105 N. Y. 398, 11 N. E. 814; Compare Clews *v.* Bank, 89 N. Y. 418, 42 Am. Rep. 303.

64. **Recovery by bank of money paid on raised check.**—Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; National Bank *v.* National Mechanics Banking Ass'n, 55 N. Y. 211, 14 Am. Rep. 232.

65. Security Bank *v.* National Bank, 67 N. Y. 458, 23 Am. Rep. 129. Compare Clews *v.* Bank, 114 N. Y. 70, 20 N. E. 852, affirming 105 N. Y. 398, 11 N. E. 814.

66. **Evidence inadmissible in action to recover money paid on raised check.**—Security Bank *v.* National Bank, 67 N. Y. 458, 23 Am. Rep. 129.

§ 145 (1im) Certification of Checks Obtained Fraudulently or in a Fictitious Name.—Where a check is certified at the request of the holder the bank can not avoid liability thereon by showing that the holder obtained it by false pretenses.[67] Where a bank certifies a check, which is afterwards transferred to an innocent holder for value, it can not set up, in defense to an action thereon, that it was obtained from the maker fraudulently and without value, or that the name of the payee is fictitious, where the person obtaining the check and the certification was intended to be the payee by the maker.[68]

§ 145 (1in) Forged Certification.—Where a forged certification of a check is presented, at the bank upon which the check is drawn, to the teller whose certificate it purports to be, and he pronounces it genuine, he adopts the certification, and the bank is bound by it the same as if it was genuine.[69]

§ 145 (1j) Effect of Over Certification of Checks by National Banks.—Congress, by the Act of March 3, 1869, only intended to impose, as penalty for over certification of checks by national banks a forfeiture of the franchise of the bank and a punishment of the delinquent officer, and did not intend to invalidate commerce transactions connected with forbidden certification.[70]

67. **Certification of checks obtained fraudulently or in a fictitious name.**—Times Square Automobile Co. *v.* Rutherford Nat. Bank, 77 N. J. L. (48 Vr.) 649, 73 Atl. 479.

68. Merchants', etc., Trust Co. *v.* Bank, 7 Daly (N. Y.), 137.

Where a check is drawn, payable to a person under a fictitious name, in payment for property which it afterwards appears he has stolen, and the bank at which it is payable certifies the check, a bank which subsequently cashes such check, on its being indorsed by the payee with his fictitious name, acquires a valid title thereto, which it can enforce against the certifying bank; it appearing that, though the payee acted all through under a fictitious name, yet the check was received by the identical person to whom its drawer intended to deliver it, and was by him indorsed in the name in which it was issued to him, and he, as was intended by the drawer, received the benefit of it. Meridian Nat. Bank *v.* First Nat. Bank, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, 52 Am. St. Rep. 450; distinguishing Armstrong *v.* Pomeroy Nat. Bank, 46 O. St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655.

69. **Forged certification.**—Continental Bank *v.* Commonwealth Bank, 50 N. Y. 575.

70. **Over certification of checks by national banks.**—Thompson *v.* St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66.

"The statute does not declare void a contract to secure a debt arising on the certifications which it prohibits. In addition to that, the statute expressly provides that a check certified by a duly-authorized officer of the bank, when the customer has not on a deposit an amount of money equal to the amount specified in the check certified, shall nevertheless be a good and valid obligation against the bank; and there is nothing in the statute which, expressly or by implication, prohibits the bank from taking security for the protection of its stockholders against the debt thus created. There is no prohibition against a contract by the bank for security for a debt which the statute contemplates as likely to come into existence, although the unlawful act of the officer of the bank in certifying may aid in creating the debt. In order to adjudge a contract unlawful, as prohibited by a statute, the prohibition must be found in the statute. The subjection of the bank to the penalty prescribed by the statute for its

§ 145 (1k) Cancellation of Check on Application of Drawer.—The rule that the possession of a check by the drawer raises a presumption that it has not been delivered to the payee, and, unless notice of a different state of facts is brought home to the banker upon whom the check is drawn, he has a right to act upon that presumption and cancel the check on the application of the drawer, applies to a certified check.[71]

§ 145 (1l) Effect of Bank's Mistake in Protesting Certified and Paying Uncertified Check.—If a bank depositor draws an uncertified check and a certified check against an account sufficient to pay one of them only, on a question of loss between the drawee bank and an innocent holder of the certified check resulting from the bank's mistake in protesting the certified check and in paying the uncertified one, the loss must fall on the bank.[72]

§ 145 (1m) Time of Demanding Payment of Check.[73]—Demand of payment of a certified check within a reasonable time is not necessary to render the bank liable to the holder.[74]

violation can not operate to destroy the security for the debt created by the forbidden certification." Thompson *v.* St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66. See Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. Ed. 188; National Bank *v.* Whitney, 103 U. S. 99, 26 L. Ed. 443; First Nat. Bank *v.* Stewart, 107 U. S. 676, 27 L. Ed. 592, 2 S. Ct. 778.

The subsequent enactment, on July 12, 1882, of § 13 of the act of that date, c. 288, 22 Stat. 166, making it a criminal offense in an officer, clerk or agent of a national bank to violate the provisions of the act of March 3, 1869, shows that congress only intended to impose, as penalties for over-certifying checks, a forfeiture of the franchises of the bank and a punishment of the delinquent officer or clerk, and did not intend to invalidate commercial transactions connected with forbidden certificates. Thompson *v.* St. Nichols Nat. Bank, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66.

Where brokers pledged with a national bank negotiable bonds on deposit with them as margins, as collateral security for repayment of any indebtedness which might exist to the bank at any time from them, and the bank afterwards paid and advanced money on the faith of the bonds and also certified checks for the brokers on the like faith when they had no money on deposit with the bank to their credit, this unlawful certification affected neither the validity of the checks nor the pledge, and the title of the bank to the bonds was good. Thompson *v.* St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66.

71. **Cancellation of check on application of drawer.**—Buehler *v.* Galt, 35 Ill. App. 225.

72. **Effect of bank's mistake in protesting certified and paying uncertified check.**—First Nat. Bank *v.* Bank, 141 Ky. 671, 133 S. W. 581.

73. As to length of continuance of bank's liability, see ante, "Bank's Liability Continues Indefinitely," § 145 (1ig).

74. **Demand of payment within reasonable time not necessary.**—Farmers', etc., Bank *v.* Butchers', etc., Bank, 11 N. Y. Super. Ct. 219, affirmed in 16 N. Y. 125, 69 Am. Dec. 678; Andrews *v.* German Nat. Bank, 56 Tenn. (9 Heisk.) 211.

A check drawn October 7, 1852, and certified, was not presented for payment until September 3, 1859. Meanwhile, on the 10th of October, 1854, the bank paid the money to the original depositor, taking his bond of indemnity against the check. Held, in an action upon the check, that the holder was not barred by his delay in making demand for payment, and that the taking of the indemnity was a distinct acknowledgment that the money then remained in bank to the credit of the holder of the certified check. Girard Bank *v.* Bank, 39 Pa. 92, 80 Am. Dec. 507.

§ 145 (1n) Rights and Liabilities of Bank Holding Certified Check Drawn on Another Bank.—Where a bank has received a certified check for deposit and has credited the amount to the depositor, it is a bona fide holder and may enforce payment, though before payment to the depositor it has notice that the check was fraudulently obtained.[75] In an action against the receiver of an insolvent bank on a check fraudulently certified and discounted for the drawer by plaintiff bank, the fact that more money was advanced to the drawer on the check than plaintiff was authorized to loan, or that usurious charges were made, will not invalidate plaintiff's claim.[76] The liability under which a bank is to one of its depositors upon a check left with it by him "for deposit," and which it has had certified by the bank upon which it is drawn, may be reached by process of garnishment.[77]

§ 145 (1o) Certification Not within Inhibition against Issuing Notes to Circulate as Money.—The certifying as "good" of checks given in the course of business for convenience, was not within the prohibition of the twenty-third section of the National Currency Act of 1864, which forbade the issue of post notes or "other notes" to circulate as money, other than the ordinary bank bills authorized by the act.[78]

§ 145 (1p) Indebtedness of Holder Can Not Be Set Off against Check.—A banker upon whom a certified check was drawn can not, when it is presented, set off the indebtedness of the holder against the check.[79]

§ 145(1q) Actions upon Certified Checks—§ 145 (1qa) By Whom Action May Be Brought.—There is a privity between a bank certifying a check, negotiable in form, and every holder thereof up to the time of its extinguishment, and the holder may sue the bank in the first instance.[80] Where under a statute a check becomes discharged on its payment in due course, one who has received payment of a certified check, but has repaid the money received thereon when threatened with suit, can not maintain an action against the bank on its certification.[81]

§ 145 (1qb) Demand an Essential Prerequisite.—The certifica-

75. **Title acquired by bank receiving check and crediting it to account of depositor.**—Blake *v.* Hamilton Dime Sav. Bank Co., 79 O. St. 189, 87 N. E. 73, 20 L. R. A., N. S., 290.

76. **Facts not invalidating bank's claim.**—Detroit Nat. Bank *v.* Union Trust Co., 145 Mich. 656, 108 N. W. 1092.

77. **Liability of bank to depositor may be reached by garnishment.**—National Commercial Bank *v.* Miller & Co., 77 Ala. 168, 54 Am. Rep. 50.

78. **Certification of checks not within inhibition against issuing notes to circulate as money.**—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

79. **Indebtedness of holder can not be set off against check.**—Brown *v.* Leckie, 43 Ill. 497.

80. **Holder may sue bank in first instance.**—Louisiana Ice Co. *v.* State Nat. Bank (La.), 1 McGloin 181.

81. **One who has repaid money received on check can not maintain action—Statute construed.**—Poess *v.* Twelfth Ward Bank, 43 Misc. Rep. 45, 86 N. Y. S. 857, 14 N. Y. Ann. Cas. 439, construing Negotiable Instrument Law (Laws 1897, p. 731, c. 612).

tion of a check does not make it payable without demand, so as to allow an action to be brought without a demand.[82]

§ 145 (2) Notes—§ 145 (2a) Effect of Certification—§ 145 (2aa) In General.—The legal effect and force of the certification of a note by a bank is that the maker has deposited funds in the bank to meet the note, and that the bank then holds the same in deposit for that purpose, and will pay the amount upon request.[83] But where a note is falsely certified by the teller as good, when the bank has no funds for its payment, the bank is liable only to a bona fide holder for value.[84]

§ 145 (2ab) Certification by Mistake.—A bank which, by mistake, has certified a promissory note, made payable at its banking house, to be "good," can correct such mistake before rights or liabilities have been incurred or losses sustained in consequence of it;[85] and if under such circumstances the bank pays the note it may recover back the amount so paid, even though the officer making the certification was guilty of negligence,[86] or it may hold the indorsers liable.[87] In such case it is immaterial that on previous occasions paper of the drawers had been certified without reference to the state of their account, if it appears that this had only been done under exceptional circumstances and with the direct authority of the bank's officers.[88] But if the holder of a note certified by mistake, has, by reason of his reliance upon such certification, suffered a loss, as by failing to charge the indorsers as upon nonpayment, on pres-

82. Demand an essential prerequisite to action.—Bank *v.* Merchants' Nat. Bank, 91 N. Y. 106.

83. Effect of certification.—Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331.

The certification by a bank of a note made payable at such bank, where the maker keeps an account, is an absolute promise by the bank to pay such note, not as the debt of another, but as its own obligation, entitling the holder to suspend any remedy against the maker and relax steps to charge an indorser. Riverside Bank *v.* First Nat. Bank, 20 C. C. A. 181, 74 Fed. 276.

84. False certification.—Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331.

A holder, who, ignorant of the falsity of the teller's certification treats it as payment, and omits to charge an indorser, is entitled to recover against the bank as a bona fide holder for value. Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331.

85. Right to correct mistake.—Second Nat. Bank *v.* Western Nat. Bank, 51 Md. 128, 34 Am. Rep. 300; National Park Bank *v.* Steele, etc., Mfg. Co., 58 Hun 81, 11 N. Y. S. 538, 33 N. Y. St. Rep. 890; Irving Bank *v.* Wetherand, 36 N. Y. 335. But see Riverside Bank *v.* First Nat. Bank, 20 C. C. A. 181, 74 Fed. 276.

Where a bank at which a note is made payable erroneously certifies that the note is "good," but the error is discovered, and the presenting bank notified, in season to enable it to make a representation, and charge the indorsers, the certifying bank is not liable. Irving Bank *v.* Wetherand, 36 N. Y. 335.

86. Right to recover back money paid.—National Park Bank *v.* Steele, etc., Mfg. Co., 58 Hun 81, 11 N. Y. S. 538, 33 N. Y. St. Rep. 890, contra Riverside Bank *v.* First Nat. Bank, 20 C. C. A. 181, 74 Fed. 276.

87. Right to hold indorsers liable.—Irving Bank *v.* Wetherand, 36 N. Y. 335.

88. Effect of having previously certified drawer's paper without reference to state of their account.—National Park Bank *v.* Steele, etc., Mfg. Co., 58 Hun 81, 11 N. Y. S. 538, 33 N. Y. St. Rep. 890.

entation, the certifying bank will be estopped from denying the truth of its certification.[89]

§ 145 (2b) Effect of Holder's Delay in Obtaining Payment.—The holder's delay, at the request of the maker of the note, who was the president of the bank, whose teller certified it, and for his accommodation, after its certification, to obtain actual payment, will not discharge the obligation arising from the certificate.[90]

§ 146. Payment of Lost or Stolen Paper—§ 146 (1) Certificates of Deposit.—In Indiana it has been held that a certificate of deposit payable in "current funds" is not negotiable, and if it is lost or stolen the depositor may recover thereon without giving a bond to indemnify the bank.[91] In Ohio it has been held that such a certificate is negotiable, but that if it is lost before indorsement by the depositor, it can invest the finder with no title, and the depositor may maintain a suit at law to recover on such certificate upon refusal of the bank to surrender the deposit, unless he shall execute to it an indemnity bond against possible loss, even though the terms of the certificate make the same payable "on return of the certificate."[92] The rule of law usually is, that where a certificate of deposit is issued by a bank, and it comes back to the bank issuing it with the indorsement of the depositor through the hands of bona fide innocent parties, the indorsement being forged, the bank paying the deposit certificate must lose it.[93] But where the certificate is issued to one who can not write his name, and is stolen from the payee, and the thief presents it to another bank for collection, and such bank, without identifying the thief, takes the certificate with the thief's mark indorsed thereon, and properly witnessed, and sends it for collection to the bank issuing it, and receives the money, and pays it to the thief, the bank issuing the certificate is entitled to assume that the payee had been properly identified, and, having paid the amount to the real payee, is entitled to recover from the collecting bank.[94]

§ 146 (2) Checks.—Where the payee of a bank check indorses it in blank and it is lost, he can not recover of the bank for paying it to a bona fide purchaser, though he had notified the bank of its loss.[95] A drawer of a check payable to himself may be estopped by his conduct from claim-

89. **When bank is estopped from denying truth of certification.**—Irving Bank *v.* Wetherand, 36 N. Y. 335. See, also, National Park Bank *v.* Steele, etc., Mfg. Co., 58 Hun 81, 11 N. Y. S. 538, 33 N. Y. St. Rep. 890.

90. **Effect of holder's delay in obtaining payment.**—Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331.

91. **Certificate of deposit payable in current funds.**—National Bank *v.* Ringel, 51 Ind. 393.

92. Citizens' Nat. Bank *v.* Brown, 45 O. St. 39, 11 N. E. 799, 4 Am. St. Rep. 526. See, also, Citizen's Nat. Bank *v.* Brown, 11 Wkly. L. Bull. 220, 9 O. Dec. 215.

93. **Liability of bank paying certificate upon forged indorsement.**—State Nat. Bank *v.* Freedmen's Sav., etc., Co., 22 Fed. Cas. No. 13,324, 2 Dill. 11.

94. State Nat. Bank *v.* Freedmen's Sav., etc., Co., 22 Fed. Cas. No. 13,324, 2 Dill. 11.

95. **Check indorsed in blank and lost.**—Unaka Nat. Bank *v.* Butler, 113 Tenn. 574, 83 S. W. 655.

ing that the check was not negotiable, where, after being indorsed in blank, it has been lost, and on presentation by a stranger has been paid by the bank.[96] If a check payable to a certain person "or order," is stolen, and the thief erases the words "or order," and inserts the words "or bearer," and obtains the money from the bank, the bank is liable to the drawer for the amount so paid, unless the drawer was guilty of negligence by which the paying teller was misled.[97] Where the payees of a check payable to their order, indorse it to the order of the cashier of a bank and, inclosing it in an envelope, send it to the bank for deposit by a messenger whom they know to be untrustworthy, and the messenger removes the check from the envelope and presents it to the bank for payment, stating that the payees desire the money, and the bank gives to the messenger the amount of the check and he absconds with it, and the payment is not in the usual course of business, the payees can recover of the bank the amount of the check.[98] Where a lost check is paid by a banker on a forged indorsement, and the owner of the check sues the banker to recover the amount thereof, the measure of damages is the full amount for which the check was drawn.[99]

§ 147. Payment of Forged or Altered Paper—§ 147 (1) Right of Bank to Recover Back Money Paid—§ 147 (1a) Where Signature Forged.—General Rule.—While it has often been stated as the general rule that if the drawee of a bill of exchange, to which the drawer's name has been forged, accepts or pays the same, he can neither repudiate

96. **Estoppel to claim check was not negotiable.**—Plaintiff drew a check payable to himself, without adding the words "or order," "or bearer." He indorsed it, "Pay to the Fourth National Bank," but erased these words, and left it indorsed in blank. The check was lost, and, on presentation by a stranger, was paid. Held, that the drawer was estopped from claiming that the check was not negotiable, and could not charge the bank. Bowden *v.* Third Nat. Bank, 7 Wkly. L. Bull. 283, 8 O. Dec. 394.

97. **Liability of bank paying thief who has altered indorsement.**—The owners of a deposit in bank signed several checks drawn payable to [blank] or order, and left them with their bookkeeper, to be filled up and sent by mail to several parties living at a distance, for the payment of debts owed to them severally. The bookkeeper handed these checks to a clerk, to be filled up with the proper dates, names, and amounts, leaving them payable to the order of the several creditors. The clerk did so, and then returned them to the bookkeeper, who examined them, found them correct, stamped them, canceled the stamps, placed them, with the accounts to be paid by them, in envelopes, sealed the envelopes, and addressed them to the proper persons. The sealed letters were delivered to the clerk to carry to the postoffice. He opened the letters and took out the checks surreptitiously, and by the erasure of the words "or order," and inserting the words "or bearer," obtained the money from the bank. Held, that the bank was not protected in making the payment, but was liable to the depositors for the amount of the deposit. The circumstances did not show any negligence on the part of the depositors by which the paying teller had been misled. Belknap *v.* National Bank, 100 Mass. 376, 97 Am. Dec. 105.

98. **Check indorsed to order of cashier paid to messenger on his false representations.**—Bristol Knife Co. *v.* First Nat. Bank, 41 Conn. 421, 19 Am. Rep. 517.

99. **Measure of damages where check is paid on forged indorsement.**—Survey *v.* Wells, etc., Co., 5 Cal. 124.

the acceptance nor recover the money paid,[1] since he is bound to know the drawer's signature,[2] and that, having paid a check, a bank can not be heard to say that the signature of the maker was not genuine, or recover on the ground that the same was forged,[3] yet it has been held, in numerous decisions, that the doctrine as to the effect of acceptance or payment of negotiable paper bearing the forged signature of the maker applies only in favor of one who is a holder for value of the instrument which turns out to have been forged,[4] and has no application in behalf of one acquiring the paper in the absence of any consideration whatever therefor either present or past.[5] Still other decisions disapprove of the former rule as being contrary to the general principle that money paid by mistake may be recovered back, and make the right of the bank to recover back money paid upon a forged signature depend on whether or not the payee has done his full duty, or, if he has and the negligence is with the bank, whether the payee will be worse off by correcting the error than if payment had been refused.[6] According to these decisions, a payee receiving money

1. **Paper accepted or paid by drawee where drawer's name forged.**—Price *v.* Meal (Eng.), 3 Burrows 1354; Bank *v.* Bank (U. S.), 10 Wheat. 333, 6 L. Ed. 334; Goddard *v.* Merchants' Bank, 4 N. Y. 147; National Park Bank *v.* Ninth National Bank, 46 N. Y. 77, 7 Am. Rep. 310; Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84.

2. **Drawee bound to know signature of drawer.**—Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84. And see cases cited to preceding text.

In some jurisdictions statutory provisions, declaratory of the common law exist, to the effect that the acceptor of a negotiable instrument admits the existence of a drawer, the genuineness of his signature, and his capacity and authority to draw the instrument. Title Guarantee, etc., Co. *v.* Haven, 196 N. Y. 487, 89 N. E. 1082, reversing 126 App. Div. 802, 111 N. Y. S. 305.

3. Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84.

Where all the indorsements on a check are genuine and the maker's signature is forged, a bank can not recover back payment on such check. Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84.

4. **Application of rule limited to holder for value of forged instrument.**—Title Guarantee, etc., Co. *v.* Haven, 196 N. Y. 487, 89 N. E. 1082, reversing 126 App. Div. 802, 111 N. Y. S. 305.

5. **Inapplicable where paper required in absence of consideration.**—Title Guarantee, etc., Co. *v.* Haven, 196 N. Y. 487, 89 N. E. 1082, reversing 126 App. Div. 802, 111 N. Y. S. 305.

Negotiable Instruments Law (Consol. Laws, c. 38), § 112, providing that the acceptor of a negotiable instrument admits "the existence of a drawer, the genuineness of his signature, and his capacity and authority to draw the instrument," is merely declaratory of the common law, and, as to a forged instrument, applies only in favor of a holder for value, and the rule therefore that he who accepts such an instrument to which the drawer's name is forged is bound by the act, and can neither repudiate the acceptance nor recover the money paid, does not apply in behalf of one who acquired the paper with consideration, either present or past, and for these reasons such section does not apply to a bank paying a forged check, purporting to be drawn by one of its depositors, not given to pay any existing or antecedent debt of the depositor or the forger, and nothing therein prevents recovery by the bank on account of the payment so made. Judgment 126 App. Div. 802, 111 N. Y. S. 305, reversed in Title Guarantee, etc., Co. *v.* Haven, 196 N. Y. 487, 89 N. E. 1082.

6. **Modification of former rule.**—American Exp. Co. *v.* State Nat. Bank, 27 Okl. 824, 113 Pac. 711; First Nat. Bank *v.* Ricker, 71 Ill. 439, 22 Am. Rep. 104; First Nat. Bank *v.* First Nat. Bank, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450; First Nat. Bank *v.* State Bank, 22 Neb. 769, 36 N. W. 289, 3 Am. St. Rep. 294; First National

from a bank upon a check purporting to be drawn upon it by one of its depositors, but the signature of which was in fact forged, is not entitled to retain the same, except upon the following combination of facts: First, that the payee was not negligent in receiving the check; second, that the payor was lacking in due care in paying the same; and, third, that upon the payor's action the payee has changed his position or would be in a worse condition if the mistake was corrected than if the payor had refused to pay the check at the time of its presentment.[7] The first step in bringing about the payment of a forged check is the act of the holder of the check in assuming and representing himself to have a right, which he has not, to receive the money. One who, by presenting forged paper to a bank, procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine, and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money which, in equity and good conscience, has never ceased to be its property.[8] It is not a case in which a consideration, which has once existed, fails by subsequent election or other act of either party, or of a third person; but there is never, at any stage of the transaction, any consideration for the payment.[9] But, if either party has been guilty of negligence or carelessness by which the other

Bank *v.* Bank, 15 N. Dak. 299, 108 N. W. 546, 10 L. R. A., N. S., 49, 125 Am. St. Rep. 588; Canadian Bank *v.* Bingham, 30 Wash. 484, 71 Pac. 43, 60 L. R. A. 955.

"In Ellis *v.* Ohio Life Ins., etc., Co., 4 O. St. 628, 64 Am. Dec. 610, it was held that: 'To entitle the holder to retain money obtained by mistake upon a forged instrument, he must occupy the vantage ground, by putting the drawee alone in the wrong; and he must be able truthfully to assert that he put the whole responsibility upon the drawee, and relied upon him to decide, and that the mistake arising from his negligence can not now be corrected without placing the holder in a worse position than though payment had been refused. If the holder can not say this, and especially if the failure to detect the forgery, and consequent loss, can be traced to his own disregard of duty, in negligently omitting to exercise some precaution which he had undertaken to perform, he fails to establish a superior equity to the money, and can not with a good conscience retain it.'" American Exp. Co. *v.* State Nat. Bank, 27 Okl. 824, 113 Pac. 711.

7. American Exp. Co. *v.* State Nat. Bank, 27 Okl. 824, 113 Pac. 711.

8. Leather Mfg'rs Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 32 L. Ed. 342, 9 S. Ct. 3.

The liability to the bank of a person who has received money from it on a forged check or order, is that of a debtor, not that of trustee or bailee, but it differs in other respects from that of a bank to its depositor. Leather Mfg'rs Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 32 L. Ed. 342, 9 S. Ct. 3.

9. Leather Mfg'rs Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 32 L. Ed. 342, 9 S. Ct. 3; Espy *v.* Bank (U. S.), 18 Wall. 604, 21 L. Ed. 947; Cabot Bank *v.* Morton (Mass.), 4 Gray 156; Aldrich *v.* Butts, 5 R. I. 218; White *v.* Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612; Gurney *v.* Womersley, 4 El. and Bl. 133.

The plaintiff's right of action did not depend upon any express promise by the defendant after the discovery of the mistake, or upon any demand by the plaintiff upon the defendant, or by the depositor or any other person upon the plaintiff; but it was to recover back the money, as paid without consideration, and had and received by the defendant to plaintiff's use. Leather Mfg'rs Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 32 L. Ed. 342, 9 S. Ct. 3.

has been injured, the negligent party must bear the loss.[10] The responsibility of the drawee, who pays a forged check, for the genuineness of the drawer's signature, is absolute only in favor of one who has not by his own fault or negligence contributed to the success of the fraud or to mislead the drawee,[11] and the drawee of a check, the signature of the drawer of which is a forgery, may recover the amount paid the payee, if the latter by his own fault or negligence contributed to the fraud, or to the mistake of fact, under which it was paid.[12] Where a forged check goes through the clearing house, and is paid by the drawee bank without inspection, it may recover back the money if it is not guilty of laches, and there has been no change of position on the part of the holder, though it failed to return the check within the time allowed by the rules of the clearing house.[13]

§ 147 (1b) Where Indorsement Forged.—It is a well-settled general rule that one who has paid a bill or draft to one holding it under a forged indorsement may recover back the amount if he proceed with due diligence.[14] And so with a payment to one presenting check with forged

10. Negligence bars right to recovery.—Espy *v.* First Nat. Bank (U. S.), 18 Wall. 604, 21 L. Ed. 947.

A bank can not cash a check drawn on it knowing that the signature thereof is not that of its purported maker, and then hold the indorser for collection for the amount. National Bank *v.* First Nat. Bank (Mo. App.), 125 S. W. 513.

11. National Bank *v.* Bangs, 106 Mass. 441, 8 Am. Rep. 349.

12. National Bank *v.* Bangs, 106 Mass. 441, 8 Am. Rep. 349; Welch *v.* Goodwin, 123 Mass. 71, 25 Am. Rep. 24.

The drawee of a bank check is presumed to know the signature of the drawer; and, if the drawer pays a forged check to the holder, he will not be entitled to recover back the money so paid, where there has been no fraud practiced upon him. But this doctrine proceeds on the ground that the loss has arisen through some neglect or default; and, the presumption being that the drawee knows the handwriting of the drawer, the drawee, or payor, of a forged bank check can recover back the amount paid by him on it, where the holder, or payee, is himself at fault, or has been guilty of fraudulent practices which may have thrown the drawee off his guard. First Nat. Bank *v.* Ricker, 71 Ill. 439, 22 Am. Rep. 104.

Where the holder of a forged check, which he had received without knowing that it was a forgery, after requiring knowledge of facts calculated to arouse suspicion that it was not genuine, presented it to the bank upon which it was drawn, and demanded payment, without disclosing such fact, and was told by the teller of the bank that he was not certain of the signature to the check, and would pay only on condition that the holder would indorse it, which he did, the bank may recover of the holder the money paid upon the check, if it was a forgery. First Nat. Bank *v.* Ricker, 71 Ill. 439, 22 Am. Rep. 104.

13. Check paid through clearing house.—National Bank *v.* Bangs, 106 Mass. 441, 8 Am. Rep. 349.

Where a check goes through the clearing house, and is subsequently allowed by the drawee bank, which does not discover that the check is forged until too late, by the rules of the clearing house, to return it, the right of the drawee to recover the money from the payee must be governed by the general principles applicable when the check is paid at the counter in the ordinary mode. National Bank *v.* Bangs, 106 Mass. 441, 8 Am. Rep. 349.

14. Recovery of payments where indorsement forged.—Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84; Holt *v.* Ross, 54 N. Y. 472, 13 Am. Rep. 615; Corn Exch. Bank *v.* Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; Canal Bank *v.* Bank (N. Y.), 1 Hill 287; Second Nat. Bank *v.* Guarantee Trust, etc., Co., 206 Pa. 616, 56 Atl. 72; First Nat. Bank *v.* Farmers', etc., Bank, 56 Neb. 149, 76 N. W. 430; First Nat. Bank *v.* Omaha Nat. Bank, 59 Neb. 192, 80 N. W. 810.

Before paying the check of a customer the drawee is not bound to as-

indorsement of payee's name.[15] If, however, although an indorsement is forged, the money is paid to the party entitled to it, the drawee has no rea-

certain the genuineness of the payee's indorsement thereof, and therefore, upon discovery that the payee's name was forged, the drawee may recover the amount paid from the person who received payment. Corn Exch. Bank v. Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655.

Where one who has received a check in due course of trade, upon which the name of the payee has been fraudulently indorsed, obtains the money on it from a bank, he is liable to the bank for the amount so obtained, the bank having accounted for the check to the payee. Levy v. First Nat. Bank, 27 Neb. 557, 43 N. W. 354.

Agents for the collection of a check indorsed it for that purpose, and it was paid by the drawees. It afterwards appeared that the indorsement to the agents was a forgery of the name of him to whose order it was payable. The agency was not known to the drawees when they paid the check. Held, that they might recover back the amount of the agents. Merchants' Bank v. McIntyre, 4 N. Y. Super. Ct. (2 Sandf.) 431.

An agent of the payee in a certificate of deposit issued by a bank indorsed it, without authority, by writing the name of the payee thereon, to a firm for collection. The firm collected the money from the bank, and paid it to the agent, without any notice that his indorsement was a forgery. Held that, the payee having recovered the money from the bank, the bank was entitled to judgment against the firm, there being nothing on the certificate inconsistent with the conclusion that the latter were the legal holders and owners, for value, of the certificate. Gueydon Bros. v. Quintanilla, 2 Tex. App. Civ. Cases, § 617.

Evidence in action against last indorsee.—In an action by a bank against the last indorser of a check drawn on the bank by one of its depositors and paid by it, in which it appeared that the drawer of the check caused it to be delivered to an imposter, supposing her to be the person whose name she assumed, and the plaintiff afterwards, on the claim of the depositor that the indorsement of the payee was a forgery, paid him the amount of the check, the plaintiff by recognizing the right of the depositor to the return of the money as having been improperly paid to the party receiving the check from him takes his place, and is bound by whatever testimony would bind him had it refused his demand for payment and suit had been by him against the bank to recover the money under the forged indorsement of his check. Central Nat. Bank v. National Metropolitan Bank, 31 App. D. C. 391.

15. Recovery from payee on forged indorsement.—If a bank, upon which a check is drawn payable to a particular person or order, pays the amount of the check to one presenting it with a forged indorsement of the payee's name, both parties supposing the indorsement to be genuine, the right of action of the bank to recover the money from the person so obtaining it accrues immediately upon the payment of the money. Leather Mfg'rs Nat. Bank v. Merchants' Nat. Bank, 128 U. S. 26, 32 L. Ed. 342, 9 S. Ct. 3.

Where one receives a check payable to his own order from a stranger, or third party, drawn in another's name, and the payee indorses it, and it is paid by the drawee bank, the latter may recover from the payee on its being discovered that the drawer's name is a forgery, since the indorsement by the payee removes all suspicion as to the genuineness of the paper. National Bank v. Bangs, 106 Mass. 441, 8 Am. Rep. 349.

A bank crediting one with the amount of a check on the faith of his indorsement is entitled to recover it of him on proof that a prior indorsement was forged. Egner v. Corn Exch. Bank, 42 Misc. Rep. 552, 86 N. Y. S. 107.

There was presented to a trust company by its local correspondent an application for a loan, offering certain land as security. The application was signed "B," and an abstract also tendered showed title in B. The loan having been accepted, a bond and mortgage were tendered, purporting to be executed by B. The company sent to the correspondent a check payable to the order of B. This check was presented to a bank, bearing the indorsement "B," and also the indorsement of the correspondent. B. did not own the land, and the abstract was false and forged. Held that, if the correspondent himself signed the application, bond, and mortgage, and indorsed the check, the indorsement was a forgery. First Nat. Bank v. Farmers', etc., Bank, 56 Neb. 149, 76 N. W. 430; First Nat.

son to complain, and no right of action over.[16] A bank is not chargeable with knowledge of the genuineness of the signature of a depositor appearing as indorser on a paper drawn by a third person on another bank, and made payable to the depositor, and by paying such paper it does not admit the genuineness of the indorsement.[17]

§ 147 (1c) Raised or Altered Checks.—In the case of raised or altered checks paid by banks on which they were drawn, there are numerous well-considered cases where the right to recover has been established, when neither the party receiving nor the party paying has been in any fault or blame in the matter.[18] Of course if there is fault on the part of the party

Bank *v.* Omaha Nat. Bank, 59 Neb. 192, 80 N. W. 810.

Where a check is payable to the order of a named payee, one who takes it on the forged indorsement of the payee, and himself indorses it, is liable to the bank on which it is drawn, if that bank pays it in ignorance of the forgery. First Nat. Bank *v.* Farmers', etc., Bank, 56 Neb. 149, 76 N. W. 430; First Nat. Bank *v.* Omaha Nat. Bank, 59 Neb. 192, 80 N. W. 810.

If the signature of the maker of a check is genuine and only the indorsements or any of them forged, the bank paying such check can recover back the payment. Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84.

16. Where money paid to party entitled though indorsement forged.—First Nat. Bank *v.* Marshalltown State Bank, 107 Iowa 327, 77 N. W. 1045, 44 L. R. A. 131.

A drawee bank which pays a forged check to the owner, who is also a subsequent indorser, can not recover back from him, as having, by his indorsement, guarantied a prior indorsement which was forged; since the forgery of the indorsement was not the cause of the loss. First Nat. Bank *v.* Marshalltown State Bank, 107 Iowa 327, 77 N. W. 1045, 44 L. R. A. 131.

17. Bank not chargeable with knowledge of genuineness of depositor's signature as indorser, etc.—Missouri-Lincoln Trust Co. *v.* Third Nat. Bank (Mo. App.), 133 S. W. 357. See also, First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247, in which the court said: "A drawee is bound to know the signatures of his own customers, and a bank is bound to know the signatures of those who deposit with it and draw checks against such deposits. But the drawee or bank is not chargeable with knowledge of any other signature on the bill of exchange or bank check, and by accepting or paying the bill or check does not admit the genuineness of any indorsement on it. * * * And even if a drawer draws a bill or a check payable to himself or his own order, and at once indorses it, and acceptance or payment of it by the drawee admits only the genuineness of the drawer's original signature, but not the genuineness of his indorsement."

18. Recovery back of payment on raised or altered check.—Espy *v.* Bank (U. S.), 18 Wall. 604, 21 L. Ed. 947; Redington *v.* Woods, 45 Cal. 406, 13 Am. Rep. 190; Continental Nat. Bank *v.* Metropolitan Nat. Bank, 107 Ill. App. 455; Parke *v.* Roser, 67 Ind. 500, 33 Am. Rep. 102; Merchants' Bank *v.* Exchange Bank, 16 La. 457; Levy *v.* First Nat. Bank, 27 Neb. 557, 43 N. W. 354; Merchants' Bank *v.* McIntyre, 4 N. Y. Super. Ct. (2 Sandf.) 431; National City Bank *v.* Westcott Exp. Co., 26 Wkly. Dig. 161; City Bank *v.* First Nat. Bank, 45 Tex. 203.

A check drawn by S. & M. on the bank for $26.50, in favor of H., was raised to $3,920, and the payee's name changed to E. H. & Co., and offered to the latter by a stranger in payment for bonds and gold purchased by him. E. H. & Co. sent the check for information to the bank, whose teller replied "It is good," or "It is all right." In a suit brought by the bank against E. H. & Co. a judgment was given for plaintiff. On error to this court it was held, that where money is paid on a raised check by mistake, neither party being in fault, the general rule is that it may be recovered back as paid without consideration. Espy *v.* First Nat. Bank (U. S.), 18 Wall. 604, 21 L. Ed. 947.

In an action by a drawee to recover the amount overpaid by mistake to defendant as the holder of a raised

receiving pay for such a check, it strengthens the right of recovery.[19] The right of the drawee to recover back the amount paid on an altered check rests upon the fact that the money was paid by the drawee without consideration, under an innocent mistake,[20] and not upon the indorsement of the holder as importing a promise to refund the money in case it should afterwards appear the check had been fraudulently altered.[21] The payment of a raised check to an indorser thereof through mistake, may be recovered back by the paying bank to the extent of the difference between the original check and the amount to which it is raised, if there be no other feature in the transaction to work an estoppel.[22] The indorsement is substantially a warranty on the part of the indorser that there is no mistake in the amount.[23] The rule forbidding a bank to set up forgery in the signature of a correspondent or customer does not apply to altered or raised checks, as to which the acceptor or drawee is not presumed to be better able than the indorser to detect the alteration.[24]

§ 147 (2) Right of Bank Paying Paper to Bona Fide Holder—§ 147 (2a) In General.—The rule would seem to be well established that a drawee bank which pays a forged check to a holder for value and without notice, and without negligence in making due inquiry, can not recover back from him,[25] at least, where the party to whom payment is made would be

check, it is no defense that plaintiff paid the check before it received any advice of its being drawn. Merchants' Bank *v.* Exchange Bank, 16 La. 457.

A raised check, payable to A. or bearer, was presented by B., whom A. had requested to cash the same, after banking hours, to the bank cashier, who pronounced it good. B. took an assignment of the check from A., and paid the amount thereof. The bank subsequently cashed the check in ignorance of the alteration, of which B. also was ignorant. Held, that the bank could recover from B. the amount paid. Parke *v.* Roser, 67 Ind. 500, 33 Am. Rep. 102.

Where a bank, by mistake, pays a bona fide holder a certified check, which, after being certified, was fraudulently raised, it may recover the amount paid thereon. National Bank *v.* National Mechanics' Banking Ass'n, 55 N. Y. 211, 14 Am. Rep. 232.

19. Espy *v.* Bank (U. S.), 18 Wall. 604, 21 L. Ed. 947.

Duty of bank paying forged draft—Raised bill or check.—It is true that there are early authorities which hold a party paying a forged draft to great diligence in giving notice. The modern doctrine is believed to be that, as against one who passes a raised bill or check, and especially in favor of a drawee who pays to such a party on the faith of his indorsement, and in so doing violated no obligation or duty, reasonable diligence is all that can be required; and where that is exercised, and no damage has resulted from the delay, the right to recover is not lost. City Bank *v.* First Nat. Bank, 45 Tex. 203.

20. Basis of rule.—Redington *v.* Woods, 45 Cal. 406, 13 Am. Rep. 190; Continental Nat. Bank *v.* Metropolitan Nat. Bank, 107 Ill. App. 455; National City Bank *v.* Westcott Exp. Co., 26 Wkly. Dig. 161.

21. Redington *v.* Woods, 45 Cal. 406, 13 Am. Rep. 190.

22. City Bank *v.* First Nat. Bank, 45 Tex. 203; Merchants' Bank *v.* Exchange Bank, 16 La. 457.

23. City Bank *v.* First Nat. Bank, 45 Tex. 203.

24. City Bank *v.* First Nat. Bank, 45 Tex. 203.

As to the effect of bank's reply to inquiry that check is "good" as guaranty genuineness of filling in of check, see post, "Estoppel of Bank to Resist Liability on Forged Check," § 147 (4).

25. General rule as to right of bank paying forged check to bona fide holder for value.—*California.*—Redington *v.* Woods, 45 Cal. 406, 13 Am. Rep. 190.

Illinois.—First Nat. Bank *v.* Ricker, 71 Ill. 439, 22 Am. Rep. 104; First Nat.

Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247.

Indiana.—First Nat. Bank *v.* First Nat. Bank, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221.

Iowa.—First Nat. Bank *v.* Marshalltown State Bank, 107 Iowa 327, 77 N. E. 1045, 44 L. R. A. 131.

Kentucky.—Deposit Bank *v.* Second Nat. Bank, 10 Ky. L. Rep. 350.

Maine.—Neal *v.* Coburn, 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495.

Maryland.—Commercial, etc., Nat. Bank *v.* First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554.

Massachusetts.—National Bank *v.* Bangs, 106 Mass. 441, 8 Am. Rep. 349.

Minnesota.—Germania Bank *v.* Boutell, 60 Minn. 189, 62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519; Pennington County Bank *v.* First State Bank, 101 Minn. 263, 125 N. W. 119.

New Hampshire.—Star Fire Ins. Co. *v.* New Hampshire Nat. Bank, 60 N. H. 442.

New York.—National Park Bank *v.* Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; Salt Springs Bank *v.* Syracuse Sav. Inst. (N. Y.), 62 Barb. 101; National Bank *v.* Grocers' Nat. Bank (N. Y.), 2 Daly 289.

Ohio.—Ellis *v.* Ohio Life Ins. Co., 4 O. St. 628, 64 Am. Dec. 610; First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748.

Pennsylvania.—Levy *v.* Bank (Pa.), 1 Bin. 27, 4 Dall. 234, 1 L. Ed. 814.

Tennessee.—Peoples' Bank *v.* Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884.

Texas.—Rouvant *v.* San Antonio Nat. Bank, 62 Tex. 610; Iron City Nat. Bank *v.* Peyton, 15 Tex. Civ. App. 184, 39 S. W. 223; Moody *v.* First Nat. Bank, 19 Tex. Civ. App. 278, 46 S. W. 660.

Vermont.—Bank *v.* Farmers', etc., Bank, 10 Vt. 141, 33 Am. Dec. 188.

The general rule is that when the drawee of a check pays the same to a bona fide holder, such drawee can not recover the money back upon discovering such check to be a forgery, where such recovery would injure the holder. First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748; Ellis *v.* Ohio Life Ins., etc., Co., 4 O. St. 628, 64 Am. Dec. 610.

This rule rests upon the supposed knowledge of the drawee of the drawer's signature, and the negligence imputed to him for paying the paper without sufficient inquiry as to its genuineness. Ellis *v.* Ohio Life Ins., etc., Co., 4 O. St. 628, 64 Am. Dec. 610.

A bank paying a forged check drawn on it is precluded from recovering back the money when the party receiving it has in no way contributed to the success of the fraud, but has taken it in good faith in the usual course of business. National Bank *v.* Bangs, 106 Mass. 441, 8 Am. Rep. 349.

A bank in accepting and paying a check or paper presented to it is held to know the signature of the drawer, and is not at liberty afterwards, in a controversy between it and an innocent holder, to dispute the drawer's signature. And therefore, if the signature of the drawer is on a subsequent day discovered to be a forgery, the bank can not compel the holder to whom the payment was made to restore the money, unless the holder be in some way implicated in fault. First Nat. Bank *v.* First Nat. Bank, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221.

A bank can not recover money paid to a person on a forged check bearing a signature differing materially from the genuine, where defendant was not acquainted with the depositor or his signature, did nothing to mislead the bank except to inquire whether a check for a certain amount signed by the depositor would be honored, and where defendant has delivered property in reliance on such payment, whereby he would suffer loss if required to refund the money. Iron City Nat. Bank *v.* Peyton, 15 Tex. Civ. App. 184, 39 S. W. 223.

Where a bank pays a forged check to a bona fide holder thereof, it can not recover the amount so paid, even though the pretended drawer was not a customer, depositor, or correspondent, as a bank is bound to know whether the pretended drawer is a customer, as well as to know the signatures of its customers. Salt Springs Bank *v.* Syracuse Sav. Inst. (N. Y.), 62 Barb. 101.

Where a check was presented to a bank in which the plaintiff kept an account, and it was entered to his credit as cash, and was soon afterwards discovered to be forged, it was held (the plaintiff being innocent) that he was entitled to recover the amount thereof from the bank. Levy *v.* Bank (Pa.), 1 Bin. 27, 4 Dall. 234, 1 L. Ed. 814.

Where a forged check, purporting to be drawn by a customer on a bank where such customer keeps a deposit, is paid at such bank to an innocent holder, who paid a valuable consider-

prejudiced by being required to refund to the bank.[26] As between the drawee and a good-faith holder of a check, the drawee bank is to be deemed the place of final settlement, where all prior mistakes and forgeries shall be corrected and settled once for all; and if overlooked, and payment is made, it must be deemed final. There can be no recovery over.[27] According to a number of decisions this rule is to be taken with the qualification that when the holder of a check has been negligent, as in not making due inquiry, if the circumstances were such as to demand an inquiry when he took the check, the drawee may recover.[28] So also the drawee of a check, who has

ation for it, and who had no knowledge of the forgery, such bank can not recover of such holder the amount so paid. Bank *v.* Farmers', etc., Bank, 10 Vt. 141, 33 Am. Dec. 188.

26. Peoples' Bank *v.* Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884.

27. First Nat. Bank *v.* Marshalltown State Bank, 107 Iowa 327, 77 N. W. 1045, 44 L. R. A. 131.

A beneficial association gave its check, payable to the order of a brother of the beneficiary. His name was forged on the back of the check, and was followed by an indorsement of a trust company guarantying the previous indorsement. The check was paid by the bank, which was the depository of the beneficial association. On the discovery of the forgery the bank demanded the money back from the trust company, and in an action on the check the trust company filed an affidavit of defense, alleging that the check had been drawn without due precaution, inasmuch as the beneficiary was living. Held insufficient to prevent judgment. Second Nat. Bank *v.* Guarantee Trust, etc., Co., 206 Pa. 616, 56 Atl. 72.

28. Qualification of rule where holder negligent in taking check without inquiry.—First Nat. Bank *v.* Marshalltown State Bank, 107 Iowa 327, 77 N. W. 1045, 44 L. R. A. 131; First Nat. Bank *v.* State Bank, 22 Neb. 769, 36 N. W. 289, 3 Am. St. Rep. 294; First Nat. Bank *v.* First Nat. Bank, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450; Ellis *v.* Ohio Life Ins., etc., Co., 4 O. St. 628, 64 Am. Dec. 610; First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748; Peoples' Bank *v.* Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884; Moody *v.* First Nat. Bank, 19 Tex. Civ. App. 278, 46 S. W. 660.

"Notwithstanding some conflict of authority upon the subject, a careful investigation of the adjudged cases and of the text books leads us to the conclusion that the bank can recover of a party to whom payment is made on a forged check, indorsed by the party to whom paid, where the party to whom paid has been guilty of negligence in receiving and indorsing the check; for, notwithstanding the negligence to some degree that the paying bank has been guilty of in paying the forged check without detecting the forgery of its depositor's signature, it often happens, or may happen, that the party to whom payment is made has been guilty of the first negligence in purchasing and indorsing the forged paper." People's Bank *v.* Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884.

To entitle the holder to retain money obtained by mistake upon a forged instrument, he must occupy the vantage ground, by putting the drawee alone in the wrong; and he must be able truthfully to assert that he put the whole responsibility upon the drawee, and relied upon him to decide, and that the mistake arising from his negligence can not now be corrected without putting the holder in a worse position than though payment had been refused. If the holder can not say this, and especially if the failure to detect the forgery, and consequent loss, can be traced to his own disregard of duty, in negligently omitting to exercise some precaution which he had undertaken to perform, he fails to establish a superior equity to the money, and can not with a good conscience retain it. To allow him to do so would be to permit him to take advantage of his own wrong, and to pervert a rule, designed for his protection against negligence of the drawee, into one for doing injustice to him. Ellis *v.* Ohio Life Ins., etc., Co., 4 O. St. 628, 64 Am. Dec. 610.

Thus, where a bank cashes a check drawn upon another bank without using proper diligence under the circum-

accepted it, and again suffered it to go into circulation, is absolutely estopped to deny the genuineness of the handwriting. The acceptance necessarily involves the most positive affirmation that the instrument is what it purports to be, and the acceptor is not permitted to withdraw the assertion,

stances to ascertain whether or not the check be a forgery, and subsequently the drawee bank pays the check to the bank that cashed it, assumpsit for money had and received lies at the instance of the drawee bank against the other bank to recover the money so paid. Ellis *v.* Ohio Life Ins., etc., Co., 4 O. St. 628, 64 Am. Dec. 610, where it was held that nothing short of fraud, or negligence amounting to fraud, would entitle the drawee to recover.

As to what constitutes such negligence as will defeat the holder's right to retain the money, the court, in Ellis *v.* Ohio Life Ins., etc., Co., 4 O. St. 628, 64 Am. Dec. 610, said: "We do not here speak of negligence as a matter at large. We only intend to deal with the case before us; and that only requires us to say that where negligence reaches beyond the holder, and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of the parties or the course of business devolved upon the holder, in relation to the genuineness of the paper, he can not, in negligent disregard of this duty, retain the money received upon a forged instrument."

Instances of negligence entitling bank to recover.—"In nearly all the cases in which the money has been recovered back, the bank purchasing the check or bill took it from an unidentified stranger, and this has often, though not always, been held to be such negligence as would authorize a recovery of the money." First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748.

That the indorser bank is unable to give the name of the person who presented the forged check, or to whom it was paid, or to assert with positiveness that it required identification of such party, is sufficient evidence of negligence to render it liable. People's Bank *v.* Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884.

A bank, having paid a forged check, brought action against the payee to recover the amount. The payee had seen the check drawn and signed by an individual who had, a short time before, and under a different name, passed a check to him. Yet he indorsed and collected the forged check without informing the bank of this suspicious circumstance. Held, that the bank was entitled to recover. Rouvant *v.* San Antonio Nat. Bank, 63 Tex. 610.

Where a bank has been induced, by the false and fraudulent representations of the payee of a draft as to the purpose for which the draft had been drawn, to pay a draft, the payee is primarily liable to the bank for the amount not used for the purpose represented and a recovery against him should not be made to depend upon the contingency of the drawer's insolvency or refusal to pay; the fact that the drawer is also liable does not alter the case. First Nat. Bank *v.* McGaughey, 48 Tex. Civ. App. 635, 108 S. W. 475. See, also, First State Bank *v.* McGaughey, 38 Tex. Civ. App. 495, 86 S. W. 55.

A seller of cattle sent a telegram to a bank asking if it would pay a buyer's checks "for cattle," and the bank replied by telegram, "Yes." The buyer thereupon drew a sight draft on the bank in favor of the seller for $8,850, which the bank paid, and the seller received. The draft included, not only money for cattle delivered, but $1,650 forfeit money for the delivery of cattle in the future. The buyer had no funds whatever. Held, that the telegram "for cattle" would be construed as between the parties to mean only cattle delivered, on which the bank could secure itself in case of nonpayment of the draft, and hence, not being able to collect the surplus $1,650, the seller was liable to the bank for such amount as money paid by mistake of fact induced by the representations of the seller. First Nat. Bank *v.* McGaughey, 48 Tex. Civ. App. 635, 108 S. W. 475. See, also, First State Bank *v.* McGaughey, 38 Tex. Civ. App. 495, 86 S. W. 55.

A holder of a forged check, who at the time of presenting it to the drawee, and receiving payment thereof, withholds knowledge possessed by him at the time of facts rendering it morally certain that the check was forged, is precluded from setting up any defense to a suit to recover back the money that the drawee was bound to know the signatures of his own de-

to the prejudice of those who have, in consequence of it, given credit to the paper.[29]

§ 147 (2b) Recovery of Payment on Forged Checks to Fictitious Payees.—Since a check drawn payable to a fictitious payee is, when in the hands of a bona fide holder, who acquires it in ignorance of the fact, in effect a check payable to bearer, where the drawee of such a check, which has been forged, pays it to an innocent holder, it can not recover the money on the ground that the holder had no title by reason of the fact that the indorsement of the payee's name on the check was a forgery.[30] The bill or

positors, and is estopped to assert that he was mistaken. First Nat. Bank *v.* Ricker, 71 Ill. 439, 22 Am. Rep. 104.

Facts held not to show negligence.—The drawee of a bill professing to be drawn by one of its correspondents who pays the same on presentation can not, on discovering that the signature of the drawer was forged, recover the amount from the bank which had cashed the draft in ignorance of the forgery, and without negligence, for one introduced to it as the payee by a reputable person, and had then indorsed and forwarded it for collection and received the proceeds in due course. Moody *v.* First Nat. Bank, 19 Tex. Civ. App. 278, 46 S. W. 660.

29. Accepting check.—Ellis *v.* Ohio Life Ins. Co., 4 O. St. 628, 64 Am. Dec. 610.

30. Recovery of payment on forged checks to fictitious payee.—Deposit Bank *v.* Second Nat. Bank, 10 Ky. L. Rep. 350; Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84.

Where one under a fictitious name applies for a loan, tendering a false and forged abstract showing the title to land to be in him, and, after the application has been accepted, tenders a mortgage and note, and receives a check payable to the order of the person whose fictitious name he has assumed, his indorsement of the check in the fictitious name is a genuine indorsement, not a forgery. First Nat. Bank *v.* Farmers', etc., Bank, 56 Neb. 149, 76 N. W. 430; Same *v.* Omaha Nat. Bank, 59 Neb. 192, 80 N. W. 810.

"A leading authority on the subject is Bank of England *v.* Vagliano Bros., L. R. 1891 App. Cas. 107, which reversed Vagliano *v.* Bank of England, 23 Q. B. D. 243, and 22 Q. B. D. 103. This authority has been frequently cited and is directly in point. There, Vagliano Bros. were foreign bankers doing a large business in various parts of the world. One of their clerks, Glyka, forged a large number of bills of exchange purporting to be drawn on the firm by one of its foreign correspondents, payable to another well-known firm. He also forged letters of advice to accompany them and caused them to be presented, the same as genuine bills, to Vagliano Bros. in the regular course of business. Vagliano Bros., deceived by the cleverness of the forgeries, accepted from time to time bills aggregating over $350,000, which they directed the Bank of England, their general banker, to pay when presented. After bills had been accepted, Glyka would obtain possession of them, indorse thereon the name of the payee, and collect the money from the bank, which charged the amounts so paid to the account of Vagliano Bros. The latter, on discovering the forgeries, sued the bank to recover the amounts so paid out on the forged bills. The House of Lords held, reversing the decisions of the lower courts, that this amount could not be recovered. The decision is placed upon the ground that 'since Glyka, although he inserted in the forged bills as payee the name of a well-known firm, knew that such firm had no interest in the bills and never intended that it should, the payee was fictitious,' and under the statute providing that 'where the payee is a fictitious or nonexisting person the bill may be treated as payable to bearer' (Bills of Exchange Act 1882, § 7, subsec. 3), the bills of exchange were, in legal effect, payable to bearer, and the bank obtained good title, regardless of the indorsements." Quoted in Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. Supp. 84.

"In Phillips *v.* Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, the cashier of the National Bank of Sumter, S. C., drew checks in the name of the bank, inserting as payees the names of customers of the bank, whose indorse-

check being, in legal effect, payable to bearer, the bank obtains good title, regardless of the indorsements.[31]

§ 147 (3) Laches as Affecting Right of Recovery.—Where there has been an unreasonable delay in discovering the forgery of a check which has been paid, and giving notice, it will bar a recovery by the payor,[32] and this rule has been held to apply to the right of the United States government to recover money paid on a check on the treasury, under a forged indorsement, such right being conditioned on its promptness in giving notice to the person to whom the check was paid.[33] Where a bank pays a customer's check upon which the payee's name has been forged, upon discovery

ments he forged. The checks thus drawn were sent to various firms in New York and subsequently came into the hands of the defendant, which received them in good faith and charged them to the account of the Sumter Bank. The receiver of the Sumter Bank thereafter brought an action to recover the amount of these checks, and it was held that the same could not be maintained, since in legal effect the payees were fictitious and the checks payable to bearer, and for that reason the defendant obtained good title. The court, Mr. Justice Gray delivering the opinion, said: 'The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon them. The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys, by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter Bank would have had no claim upon the defendant. How, then, can the transaction be said to assume a different aspect because the names adopted were of known persons? That the intention was to treat them as being of fictitious persons is manifest. * * * The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name.'" Quoted in Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84.

Under a statute providing that an instrument shall be considered payable to bearer when it is payable to the order of a fictitious person and such fact is known to the person making it so payable, the fact that the names of such payees were forged will not entitle the bank paying such checks to recover back the payments. Bank of England *v.* Vagliano Bros., L. R. 1891, App. Cas. 107, reversing 23 O. B. D. 243 and 22 O. B. D. 103; Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84.

Negotiable Instruments Law, Laws 1897, p. 724, c. 612, § 28, provides that an instrument is payable to bearer when it is payable to the order of a fictitious person and such fact was known to the person making it so payable. The name of the maker of checks purporting to have been signed by an administrator, made payable to beneficiaries entitled to a greater amount from the estate than the amount of the checks, was forged. The checks were accepted and paid by the drawee. The names of the payees were also forged. It did not appear who forged the maker's name, but the person who did so knew that the payees would never have any interest in the instruments. Held, that the payees were fictitious within the statute, and the drawee could not recover the money paid. Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84.

31. Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84.

32. **Delay in discovering and giving notice of forgery as barring recovery.**—Continental Nat. Bank *v.* Metropolitan Nat. Bank, 107 Ill. App. 455.

The drawee must give prompt notice to the holder or indorsee as soon as the forgery is discovered. Van Wert Nat. Bank *v.* First Nat. Bank, 6 O. C. C. 130, 3 O. C. D. 380, affirmed in 52 O St. 630, 44 N. E. 1142.

33. **Application of rule to right of federal government to recover payments on forged checks on treasury.**—United States *v.* Clinton Nat. Bank, 28 Fed. 357; United States *v.* Central Nat. Bank, 6 Fed. 134.

of the forgery only reasonable diligence in giving notice thereof is necessary to bind the person from whom the check was received.[34] What is reasonable diligence in giving notice of the forgery of the check after its discovery is usually a question of fact, under the circumstances of each particular case.[35]

§ 147 (4) Estoppel of Bank to Resist Liability on Forged Check. —Where a party to whom a raised check is offered sends it to the bank on which it is drawn for information respecting the genuineness of the drawer's signature, and the state of his account, the statement that it is "good," or "all right," will estop the bank from denying that the signature was genuine or that there were funds to meet it.[36] The law presumes that the bank has knowledge of the drawer's signature and of the state of his account, and it is responsible for what may be replied on these points, but not further, unless the inquiry is directed to other special points.[37] Unless there is something in the terms in which the information is asked that points the attention of the bank officer beyond these two matters, his response that the

34. Reasonable diligence sufficient. —Schroeder *v.* Harvey, 75 Ill. 638.

35. Reasonable diligence question of fact under circumstances of case.— Continental Nat. Bank *v.* Metropolitan Nat. Bank, 107 Ill. App. 455.

Where the drawee received and paid a forged check, which had been previously honored and indorsed by other banks, and held that check for thirty days or more, it thereby admitted the same to be correct, and was estopped to deny the genuineness thereof, or to avoid, as to the indorsing banks, the effect of its act in accepting and paying the check. Farmers', etc., Bank *v.* Bank, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817.

Notice when the forgery is discovered is sufficient. Ellis *v.* Ohio Life Ins., etc., Co., 4 O. St. 638, 64 Am. Dec. 610.

Where a forged check went through the clearing house, and was paid by the drawee bank, and it failed to discover the forgery until informed thereof by the depositor on receiving his monthly account, when the bank immediately informed the payee, it was not guilty of such laches as to preclude it from recovering back the money, provided such right of recovery otherwise existed. National Bank *v.* Bangs, 106 Mass. 441, 8 Am. Rep. 349.

Instances of delay held to bar recovery.—A bank paid a forged check drawn upon it to an innocent holder who paid value. Held that, even if the bank were entitled to recover the amount of the check from the payee, it could not do so where it did not discover the forgery for four months, such delay being presumed to injure the payee. Deposit Bank *v.* Second Nat. Bank, 10 Ky. L. Rep. 350.

Where the person whose name is affixed to a check as its drawer has no individual account with the bank, the bank, by paying the check and charging it to such person as administrator, thereby delaying for three months the discovery of the fact that the check is a forgery, is negligent. First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748.

36. Effect of bank's reply on inquiry, that check is "good," "all right," etc. —Espy *v.* Bank (U. S.), 18 Wall. 605, 21 L. Ed. 947.

Where the drawee represents the check as "all right," in speaking of the same to another bank which has cashed it, and to which the drawee has paid it, such representation being made after the drawee has knowledge of the forgery and in answer to the other bank's inquiry as to whether anything was the matter with the check, the drawee will be estopped, as against the other bank, thereafter to assert that the check is a forgery. Van Wert Nat. Bank *v.* First Nat. Bank, 6 O. C. C. 130, 3 O. C. D. 380, affirmed in 52 O. St. 630, 44 N. E. 1142.

37. Effect of reply limited to drawer's signature and state of account.—Espy *v.* Bank (U. S.), 18 Wall. 605, 21 L. Ed. 947.

check is good would be limited to them, and will not extend to the genuineness of the filling in of the check as to payee or amount.[38]

§ 147 (5) Procedure to Recover Back.—Form of Action.—Where a bank pays a check to one presenting it under a forged indorsement, the bank may recover back the money by action in assumpsit.[39]

Accrual and Limitation of Action.—The right of action by a drawee bank paying a check to one presenting it with a forged indorsement of the payee's name, accrues at the date of the payment, and is barred by the lapse of the prescribed period after the date.[40]

Evidence.—When it is proved that the indorsement of a payee's name upon a bank check is not in his handwriting, this is prima facie sufficient to establish the fact that the indorsement is a forgery. While the signature need not be in the handwriting of the indorser, yet, if it is not, there must be proof that he authorized it to be made.[41] Where negligence of a bank, in cashing a draft for one introduced to it as and falsely personating the payee, is asserted, by reason of its failure to make further inquiry as to the identity of such person presenting it, evidence tending to show that further inquiries would have increased instead of destroying its confidence is admissible.[42] In a suit by a bank to recover back the amount paid on a forged check, evidence of experts that the signature to the forged instrument was very dissimilar to those upon other genuine checks of the drawer, which were also in evidence before the jury, was admissible as bearing on the question of plaintiff's negligence in paying the check.[43]

§ 148. Liabilities of Bank to Depositor, Payee or Owner—§ 148 (1) Liability of Bank to Depositor on Paying.—If the depositor be

38. **Does not guaranty genuineness of filling in of check.**—Espy *v.* Bank (U. S.), 18 Wall. 605, 21 L. Ed. 947.

Where a raised check was sent to the bank on which it was drawn for the purpose of ascertaining the genuineness of the drawer's signature, the state of his account, and the genuineness of the check in all other respects, the statement that it is "good," or "all right," will estop the bank to set up that the check was raised, if it knew the full extent of the object for which it was sent. Espy *v.* Bank (U. S.), 18 Wall. 605, 21 L. Ed. 947.

Generally, as to recovery on raised or altered checks, see ante, "Raised or Altered Checks," § 147 (1c).

39. **By action in assumpsit of payment on forged indorsement.**—Second Nat. Bank *v.* Guarantee Trust, etc., Co., 206 Pa. 616, 56 Atl. 72.

40. **Accrual and limitation.**—Leather Mfg'rs Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 32 L. Ed. 342, 9 S. Ct. 3.

"The plaintiff's right of action did not depend upon any express promise by the defendant after the discovery of the mistake, or upon any demand by the plaintiff upon the defendant, or by the depositor or any other person upon the plaintiff; but it was to recover back the money, as paid without consideration, and had and received by the defendant to the plaintiff's use. That right accrued at the date of the payment, and was barred by the statute of limitations in six years from that date." Leather Mfg'rs Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 32 L. Ed. 342, 9 S. Ct. 3.

41. **Sufficiency of evidence as to forgery.**—Schroeder *v.* Harvey, 75 Ill. 638.

42. **Evidence as to probable effect of inquiries.**—Moody *v.* First Nat. Bank, 19 Tex. Civ. App. 278, 46 S. W. 660.

43. **Admissibility of expert evidence as to signature.**—Iron City Nat. Bank *v.* Peyton, 15 Tex. Civ. App. 184, 39 S. W. 223.

free from blame, and has done nothing to mislead the bank, all the loss must be borne by the bank paying a forged check,[44] for in such case it acts

44. **General rule as to liability of bank to depositor on paying forged check.**—*California.*—Hatton *v.* Holmes, 97 Cal. 208, 31 Pac. 1131.

Delaware.—National Dredging Co. *v.* Farmers' Bank (Del.), 6 Pa. 580, 69 Atl. 607.

Georgia.—Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96; Georgia R., etc., Co. *v.* Love, etc., Soc., 85 Ga. 293, 11 S. E. 616.

Illinois.—Chicago Sav. Bank *v.* Block, 126 Ill. App. 128.

Indiana.—Robinson *v.* Bank, 42 Ind. App. 350, 85 N. E. 793; Second Nat. Bank *v.* Gibboney (Ind. App.), 87 N. E. 1064.

Kentucky.—Rice *v.* Citizens' Nat. Bank, 21 Ky. L. Rep. 346, 51 S. W. 454.

Louisiana.—Laborde *v.* Consolidated Ass'n (La.), 4 Rob. 190, 39 Am. Dec. 517; Etting *v.* Commercial Bank (La.), 7 Rob. 459.

Massachusetts.—Jordan Marsh Co. *v.* National Shawmut Bank, 201 Mass. 397, 87 N. E. 740.

Michigan.—Harmon *v.* Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617.

Missouri.—Kenneth Inv. Co. *v.* National Bank, 96 Mo. App. 125, 70 S. W. 173; Union Biscuit Co. *v.* Springfield Grocer Co., 143 Mo. App. 300, 126 S. W. 996; Lieber *v.* Fourth Nat. Bank (Mo. App.), 117 S. W. 672; Missouri-Lincoln Trust Co. *v.* Third Nat. Bank (Mo. App.), 133 S. W. 357.

New Jersey.—Mechanics' Nat. Bank *v.* Harter, 63 N. J. L. 578, 44 Atl. 715, 76 Am. St. Rep. 224.

New York.—Critten *v.* Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529, modifying judgment in 60 App. Div. 241, 70 N. Y. S. 246; Gallo *v.* Brooklyn Sav. Bank, 199 N. Y. 222, 92 N. E. 633, reversing 129 App. Div. 698, 114 N. Y. S. 78; Timbel *v.* Garfield Nat. Bank, 121 App. Div. 870, 106 N. Y. S. 497; Morgan *v.* United States Mortg., etc., Co., 125 App. Div. 22, 109 N. Y. S. 276; Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84; Ellery *v.* People's Bank (App. Div.), 114 N. Y. S. 108; Newman *v.* State Bank, 68 Misc. Rep. 316, 123 N. Y. S. 926; Frank *v.* Chemical Nat. Bank, 45 N. Y. Super. Ct. 452, affirmed in 84 N. Y. 209, 38 Am. Rep. 501; Leavitt *v.* Stanton (N. Y.), Lalor's Supp. 413; Springs *v.* Hanover Nat. Bank (Sup. Ct.), 127 N. Y. S. 478.

North Carolina.—Yarborough *v.* Banking Loan, etc., Co., 142 N. C. 377, 55 S. E. 296.

Ohio.—Ellis *v.* Ohio Life Ins., etc., Co., 4 O. St. 628, 64 Am. Dec. 610; First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748.

Oregon.—First Nat. Bank *v.* Bank, 5 Ore. 388, 117 Pa. 293.

Pennsylvania.—Houser *v.* National Bank, 27 Pa. Super. Ct. 613; Califf *v.* First Nat. Bank, 37 Pa. Super. Ct. 412; McNeely *v.* Bank, 221 Pa. 588, 70 Atl. 891; Snyder *v.* Corn Exch. Nat. Bank, 221 Pa. 599, 70 Atl. 876; West Philadelphia Bank *v.* Green (Pa.), 3 Penny. 456.

Tennessee.—People's Bank *v.* Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884; Farmers', etc., Bank *v.* Bank, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817.

Texas.—Morris *v.* Beaumont Nat. Bank, 37 Tex. Civ. App. 97, 83 S. W. 36.

Virginia.—National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826.

A bank which makes a payment on a check to which a depositor's name has been forged, or on his genuine check to which the name of a necessary indorser has been forged, can not charge the amount against the depositor, unless it shows a right to do so on the doctrine of estoppel, or because of some negligence chargeable to the depositor. Mechanics' Nat. Bank *v.* Harter, 63 N. J. L. 578, 44 Atl. 715, 76 Am. St. Rep. 224.

It is a general rule regulating the law of negotiable instruments, that the drawee of a check should be held to know the signature of its customers and to pay only such paper as has a genuine signature. Farmers', etc., Bank *v.* Bank, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817; People's Bank *v.* Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884.

When the drawee is a bank, there is a much stronger reason for holding it to know the signature of its depositors and customers than in the case of a private individual, because banks keep a book in which are preserved the genuine signatures of their

at its peril, and will be held to have paid out its own funds and not those of the depositor.[45] If a bank pays out money to the holder of a check upon which the name of the depositor, or of a payee or indorsee, is forged, it is simply no payment as between the bank and the depositor; and the legal state of the account between them, and the legal liability of the bank to him, remain just as if the pretended payment had not been made.[46] Nor can the

depositors, customers and correspondents. First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748.

"The general rule undoubtedly is, that the bank has, at its peril, to know the genuineness of the signature of its depositor; and if it pays a forged check, the loss must fall upon the bank and not upon the depositor, except in cases where the negligence of the depositor has induced or brought about the payment by the bank. This duty, with reference to the bank, may be said to be an exception to the general rule that money paid by mistake can be recovered, and to the general statement of another equally well-settled rule that the payment of a forged paper conveys no title; for it is well settled that the deposit of a forged bill or base coin creates no indebtedness, although credited to the depositor's account, for the reason that payment in such material could not discharge a debt and can not create one." People's Bank *v.* Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884.

Liability for amount with interest.—Where a depositary of money to be drawn upon checks pays a forged check, he will be liable for the amount, with legal interest from judicial demand. Laborde *v.* Consolidated Ass'n (La.), 4 Rob. 190, 39 Am. Dec. 517; Etting *v.* Commercial Bank (La.), 7 Rob. 459.

45. Bank held to have paid out its own funds.—Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

The drawee of a bill or check or persons purchasing it take the paper relying solely on the responsibility of their transferrors and the other parties to the paper, and its apparent genuineness, and they, therefore, deal with it at their peril. Gallo *v.* Brooklyn Sav. Bank, 199 N. Y. 222, 92 N. E. 633, reversing order, 129 App. Div. 698, 114 N. Y. S. 78.

Failure to examine signature.—A bank on which a forged check is drawn in the name of a customer, whose signature is well known to it, is negligent, where the cashier does not examine the signature closely, but passes the check, relying on previous indorsements. Farmers', etc., Bank *v.* Bank, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817.

Duty to require identification.—"It is a great error to suppose that the drawee of a bill or check is bound to rely alone upon his knowledge of the handwriting of his customer or correspondent. The testimony in the case, as well as every day's experience, shows this alone to be an insufficient security, when dealing with strangers and in large amounts, against the ingenuity with which forgeries are now committed. The next most effective precaution is that of requiring the holder to furnish some reliable information of himself, and of his right to the paper. But when another bank intervenes and takes the check, this can not be resorted to by the drawee. As between the banks, therefore, the observance of the custom becomes a matter of mutual protection, and saves to the drawee the benefit of this precaution. While the bank taking the check, by its exercise, is consulting its own security, as well as that of the bank upon which it purports to be drawn, it gets a full renumeration for its care, in the reciprocity afforded in relation to checks drawn upon itself and taken in like manner." Ellis *v.* Ohio Life Ins., etc., Co., 4 O. St. 628, 64 Am. Dec. 610.

Effect of limitations in passbook.—A depositor in a so-called "inactive department" of a bank, not sufficiently familiar with English to understand what was printed on the fly leaf of his passbook, can not be charged with knowledge of a limitation of the bank's liability, when it was not called to his attention by the bank officials, and there was nothing in the circumstances to indicate to him the necessity for knowing what this printed matter meant; and hence it is solely responsible for payments made on his forged signature, notwithstanding the limitation. Siegel *v.* State Bank (App. Div.), 123 N. Y. S. 220.

46. Leather Mfg'rs Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26,

bank cast on the depositor the duty of seeking to recover the money paid from the person receiving it.[48] A bank can not charge the account of a

32 L. Ed. 342, 9 S. Ct. 3; First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229.

When a bank pays a check made payable to order and the indorsement is forged or unauthorized, it is the same as if payment had not been made and the amount due to the depositor is not thereby affected. Califf *v.* First Nat. Bank, 37 Pa. Super. Ct. 412.

That a bank which paid out money on checks to which a depositor's signature was forged, did so in good faith, believing from inquiry of the person presenting the checks that he was authorized to sign the depositor's name, does not relieve it from liability to the depositor. Georgia R., etc., Co. *v.* Love, etc., Soc., 85 Ga. 293, 11 S. E. 616.

Where a party forging a check was a stranger to the drawee and the person receiving the money on the check, and they were equally innocent, the drawee must stand the loss, for the risk of paying out money on a forged signature of a depositor is one a banker must assume. Trust Co. *v.* Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84.

Illustrations.—Plaintiff gave his agent a note against B. for collection, in payment of which B. gave the agent a check on defendant bank, payable to plaintiff's order. The agent cashed the check at defendant's bank, after indorsing plaintiff's name thereon with the bank's consent, and converted the proceeds. Held, that the agent's authority to collect the note did not authorize her to indorse the check, and the bank was therefore liable to plaintiff for the proceeds. Robinson *v.* Bank, 42 Ind. App. 350, 85 N. E. 793.

Plaintiff paid defendant bank $500, requesting a draft for that amount to a third person's order. Defendant's cashier drew a draft having the characters $500 at the top of it, but in words directing the payment of "five thousand dollars." Plaintiff did not examine the draft, but at his request the envelope in which he enclosed it was addressed by the cashier to the payee, and posted with the bank's mail. Some unauthorized person added a cipher to the characters "$500" and the drawee paid on the draft $5,000. Held, that there was no contract between the bank and plaintiff which created any liability from plaintiff to the bank, nor did plaintiff commit any unlawful act from which a liability could arise. City Nat. Bank of Ft. Worth *v.* Stout, 61 Tex. 567.

The signature on which the depositor is to be bound and a bank is to disburse his money may be whatever they agree on, and where a particular form of private check is prepared, having the name of John Doe printed and the word "per" printed below, followed by a blank space, and it is agreed that the signature Richard Roe following the "per" shall be good for the drawing of the money, a check, the whole body of which and the name of John Doe is written by a hand other than that by Richard Roe, will not protect the bank, where the signature of Richard Roe was written on a blank piece of paper for another purpose, and the balance of the instrument was written by some one else with intent to defraud. Polizzotto *v.* People's Bank, 125 La. 770, 51 So. 843.

Plaintiff, on representations of J. that he was the agent of K., who owned certain land, took a mortgage on the land, purporting to be signed and acknowledged by K., and delivered to J. a check for $1,000, payable to K. J. presented the check to a bank, and received payment thereon, the check being indorsed by K. The acknowledgment of the deed was false, and the indorsement of K.'s name on the check was a forgery. Held, in an action by plaintiff to recover the value of the check against the notary who took the false acknowledgment, that plaintiff had no right of action, in that the bank, having paid the check under a forged indorsement, acquired no rights therein against plaintiff, and could not charge the amount paid against plaintiff's account. Hatton *v.* Holmes, 97 Cal. 208, 31 Pas. 1131.

Where a bank pays money of a depositor to one who has forged his name, the bank knowing that such depositor can not write, it is liable to him for the money so paid, though it relied on the forger's statement that he had authority to sign the depositor's name. Georgia, etc., Co. *v.* Love, etc., Soc., 85 Ga. 293, 11 S. E. 616.

48. Yarborough *v.* Banking Loan, etc., Co., 142 N. C. 377, 55 S. E. 296.

depositor with money paid upon raised or altered checks,[49] and the depositor has a cause of action against a bank for the amount a check paid by it is raised by the payee above the original amount.[50] The reason of the rule that, when a bank pays a depositor's check on a forged indorsement or a raised check, it is held to have paid it out of its own funds and can not charge the payment to the depositor's account, is that there is an implied agreement by the bank with its depositor that it will not disburse the money standing to his credit except on his order.[51] In their relations with depositors, banks are held to a rigid responsibility. They undertake the care and custody of the customer's money from the benefit derived from its use while in their hands, and they are bound to pay from time to time such sums as are ordered. If, however, a banker pays money belonging to the customer upon an order which is not genuine, he must suffer, and to justify the payment he must show that the order is genuine, not in signature only, but in every other respect or he must show negligence on the part of the

49. Depositors account not chargeable with payments on raised or altered checks.—Chicago Sav. Bank *v.* Block, 126 Ill. App. 128.

As between the depositor and the bank, the latter is held to a knowledge of the signature and handwriting of the former, and, in the absence of some fault on the part of the depositor affecting the question of liability, a forged check, whether the forgery is of the signature of the depositor or consists in a material alteration, is honored by the bank at its peril. Morris *v.* Beaumont Nat. Bank, 37 Tex. Civ. App. 97, 83 S. W. 36.

An alteration of a check by the holder, consisting in a change of the name of the bank on which the check is drawn, is a material alteration. Morris *v.* Beaumont Nat. Bank, 37 Tex. Civ. App. 97, 83 S. W. 36.

In an action against a bank for paying a forged check, the name of the payee bank having been changed after delivery of the check, evidence that it was the legal custom for banks to pay checks where the printed name of the bank was erased, and another inserted in writing, is immaterial, as such custom could not render the forged check valid. Morris *v.* Beaumont Nat. Bank, 37 Tex. Civ. App. 97, 83 S. W. 36.

No local custom can give vitality to a forged check. Morris *v.* Beaumont Nat. Bank, 37 Tex. Civ. App. 97, 93 S. W. 36.

It is not the duty of a depositor in a bank, who has transferred his account to another bank, to foresee that the holder of a check which was drawn on the first bank, and on which he has stopped payment, will fraudulently alter the check so as to make it appear to have been drawn on the bank to which the account is transferred, and notify that bank as against such check. Morris *v.* Beaumont Nat. Bank, 37 Tex. Civ. App. 97, 83 S. W. 36.

Where the erasure of the words "or order" or "the order of" and the insertion of the words "or bearer" in a check, without the authority of the depositor making it, results in its payment by the depositor's bank to a person other than the payee, such payment is not in conformity with the order of the depositor, and he can not be charged with it. National Dredging Co. *v.* Farmers' Bank (Del.), 6 Pen. 580, 69 Atl. 607.

The checks showed the signs of alteration, and the paper showed erasures, so that in one instance the cashier required the clerk's indorsement, and also required several of the checks to be indorsed, because of the large amount for which they were drawn, and only paid many of them because presented by plaintiffs' clerk, who it did not appear was authorized to indorse checks, or in the habit of presenting the firm's cash checks. Held, in an action against the bank, that it was negligent in cashing the checks. Critten *v.* Chemical Nat. Bank, 60 App. Div. 241, 70 N. Y. S. 246, judgment modified in 171 N. Y. 219, 57 L. R. A. 529, 63 N. E. 969.

50. Effect of liability on raised check.—In re Beer (N. Y.), 124 N. Y. S. 423.

51. Reason of rule imposing liability on bank.—Houser *v.* National Bank, 27 Pa. Super. Ct. 613.

depositor.[52] The requirement that a bank shall know its customers' handwriting does not extend beyond a knowledge of their signatures, and neither by any rule of law nor ordinary course of business is it made a matter of suspicion that the body of a check is not written in the maker's handwriting.[53] Where it was known to the officers of a bank that plaintiff's employee was its bookkeeper and trusted agent, and that he was required to fill out and cash his employer's checks, though without authority to sign them, any change in the amount of plaintiff's checks appearing in such employee's handwriting being within the apparent scope of his authority, payment thereof by the bank would not impose any liability on it to reimburse plaintiff for the amount thereof.[54] The fact that a check was for an amount in excess of a letter of credit given the depositor on whose account the check was drawn, to establish credit with other banks or persons with whom he might have business, did not tend to prove negligence in the payment of the check.[55] The fact that, some days previous to the payment of a check written on the blank of another bank, the bank had paid a check drawn by its depositor on one of its regular blanks, was wholly immaterial and not sufficient to excite suspicion as to the genuineness of the check written on the blank of the other bank.[56] Where, without consideration, a bank receives from a money lender money to be delivered to one of his customers on a check drawn by such customer, and the bank pays the money on the check received in due course of business, the fact that such check is a forgery will not render the bank liable for the amount of the same; the bank being a bailee without hire, and not liable where good faith and ordinary diligence was exercised.[57] If banks on which checks are drawn have no notice of fraud in procuring their issuance by the drawer, they are not negligent in honoring them, and the checks are not in such case forgeries in such sort as to render the banks liable for paying them when sued by the drawer.[58] The decisions of the English courts and the supreme court of the United States have universally held that money paid upon a draft properly drawn, but accompanied by forged bills of lading, when paid by the

52. National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826.

53. That body of check not in maker's writing not ground for suspicion.—First State Bank *v.* Vogeli, 78 Kan. 264, 96 Pac. 490. See, also, Redington *v.* Woods, 45 Cal. 406, 13 Am. Rep. 190; Bank *v.* Union Bank, 3 N. Y. 230; National Park Bank *v.* Nat. Bank (N. Y.), 7 App. Prac., N. S., 120, 55 Barb. 87, reversing 46 N. Y. 77, 7 Am. Rep. 310; Cranes *v.* Horton, 5 Wash. 479, 39 Pac. 223.

54. Effect of changes by employee of depositor authorized to fill out checks.—Champion Ice Mfg. Co. *v.* American, etc., Co., 25 Ky. L. Rep. 239, 115 Ky. 863, 75 S. W. 197, 103 Am. St. Rep. 356.

55. Check in excess of letter of credit given depositor.—First State Bank *v.* Vogeli, 78 Kan. 264, 96 Pac. 490.

56. Check written of blank of another bank.—First State Bank *v.* Vogeli, 78 Kan. 264, 96 Pac. 490.

57. Liability when bank bailee without hire.—People's Nat. Bank *v.* Wheeler, 21 Okl. 387, 96 Pac. 619.

58. Fraud in procuring issuance of check not equivalent to forgery within meaning of rule.—Southern Hardware, etc., Co. *v.* Lester, 166 Ala. 86, 52 So. 328.

drawee can not be recovered back.[59]

§ 148 (2) Liability of Bank Paying Check on Forged or Fraudulent Indorsement.—In General.—Where a bank pays a bill or check on a forged indorsement, it is liable to some one for funds so wrongfully paid out.[60] The liability must be to the drawer or to the payee.[61]

Liability to Drawer.—If the payee named in the check or bill has no interest therein, and it has never passed into such payee's hands, and the payee's name was indorsed thereon as a forgery, then the drawer has never parted with the funds misapplied by the bank and it is bound to replace the same.[62] The relation between a bank and its depositor is that of debtor and creditor, and the bank is under an implied contract to disburse the money standing to the depositor's credit only upon his order and in conformity with his directions, and makes payments upon forged indorsements at its

59. **Money paid upon genuine draft accompanied by forged bill of lading.**—Springs *v.* Hanover Nat. Bank (Sup. Ct.), 127 N. Y. S. 178.

In Hoffman & Co. *v.* Bank, 79 U. S. 181, 20 L. Ed. 366, a consignor, who had been in the habit of drawing bills of exchange on his consignee with bills of lading attached to the drafts drawn (it being part of the agreement between the parties that such bills should always attend the drafts), drew bills on him with forged bills of lading attached to the drafts, and had the drafts with the forged bills of lading so attached discounted in the ordinary course of business by a bank ignorant of the fraud. The consignee, not knowing of the forgery of the bills of lading, paid the drafts. It was held that there was no recourse by the consignee against the bank.

Plaintiffs agreed for shipment of cotton by a cotton company; plaintiffs to advance 85 per cent of its value pending its sale, and the cotton company to draw on them for that amount. The draft was delivered to a bank for collection, which discounted it, and forwarded it to defendant bank with the bills of lading attached, and defendant, as agent for the other bank, received payment from plaintiffs; neither bank having knowledge that the bills of lading were forged and represented no actual shipment. Held, that plaintiffs could not recover from defendant the amount of the draft on the ground that it was paid through a mistake of fact, in that plaintiffs believed that the bills of lading attached to the draft were genuine; the defendant being only the agent of the discounting bank, and that bank being a bona fide holder for value. Springs *v.* Hanover Nat. Bank (Sup. Ct.), 127 N. Y. S. 178.

60. **Liability of bank for payment on forged indorsement.**—First Nat. Bank *v.* Pease, 168 Ill. 40, 48 N. E. 160.

A bank which pays a check on a forged indorsement must bear the loss. Henderson Trust Co. *v.* Ragan, 21 Ky. L. Rep. 601, 52 S. W. 848.

Where a check payable to T., but not accepted by him, was paid by the bank on a forged indorsement, a firm of which T. was a member, which accepted from the drawer another check for the same amount, was entitled to have it paid by the bank, notwithstanding the lack of funds after the payment of the former check; the payee not being chargeable with the negligence of the drawer in failing to destroy that check. Henderson Trust Co. *v.* Ragan, 21 Ky. L. Rep. 601, 52 S. W. 848.

61. First Nat. Bank *v.* Pease, 168 Ill. 40, 48 N. E. 160.

62. **Liability of bank to drawer where payment made on forged indorsement.**—First Nat. Bank *v.* Pease, 168 Ill. 40, 48 N. E. 160.

"So Mr. Daniel, in his very learned work upon Negotiable Instruments, lends the support of his name to the view we have taken, saying: 'There is no doubt that if the bank pays a check upon the forged indorsement of the payee's or special indorsee's name, the payee, or such indorsee, may recover back the amount, if the check had been delivered to him, and the drawer may recover it back if he had not issued it.' 2 Daniel on Negotiable Instruments, § 1663." Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. Rep. 900.

peril, in the absence of some ground of estoppel or negligent act on the part of the depositor.[63] The bank is not only bound to know the signature of

63. Liability to drawer where payment made on forged indorsement.—*California.*—Hatton *v.* Holmes, 97 Cal. 208, 31 Pac. 1131.

Georgia. — Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96.

Kentucky.—Rice *v.* Citizens' Nat. Bank, 21 Ky. L. Rep. 346, 51 S. W. 454.

New York.—Kearney *v.* Metropolitan Trust Co., 110 App. Div. 236, 97 N. Y. S. 274, affirmed in 186 N. Y. 611, 79 N. E. 1108; Morgan *v.* Bank, 11 N. Y. 404, affirming 8 N. Y. Super. Ct. 434; Bank *v.* Merchants' Nat. Bank, 91 N. Y. 106; Welsh *v.* German-American Bank, 42 N. Y. Super. Ct. 462, affirmed 73 N. Y. 424, 29 Am. Rep. 175; Citizens' Nat. Bank *v.* Importers', etc., Bank, 44 Hun 386, 9 N. Y. St. Rep. 201; S. C., 49 Hun 607, 1 N. Y. S. 664, 17 N. Y. St. Rep. 430, affirmed in 119 N. Y. 195, 23 N. E. 540; Shipman *v.* State Bank, 59 Hun 621, 13 N. Y. S. 475, affirmed in 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Bloomingdale *v.* National Butcher's, etc., Bank, 33 Misc. Rep. 594, 68 N. Y. S. 35.

Ohio.—Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648; Armstrong *v.* Pomeroy Nat. Bank, 46 O. St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; Kuhn & Sons *v.* Frank, 7 Wkly. L. Bull. 134, 8 O. Dec. Reprint 345, 6 O. Dec. 1142.

Pennsylvania. — West Philadelphia Bank *v.* Green (Pa.), 3 Penny. 456.

Utah.—Brixen *v.* Deseret Nat. Bank, 5 Utah 504, 18 Pac. 43.

A depositor has a right to assume that the bank, before paying his checks, will ascertain the genuineness of the indorsements. Welsh *v.* German-American Bank, 73 N. Y. 424, 29 Am. Rep. 175.

It is the duty of a bank to which a check drawn by a depositor, and payable to order, is presented by one claiming under an ostensible indorsement by the payee, to ascertain at its peril that the indorsement is genuine. German Sav. Bank *v.* Citizens' Nat. Bank, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399.

Where a bank paid a check, the payee's indorsement being forged, and deducted the amount from the account of the drawer, it is liable to the drawer for the full amount. Guaranty State Bank, etc., Co. *v.* Lively (Tex. Civ. App.), 149 S. W. 211.

Illustrations.—A husband forged his wife's name to a note and deed, and thereby procured a check payable to his wife; and by forging her indorsement and adding his own he received payment thereof from the bank on which it was drawn. Held, that the payment was void as against the drawer, notwithstanding the last indorsement was genuine. Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96.

The drawer of a check delivered it to one who had applied for a loan as agent of the payee, and who gave the drawer notes and a trust deed purporting to be signed by said payee; but the latter had not authorized the transaction, and never received the check, which was paid by the drawee bank on a forged indorsement of the payee's name. Held, that the liability of the bank was to the drawer of the check, since it never became the property of the payee. Judgment, 68 Ill. App. 562, affirmed in First Nat. Bank *v.* Pease, 168 Ill. 40, 48 N. E. 160.

Where plaintiff made a deposit, with direction to the bank to pay it out on checks drawn by J., payable to certain persons, payment of the checks named on J.'s forged indorsement constitutes no defense to plaintiff's action against the bank to recover the deposit. Rice *v.* Citizens' Nat. Bank, 21 Ky. L. Rep. 346, 51 S. W. 454.

Where plaintiff deposited money with defendant, and thereafter drew checks to the order of C. & Co., which the bank paid to a person other than C. & Co., their indorsement having been forged, the bank is liable to plaintiff for the amount so paid. Morgan *v.* Bank, 11 N. Y. 404, affirming 8 N. Y. Super. Ct. 434.

A payment by a bank to the holder of a check on which the name of the payee or indorsee is forged makes the bank liable to the depositor as if the pretended payment had not been made, since nothing but actual payment, accord and satisfaction, or a release under seal, is an answer to the depositor's demand. Winslow *v.* Everett Nat. Bank, 171 Mass. 534, 51 N. E. 16.

It is immaterial, in so far as the liability of the bank to the depositor for the amount of such checks is concerned, whether or not its delivery to the payee was for the purpose of pay-

its depositor, so that it is liable for a payment on the customer's forged draft, but is also bound to know that the indorsement of one who is a stranger is genuine, and it is liable for the payment to the wrong person

ment. Winslow *v.* Everett Nat. Bank, 171 Mass. 534, 51 N. E. 16.

A. delivered to plaintiff a sum to be paid to B. Plaintiffs gave to C. for B. their check on defendant bank, in which they were depositors, for the amount, payable to the order of B. C. forged B.'s name on the back of the check, and thus obtained the money from the bank. Held, in an action by plaintiffs to recover from the bank the balance of their deposits, that the bank would not be entitled to charge the check against plaintiffs on showing that A. had lost his right of action against plaintiffs for the money which he had delivered to them. Mechanics' Nat. Bank *v.* Harter, 63 N. J. L. 578, 44 Atl. 715, 76 Am. St. Rep. 224.

Pub. Laws 1899, c. 674, § 31, declares that a signature to a negotiable instrument, which is made without authority or forged, shall be wholly inoperative, and shall not give a right to enforce payment against a party thereto. A check drawn payable to the order of A. was procured by representations that the person to whom it was given was A., and the indorsement of the latter was forged thereto, and it was paid by the bank. Held, that the bank was liable to the drawer for such sum, both at common law and under the statute. Tolman *v.* American Nat. Bank, 22 R. I. 462, 48 Atl. 480, 52 L. R. A. 877, 84 Am. St. Rep. 850.

If, according to methods of doing business through a clearing house, a bank on which a check is drawn chooses to pay it on a guaranty of indorsement of payee's name by another responsible bank, such guaranty does not affect the paying bank's duty to its depositor to see that payee's indorsement is genuine. Jordan Marsh Co. *v.* National Shawanut Bank, 201 Mass. 397, 87 N. E. 740.

In an action by a depositor to recover from a bank the amount of his deposits, the bank claimed to be allowed for checks which they had paid. It appeared that the checks themselves were genuine, but the indorsements were forged, and that the depositor had, from time to time, made the checks, in good faith, in favor of a supposed creditor, and had delivered them to his confidential clerk for the creditor, on the clerk's statement that the amounts drawn for were due for goods purchased, and the clerk had forged the indorsements, and drawn the money. Held no defense to the bank. Paying on a forged indorsement is not paying on the depositor's written order. Welsh *v.* German-American Bank, 42 N. Y. Super. Ct. 462, affirmed in 73 N. Y. 424, 29 Am. Rep. 175.

Where a payee of a check specially indorses it, and the indorsements are fraudulently erased, and other payees substituted, payment to the substituted payees will not avail in an action on the checks by the drawer against the bank. Citizens' Nat. Bank *v.* Importers', etc., Nat. Bank, 44 Hun 386, 9 N. Y. St. Rep. 201; S. C., 49 Hun 607, 1 N. Y. S. 664, 17 N. Y. St. Rep. 430, affirmed in 119 N. Y. 195, 23 N. E. 540.

The fraudulent indorsement of a check by the clerk of the payee, who had authority to indorse checks for certain purposes, to persons who did not know that the clerk had authority to indorse for any purpose, conveys no title. Citizens' Nat. Bank *v.* Importers', etc., Nat. Bank, 49 Hun 607, 1 N. Y. S. 664, 17 N. Y. St. Rep. 430.

A person representing himself as the agent of the owner of a note and mortgage sold them, and received in payment a check payable to his alleged principal. He forged an indorsement, and received the amount of the check, being known to both the bank and drawer of the check as a reliable business man hitherto. Held, that the fact that the drawer was deceived, the note and mortgage being spurious, did not release the bank because of the forged indorsement. Kuhn & Sons *v.* Frank, 7 Wkly. L. Bull. 134, 8 O. Dec. Reprint 345, 6 O. Dec. 1142.

A bank which delivered to the supposed agent of a borrower its check on another bank for the amount of the loan, payable to the borrower, is not bound by such agent's act in procuring the money from a third bank on a forged indorsement of the borrower's name, though he was at the time acting as the drawer's agent. German Sav. Bank *v.* Citizens' Nat. Bank, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399.

A bank is liable to its depositors for money deposited which it has paid

of an altered check or draft.[64] It is only when the banker is misled by some negligence or other fault of the drawer that he can set up his own

out on checks drawn by the depositor, which checks have been stolen by the depositor's clerk, who has forged the indorsement thereon, where it appears that the depositor was guilty of no negligence in the matter, and that the bank paid the checks without inquiry as to the genuineness of the indorsement, and in reliance upon the responsibility of the persons presenting them for payment. Shipman *v.* Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, affirming 59 Hun 621, 13 N. Y. S. 475.

Plaintiffs, a firm of attorneys, placed their real estate department in charge of B., subject to the supervision of a member of the firm. B. would examine the titles to the real estate upon which moneys were loaned by plaintiffs' clients; and upon his statement showing existing liens, and the amounts required to remove them, checks would be drawn by plaintiffs, and issued to B., to be deliverable only as against the mortgages. By fraudulent statements, B. obtained 27 checks from plaintiffs, drawn on defendant bank, for amounts aggregating nearly $200,000, and forged the indorsements of the payees, most of whom were fictitious persons, and appropriated the proceeds. Upon such forged indorsements, the checks were paid by defendant. During the four years covered by B.'s crimes, plaintiffs' passbook with defendant was written up 13 times, and on nearly every occasion one or more of the forged checks were returned by defendant. Seventeen of the checks bore also the personal indorsement of B., and passed into his private account with other banks. The remaining ten were delivered by B. to one H., and deposited in the latter's bank. When the plaintiffs' passbook was written up, it went into the hands of their cashier for examination. Held, that defendant was responsible to plaintiffs for the amount of the checks. Shipman *v.* Bank, 59 Hun 621, 13 N. Y. S. 475, judgment affirmed in 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821.

Defendant could not avoid liability on certain of the checks by showing that parties who had claims against plaintiffs for moneys represented by the checks, and in whose favor they were drawn, had since been paid the amount of their claims by B. Shipman *v.* Bank, 59 Hun 621, 13 N. Y. S. 475, judgment affirmed in 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821.

In an action by a depositor against a bank to recover money deposited, which the bank has paid out on checks having forged indorsements, the fact that the forger has made good the amount of the checks to the payees constitutes no defense, where the money with which he made good the checks was not furnished by the bank, and plaintiff had not profited by such payment, since the action is not founded upon the wrongful payment of the checks, but upon the debt created by the deposit. Shipman *v.* Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, affirming 59 Hun 621, 13 N. Y. S. 475.

Plaintiff gave his note to his assignor and received in exchange therefor the latter's check on defendant bank, payable to a third person. The third person did not use the check; but it was unauthorizedly indorsed in his name, and the bank paid it in reliance on the forged indorsement. The plaintiff's assignor assigned to plaintiff his claim against defendant for wrongfully paying the check, and plaintiff, brought suit thereon. Held, that a contention that plaintiff's assignor had sustained no loss of reason of defendant's act, and that consequently plaintiff was not entitled to maintain the action, was without merit. Kearny *v.* Metropolitan Trust Co., 110 App. Div. 236, 97 N. Y. S. 274, 17 N. Y. Ann. Cas. 465, affirmed in 186 N. Y. 611, 79 N. E. 1108.

64. First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229; Belknapp *v.* National Bank, 100 Mass. 376, 97 Am. Dec. 105; Houston Grocer Co. *v.* Farmers' Bank, 71 Mo. App. 132; Bank *v.* First Nat. Bank, 109 Mo. App. 665, 83 S. W. 537; Merchants' Bank *v.* Prudential Ins. Co., 110 Mo. App. 62, 84 S. W. 101; Union Biscuit Co. *v.* Springfield Grocer Co., 143 Mo. App. 300, 126 S. W. 996.

The fact that fraud is practiced in obtaining from the drawer a genuine check in favor of a third person does not excuse the bank from liability for paying the check on a forged indorsement. Kuhn & Sons *v.* Frank, 7 Wkly. L. Bull. 134, 8 O. Dec. Reprint 345, 6 O. Dec. 1142.

A depositor was induced, by the fraud of a third person, to draw her

mistake in this particular against the drawer.[65] Where a check is payable to order, the bank is authorized to pay to one who has become holder only by a genuine indorsement, and can not charge the drawer with payment on a forged indorsement[66] unless the circumstances amounted to a direction by the drawer to pay without reference to the genuineness of the indorsement, or to a subsequent admission that the indorsement is genuine, sufficient to estop the drawer from setting up its forgery.[67] The duty of a bank to use due diligence in identifying the payee of a check is not charged by the time and place of a forgery of a check so as to make it payable to a fictitious payee,[68] since it has been held in numerous cases that a statute providing that a check made payable to a fictitious payee shall be in effect payable to bearer, applies only to cases where the drawer knowingly draws the check to the order of a fictitious payee.[69] There are authorities to the

check payable to the order of a non-existing person, the drawer believing there was such a person, and that she was delivering the check to his agent. The check was presented by the supposed agent with the fictitious payee's name indorsed thereon, and was paid by the bank. Held, that the indorsement was, in effect, a forgery, and that the payment thereof was void as against the depositor. Armstrong *v.* Pomeroy Nat. Bank, 46 O. St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655.

65. Harmon *v.* Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617; Murphy *v.* Metropolitan Nat. Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595.

"A banker can not debit his customer with the payment made to one who claims to a forged indorsement, and so can not give a valid discharge for the bill, unless there be circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of the indorsement, or equivalent to an admission of its genuineness, inducing the banker to alter his position, so as to preclude the customer from showing it to be forged." Roberts *v.* Tucker, 16 Q. B. 560, quoted in Harmon *v.* Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617.

"This is not the case of United States *v.* National Exch. Bank, 45 Fed. 163. In that case the drawer of the check, the postmaster, went with the fraudulent payee to the bank and identified him as the payee named in the check. In that case the fault was of course with the drawer, and not with the drawee. To render that case applicable to this it should have appeared that the proper officer of the railroad company went to the bank and identified the payee." Harmon *v.* Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617.

66. Where check payable to order.—Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648.

Payment by a bank, upon a forged indorsement, of a check payable to order, is not binding on the drawer. Welsh *v.* German-American Bank, 73 N. Y. 424, 29 Am. Rep. 175.

In an action against a bank to recover the amount paid on a check payable to the order of a particular bearer, and having a forged indorsement, a refusal to submit to the jury the question whether the maker intended that the check should be payable to bearer was proper, where the payee was a real, and not a fictitious, person. Bloomingdale *v.* National Butchers', etc., Bank, 33 Misc. Rep. 594, 68 N. Y. S. 35.

67. Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648; Harmon *v.* Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617; Roberts *v.* Tucker, 16 B. 560.

68. Liability of bank not affected by time and place of forgery.—Harmon *v.* Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617.

The time and place of the forgery of a check is immaterial to the bank's liability to the maker for paying the same, unless the forgery was committed under such circumstances as to show negligence on the part of the drawer. Harmon *v.* Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617.

69. Harmon *v.* Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617;

contrary in this country, but the clear weight of authority in both England and United States is in favor of this rule.[70] Where a check is payable to bearer, or has been genuinely indorsed in blank, the bank is authorized to pay to the person who seems to be the holder.[71] A bank that has paid a check on a forged indorsement is not responsible therefor to the drawer where the person who committed the forgery was identified to the bank by one who believed him to be the payee, and was in fact the person to whom the drawer had delivered the check, and whom he believed to be the payee.[72]

Armstrong *v.* Pomeroy Nat. Bank, 46 O. St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; Shipman *v.* Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Hatton *v.* Holmes, 97 Cal. 208, 31 Pac. 1131; Chism *v.* First Nat. Bank, 96 Tenn. 641, 36 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863; Murphy *v.* Metropolitan Nat. Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595.

"We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It can not be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person." Shipman *v.* Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821.

Comp. Laws, § 4870, provides that notes made payable to the order of the maker or to the order of a fictitious person shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker and all persons having knowledge of the facts as if payable to bearer. Held, that such section was applicable only to cases where the drawer knowingly drew the check to the order of a fictitious payee, and was not available as a defense to a suit by the drawer against a bank for payment of a check which had been issued on vouchers altered by the drawer's servant without authority so as to make the same payable to a fictitious payee. Harmon *v.* Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617.

Where, in an action against a bank for paying a forged check, plaintiff, the receiver of a railroad company drawing it, proved that a trusted employee of the company had erased, or caused to be erased, with the aid of others, the name of the real payee from the voucher, had substituted the name of another as payee, and obtained the issuance of a new check to the latter, which was either a fictitious corporation or one unknown to the drawer, plaintiff established a prima facie case of a fictitious payee. Harmon *v.* Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617.

A voucher warrant having been issued by a railroad company to a coal company in Columbus, Ohio, in payment for a coal bill, one of the railroad company's trusted employees sent the papers to Chicago, where the name and address of the payee on the voucher was changed to that of a Chicago coal company, and the altered papers being returned to the office of the railroad's auditor of disbursements, a new warrant was issued, payable to the Chicago concern. This warrant was signed and mailed to the Chicago payee, and was later cashed by a Denver bank and forwarded to a bank in Chicago, which forwarded it to a bank, which collected the same from defendant, the drawee bank, after a guaranty of prior indorsements had been made thereon; defendant taking no precautions to ascertain the identity of the payee before paying the check. Held, in a suit by the railroad company's receiver against the bank to recover the amount so paid, that the burden was on defendant in order to escape liability to show the existence or nonexistence of the payee, and that the Denver bank took the proper means to identify such payee. Harmon *v.* Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617.

70. Harmon *v.* Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617.

71. Where check payable to bearer, or indorsed in blank.—Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648; Roberts *v.* Tucker, 16 Q. B. 560.

72. Facts held to exonerate bank from liability to drawer.—United

A bank is not negligent in cashing a draft on an indorsement of one introduced as the owner by a reliable person well known to the bank, and that the bank guarantees the indorsement is immaterial.[73] A bank being liable to its depositor only for the damages sustained by him by reason of its paying a check upon a forged indorsement, if the depositor has lost nothing he should recover nothing.[74]

Liability to Payee or Legal Owner of Check.—After a check has become the property of the payee thereof by coming into his hands, the liability of the bank will be to such payee for a wrongful payment to another upon a forged indorsement.[75] After acceptance by bank of check drawn

States *v.* National Exch. Bank, 45 Fed. 163.

A bank is not liable for the payment of a draft on a forged indorsement, where the person who committed the forgery and received the money was in fact the person to whom the drawer delivered the check, and whom he believed to be the payee named. States *v.* First Nat. Bank, 17 Pa. Super. Ct. 256.

H. secured a loan from plaintiffs, giving a note and mortgage therefor by the name of D., under the false representation that his name was D., and that he owned the land. The loan was turned over by a check on defendant bank. H. indorsed the check as D., and again as H., and received the money. The land was owned by the real D. Held, that H., and not D., was the intended payee of the check, and he was entitled to payment as between himself and the bank, and the bank, having no notice of the fraud, was not liable to plaintiff for the amount of the check. Meyer *v.* Indiana Nat. Bank, 27 Ind. App. 354, 61 N. E. 596.

Where plaintiff made his check payable to B. in payment for certain horses, and the check was regularly indorsed by B., who was the owner of the horses, to another, to whom the check was paid by the bank on which it was drawn, the fact that the agent of the payee, who sold the horses to plaintiff, falsely represented the owner of the horses to be another person of the same name, who was a person of high business standing, did not entitle plaintiff to recover the money so paid from the bank on the ground that the indorsement of the check was not genuine. Sherman *v.* Corn Exch. Bank, 91 App. Div. 84, 86 N. Y. S. 341.

73. Kelley *v.* Planters', etc., Nat. Bank (Tex. Civ. App.), 135 S. W. 1142.

74. No liability in absence of loss or damage to depositor.—Plaintiffs drew a check payable to a customer to whom they were indebted, and forwarded the same to their agent, to be delivered to the payee. The agent forged the payee's name to an indorsement of the check, and deposited it in a bank to his own credit, and paid the proceeds thereof to plaintiffs with other money in settlement of a shortage in his accounts. The drawee bank paid the check on the forged indorsement in the ordinary course of business. Held, that plaintiffs as drawers were not entitled to recover the amount of the check from the bank, since the proceeds thereof came back to them, and, the debt of their agent remaining unpaid, they suffered no damage by reason of the payment of the check by the bank. Andrews *v.* Northwestern Nat. Bank (Minn.), 117 N. W. 621.

75. Liability to payee for payment of check on forged indorsement.—First Nat. Bank *v.* Pease, 168 Ill. 40, 48 N. E. 160; Vanbibber & Co. *v.* Bank, 14 La. Ann. 481, 74 Am. Dec. 442; Dodge *v.* National Exchange Bank, 20 O. St. 234, 5 Am. Rep. 648.

A bank is liable to the payees of a check made payable to their order, when the check is paid on a forged indorsement made by the collector of the payees, who receives the check in payment of a bill of merchandise intrusted to him for collection by his employers. Vanbibber & Co. *v.* Bank, 14 La. Ann. 481, 74 Am. Dec. 442.

Where plaintiff received from defendant his certified check in payment of a debt, which was subsequently paid by the bank on which it was drawn on a forged indorsement of the payee's name, and returned to defendant as a paid voucher, the bank is liable to plaintiff for the amount so wrongfully paid by it. Laue *v.* Nuffer (N. Y.), 5 N. Y. S. 421.

Where a bank paid a check to another than the payee, upon a forged indorsement, such bank acquired no

upon it in favor of a particular payee or order, the bank must, at its peril, see that the check is paid upon the genuine indorsement of the payee. If the bank mistake identity of payee, or pay to another upon forged indorsement, it will be responsible.[76] Where a check is to be paid to the order of the person named in it, and the payee orders payment to another, the banker is bound to see that the payee's signature is genuine, whether payment is made through the clearing house or over the counter.[77] According to some decisions it has been held that where the drawee has received the checks bearing the unauthorized indorsements, paid them, surrendered them canceled to the drawer, and charged his account with the sums thus expended, these acts constitute in law an acceptance of the checks and assignment of proceeds by the drawee entitling the true payee to sue for the amounts for which the checks were given;[78] and it is well settled in some jurisdictions that a bank, receiving and collecting a check upon a forged indorsement of the payee's name, is liable to the payee for its proceeds, although the bank has fully paid over and accounted for the same to the forger, without knowledge or suspicion of the forgery.[79] According to the decisions in

right against the drawer either to reimbursement or to retain the check. Garthwaite *v.* Bank, 134 Cal. 237, 66 Pac. 326.

76. Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. Rep. 900.

77. Duty of bank not affected by manner of payment.—Jordan Marsh Co. *v.* National Shawmut Bank, 201 Mass. 397, 87 N. E. 740.

The duty of a drawee bank to see that there is a genuine indorsement of a check is the same in law, whether it is made payable to a fictitious or nonexisting person, through the drawer's negligent failure to discover the fraud by which it is obtained, or made payable to an actual existing payee. Jordan Marsh Co. *v.* National Shawmut Bank, 201 Mass. 397, 87 N. E. 740.

78. View that payee entitled to sue where checks paid, surrendered to drawer and charged to his account.—Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648; Seventh Nat. Bank *v.* Cook, 73 Pa. 483, 13 Am. Rep. 751. And see Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897.

That the drawer of a check in favor of plaintiffs, on which plaintiffs' collector had forged their indorsement, introduced such collector to the bank as the person authorized to receive the money, did not prevent plaintiffs' recovery from the bank on a second check which the bank paid to the collector on his forged indorsement of plaintiffs' name, in the absence of evidence that the drawer knew of the forged indorsement on the prior check, or was in complicity with the forger. Adler *v.* Broadway Bank, 30 Misc. Rep. 382, 62 N. Y. S. 402.

Where plaintiffs' collector, receiving a check in payment of a bill on a bank in which the maker had funds, forged plaintiffs' name thereto as indorser, collected the money, and appropriated it to his own use, plaintiffs, having received an assignment of the maker's interest therein, were entitled to recover the amount of the check from the bank. Adler *v.* Broadway Bank, 30 Misc. Rep. 382, 62 N. Y. S. 402.

79. Knoxville Water Co. *v.* East Tennessee Nat. Bank, 123 Tenn. 364, 131 S. W. 447; Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. Rep. 900; Chism *v.* First Nat. Bank, 96 Tenn. 641, 36 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863; Farmer *v.* Bank, 100 Tenn. 187, 47 S. W. 234.

"The authorities are reviewed in case of Farmer *v.* Bank, 100 Tenn. 187, 47 S. W. 234, and it is there said that 'one coming into possession of such paper, either unindorsed, or with a forged indorsement of the payee's name, could not successfully resist the title of the true owner, or, if it has been converted into money, a demand for its proceeds.' The bank in that case received a check from a third party with the forged indorsement of the payee's name. The check was on a bank in a different town, and the receiving bank collected it and placed it to the forger's credit, permitting him to check out the proceeds. The bank

other jurisdictions, however, it has been held that payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of a check, so as to authorize an action by the real owner to recover its amount as upon an accepted check.[80] The principle underlying the rule making the

was held liable, upon the suit against it of the payee, for the amount of the check." Knoxville Water Co. *v.* East Tennessee Nat. Bank, 123 Tenn. 364, 131 S. W. 447.

The liability of a bank to an employer for paying a check drawn on the individual account of such employee, created by indorsing checks without actual or apparent authority, would not be affected by the fact that other banks, including the drawee bank, might be held liable to the employer. Knoxville Water Co. *v.* East Tennessee Nat. Bank, 123 Tenn. 364, 131 S. W. 447.

Where an employee of a waterworks company brought the company's checks to a bank with which it had no business relation, and indorsed them in its name and deposited them to his individual credit, the transaction was such as to put the bank on inquiry, even though such employee may be an officer of the employer; and the bank could not relieve itself from liability for cashing individual checks of such employee, upon the account so created on the ground that it believed the employee to be acting within the apparent scope of his authority. Knoxville Water Co. *v.* East Tennessee Nat. Bank, 123 Tenn. 364, 131 S. W. 447.

Negotiable Instruments Act (Acts 1899, c. 94), § 23, providing that a signature which is forged or made without authority is wholly inoperative, unless the party against whom it is sought to enforce payment is precluded from setting up the want of authority, places a check indorsed without authority on the same basis as a forged indorsement, so that a bank paying checks indorsed by an employee in his employer's name without authority, and thus transferred to the employee's personal account, is liable for the amount thereof. Knoxville Water Co. *v.* East Tennessee Nat. Bank, 123 Tenn. 364, 131 S. W. 447.

80. Payment upon unauthorized indorsement held not an acceptance authorizing action by real owner.—First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229; Houston Grocery Co. *v.* Farmers' Bank, 71 Mo. App. 132; Ranch *v.* Bankers' Nat. Bank, 143 Ill. App. 625.

Payment of a check by drawee bank on a forged indorsement does not constitute nor prove acceptance so as to make it thereafter as an acceptor liable to the true owner. Ranch *v.* Bankers' Nat. Bank, 143 Ill. App. 625.

The fact that a bank paid a check upon a forged indorsement, where the deposit of the drawer exceeded the amount of the check, gave no right of action against the bank to the payee of the check. Houston Grocer Co. *v.* Farmers' Bank, 71 Mo. App. 132.

"We do not understand counsel for appellant to controvert the rule, that a check upon a bank, not for the full amount to the credit of the drawer, and neither drawn upon a particular fund, nor containing in itself words of transfer, does not before acceptance establish any privity of contract between the payee and the drawee, nor afford the former any right of action against the latter. Dowell *v.* Vandalia Banking Ass'n, 62 Mo. App. 482. It is insisted that the case at bar is not governed by this general rule, because the evidence shows that the drawee received the checks bearing the unauthorized indorsements, paid them, surrendered them canceled to the drawer, and charged his account with the sums thus expended, and that these acts constituted in law an acceptance of the checks and assignments of their proceeds by the drawee entitling the true payee (plaintiff) to sue for the amounts for which the checks were given. This position is maintained in some of the cases in other states cited by appellant. Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648; Seventh Nat. Bank *v.* Cook, 73 Pa. 483, 13 Am. Rep. 751; Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. Rep. 900. An examination of these cases does not convince us of the correctness of the reasoning upon which they are founded. We are better satisfied with the contrary doctrine as expounded by the supreme court of the United States in the case of the First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229. In speaking of the legal effect of such acts as those relied upon by appellant in this case, that court says: 'It is further contended that such an acceptance of the check as creates a privity

bank responsible to the payee for payment upon a forged indorsement is that the bank holds the money of its depositors, subject to be checked for as their agent. When, then, the bank receives a check instructing it to pay a certain part of the deposit of the drawer to a third party, and the bank agrees so to do by its general custom, and by undertaking to pay it upon a supposed indorsement of the third party, the amount of the money represented by the check, and on deposit as that of the drawer, becomes eo instante the property of the payee, and the bank, from the moment it undertakes to pay the check, holds the amount of the check as the agent of the payee, and is responsible to the payee, as his agent, if it pays it upon a forged indorsement.[81] The payee of a check whose indorsement has been forged thereon has no right of action against the bank upon which it was drawn, for money had and received, because the bank, supposing the indorsement to be genuine, charged the amount of the check to its depositor, the drawer, credited its correspondent from whom the check was received with an equal amount, and afterwards, upon discovery of the forgery, returned the check to its correspondent and made entries in its books equivalent to a cancellation of its former entries.[82] The check was neither paid nor accepted.[83] The fact that a check has been paid on a forged indorsement, made by one into whose hands it came through a misdirection of a letter, does not prevent the payee from accepting it, and bringing suit precisely as though there had been no indorsement and payment.[84] Where

between the payee and the bank is established by the payment of the amount of this check * * * in the manner described. This argument is based upon the erroneous assumption that the bank has paid this check. If this were true, it would have discharged all of its duty, and there would be an end of the claim against it. The bank supposed that it had paid the check, but this was an error. The money it paid was upon a pretended and not a real indorsement of the name of the payee. The real indorsement of the payee was as necessary to a valid payment as the real signature of the drawer; and in law the check remains unpaid. Its pretended payment did not diminish the funds of the drawer in the bank, or put money in the pocket of the person entitled to the payment. The state of the account was the same after the pretended payment as it was before. We can not recognize the argument that a payment of the amount of a check or sight draft under such circumstances amounts to an acceptance, creating a privity of contract with the real owner. It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act, the other an actual performance.'" Houston Grocery Co. *v.* Farmers' Bank, 71 Mo. App. 132.

81. Reason for rule.—Vanbibber & Co. *v.* Bank, 14 La. Ann. 481, 74 Am. Dec. 442, quoted in Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648.

82. Effect of credit and subsequent cancellation and return of check.—Freeman *v.* Savannah Bank, etc., Co., 88 Ga. 252, 14 S. E. 577.

83. Freeman *v.* Savannah Bank, etc., Co., 88 Ga. 252, 14 S. E. 577, citing First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229.

A check was drawn on C., B. indorsed C's name without his authority and received the money; the bank deducted the check from the drawee's account and settled with him on that basis. It was held that C. could recover the amount of the check from the bank, the conduct of the bank being an acceptance and binding it as a certified check would. Seventh Nat. Bank *v.* Cook, 73 Pa. 483, 13 Am. Rep. 751.

84. Election of payee to accept check after payment on forged indorsement.—Indiana Nat. Bank *v.* Holtsclaw, 98 Ind. 85.

"It is insisted that as the plaintiff did not know that such check had been

one, by falsely representing himself to be the creditor, induces the debtor to give his check, payable to the creditor, and he obtains the money thereon from the bank by forging an indorsement of the payee's name, the payee may ratify the giving of the check, and recover of the bank.[85] Where a bank pays a check on a forged indorsement of the payee's name, it is not relieved from liability to the payee by a subsequent implied admission of the drawer in settling with the bank that the indorsement was genuine.[86] The fact that the drawer of a check payable to order negligently gave it to a third person whom he mistakenly supposed was the payee, will not relieve the bank from liability to the payee for paying the check to such third person on his indorsing the payee's name, without requiring identification, the bank having no notice that the drawer gave the check to such third person.[87] A drawee of a check, who relies on false representations as to identity, for which neither the drawer nor the payee is responsible, does it at his peril.[88] The duty of the drawee, upon acceptance of a check to pay the same only upon the genuine indorsement of the payee named therein, is not affected by a custom among bankers as to the mode of ascertaining the identity of the person indorsing the name of the payee and receiving payment.[89] Where the drawee of a check payable to order pays it upon the forged indorsement of the payee, it is no defense to an action by the payee that it was paid to a person having the rightful possession of the check.[90]

issued and mailed to him until after the appellant had purchased and received the money upon it, he could not thereafter waive the mistake made in addressing the letter and accept the check. We are at a loss to know why. The appellant had acquired no rights, and hence there was nothing to hinder such acceptance. The purchase of the check upon a forged or unauthorized endorsement conferred no title, and in contemplation of law the check remained untransferred. In this condition it was subject to the plaintiff's acceptance, though misdirected, and when accepted the title vested, though it had, in fact, been paid. As its endorsement was unauthorized, its purchase and payment in no manner affected the plaintiff's rights, and, therefore, did not preclude its acceptance. Graves *v.* American Exch. Bank, 17 N. Y. 205." Indiana Nat. Bank *v.* Holtsclaw, 98 Ind. 85.

85. Ratification by payee.—Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648.

86. Effect of subsequent implied admission of drawer in settling with bank.—Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648.

87. Negligence of drawer in giving check to supposed payee.—Dodge *v.* National Exch. Bank, 20 O. St. 234, 5 Am. Rep. 648.

88. Reliance of drawee on false representations, as to identity, etc.—Dodge *v.* National Exch. Bank, 30 O. St. 1.

89. Effect of custom as to mode of ascertaining identity of indorser.—Dodge *v.* National Exch. Bank, 30 O. St. 1.

90. Payment to one having rightful possession of check as defense.—Dodge *v.* National Exch. Bank, 30 O. St. 1.

In an action by D. against a bank to recover damages for the payment upon a forged indorsement of a check of which D. was the legal owner, the agreed statement of facts set out in substance that D. had forwarded a certificate of indebtedness, payable to his order, and indorsed by him in blank, to the paymaster of the United States army at Cincinnati, requesting him to return in payment a draft or check; that the letter containing the certificate was stolen, and the certificate subsequently presented to the paymaster at Columbus by a person representing himself to be D.; that, upon proof of his identity being required, he represented to the paymaster that he could identify himself at the bank; and that, with this understanding, the paymaster gave him a check, payable

Where checks drawn on other banks in favor of a depositor of a bank are cashed by it on forged indorsements, and it subsequently receives the amount of such checks from the drawee banks, the depositor can not recover such moneys from the bank as money received for his use.[91]

to the order of D., which he presented at the bank, and received the money thereon, having forged D.'s indorsement. The bank sought to justify its payment on the ground that the person receiving the money was the one to whom the drawer of the check intended that payment should be made. Upon defendant's objection, the court excluded that part of the agreed statement of facts relating to the conversation between the paymaster drawing the check and the person to whom it was given as to the ability of the latter to identify himself at the bank. Held, error. Dodge *v.* National Exch. Bank, 30 O. St. 1.

The drawee of a bill or check is bound to ascertain that the person to whom he makes payment is the genuine payee, or is authorized by him to receive payment; it being no defense against the payee that the drawee, in the regular course of business and with nothing to excite suspicion, paid the bill to the holder, in good faith and for value, under the indorsement of a person bearing the same name as the payee, but not that person. Gallo *v.* Brooklyn Sav. Bank, 199 N. Y. 222, 92 N. E. 633, reversing 129 App. Div. 698, 114 N. Y. S. 78.

C., falsely representing himself as the owner of a savings bank deposit, presented the book to defendant, and demanded payment. Defendant, not being satisfied with his identification, caused its comptroller to draw a check for the amount to the order of its teller who indorsed the check to the order of the depositor, and handed it to C., who induced plaintiff to cash the check, which was subsequently paid by the drawee bank on an indorsement, which was thereafter held to be a forgery. The drawee bank having recovered the money from a bank in which plaintiff had deposited the check for credit, that bank sued plaintiff to recover the amount, and he notified defendant bank to defend the suit, which it declined to do, and plaintiff, having been cast therein, sued defendant bank to recover ex delicto the amount of the check and the costs of the litigation. Held that, since defendant discharged its obligation when it provided funds for the payment of the check and the check was paid, it was under no obligation to defend the suit against plaintiff, nor was it liable to plaintiff to refund. Gallo *v.* Brooklyn Sav. Bank, 199 N. Y. 222, 92 N. E. 633, reversing 129 App. Div. 698, 114 N. Y. S. 78.

Where a bank pays a check on another bank, made payable to the order of the payee, to a person who indorsed the payee's name thereon without authority, the bank is liable to the payee. Ellery *v.* People's Bank (App. Div.), 114 N. Y. S. 108.

91. Money received by depositor's bank on checks on other banks cashed by it on forged indorsements.—Tibby Bros. Glass Co. *v.* Farmers', etc., Bank, 220 Pa. 1, 69 Atl. 280, 15 L. R. A., N. S., 519.

"The money paid on the checks would not be the money of the drawer of the checks. It would be the money of the banks which paid it. Such is the case here. If the defendant bank received the money on the checks from the drawee banks, the latter did not pay the money out of the deposits of the drawers of the checks, but out of their own money, and hence the money which the defendant received was not the money of the drawers of the checks nor was it the money of the plaintiff. Neither was it received for the use of the plaintiff. The drawers of the checks and the payee were in no way affected by the payment of the amount of the checks by the drawee banks to the defendant bank on the forged indorsements. The depositors of the drawers on which they had drawn the checks were still their money, and the indebtedness of the drawers to the payee for which the checks were given still existed and warranted an action by the payee against his debtors, the drawers of the checks. The collection of the checks by the defendant bank from the drawee banks did not constitute a payment by the latter of the drawers' checks, and hence left intact the drawers' deposits, unaffected by the checks which they had drawn and delivered to the payee. The plaintiff's right of action against the defendant bank is not superior to its right of action against the drawee banks. The money paid the defendant on the several checks was the money of the drawee banks in which neither the

Ratification by Payee.—A bank, through which the collection of a check was negotiated, is not liable to the payee thereof, though she had never indorsed it, where she had ratified its unauthorized collection by accepting a part of the proceeds and a promissory note, such ratification being with full knowledge of all the material facts.[92]

Pleading and Proof—Variance.—Where the petition in an action against a bank for paying drafts on forged indorsements merely alleged that the forgeries were committed by a third person, there could be no recovery if the third person procured another to make the forgeries, or if the forgeries were committed by another.[93]

Evidence.—In a suit against a bank, the issue of fact being whether defendant honored plaintiff's check upon the forged indorsement of the party to whom the payee of the check indorsed it, where the facts tended to discredit the indorsee's testimony as to his nonindorsement of the check, or at least to show that he was a mere dummy for the alleged forger, who was the real party in interest, it was competent to permit defendant to develop all the circumstances connected with the relations between such forgery and the indorsee and the transaction involved in the check.[94]

§ 148 (3) Negligence of Depositor, and Ratification of Forgery or Fraudulent Alteration—§ 148 (3a) Negligence of Depositor as Relieving Bank from Liability.—In General.—Although, as has been seen, banks are held to a strict liability in the payment of forged checks, yet where the drawer of a check has been guilty of negligence facilitating the forgery or alteration or influencing the bank in the payment of such forged or altered paper, the bank is ordinarily relieved from its liability.[95] A check

drawers of the checks nor the plaintiff had any interest, and, having been paid on forged indorsements, it may be recovered from the defendant by the paying banks. The defendant, therefore, has received no money for or on account of the plaintiff company and for which in good conscience it should account to the plaintiff." Tibby Bros. Glass Co. *v.* Farmers', etc., Bank, 220 Pa. 1, 69 Atl. 280, 15 L. R. A., N. S., 519.

92. Ratification by payee.—Hughes *v.* Neal Loan, etc., Co., 97 Ga. 383, 23 S. E. 823.

93. Variance between allegations and proof.—Texas Seating Co. *v.* Farmers', etc., Nat. Bank (Tex. Civ. App.), 134 S. W. 807.

94. Evidence held competent.—Iaffe *v.* State Bank (App. Div.), 110 N. Y. S. 204.

95. Negligence of depositor as relieving bank from liability.—*United States.*—Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657; Armour *v.* Greene County State Bank, 50 C. C. A. 339, 112 Fed. 631; United States *v.* National Exch. Bank, 45 Fed. 163; Central Nat. Bank *v.* National Metropolitan Bank, 31 App. D. C. 391.

California.—Otis *v.* Elevator Co. *v.* First Nat. Bank, 163 Cal. 31, 124 Pac. 704.

Indiana.—Snodgrass *v.* Sweetser, 15 Ind. App. 682, 44 N. E. 648.

Louisiana.—Smith *v.* Merchants', etc., Bank, 6 La. Ann. 610; Levy *v.* Bank, 24 La. Ann. 220, 13 Am. Rep. 124; Israel *v.* State Nat. Bank, 124 La. 885, 50 So. 783.

Maryland. — Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

Minnesota.—Scanlon-Gipson Lumber Co. *v.* Germania Bank, 90 Minn. 478, 97 N. W. 380.

New York.—Shipman *v.* Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Timbel *v.* Garfield Nat. Bank, 121 App. Div. 870, 106 N. Y. S. 497; Morgan *v.* United States Mortg., etc., Co., 125 App. Div. 22, 109

may be so carelessly executed by the depositor as to invite or give opportunity for forgery, and make him liable for a loss ensuing and excuse the bank.[96] Thus, where the drawer of a check has prepared his check so negligently that it can be easily altered without suspicion, and alterations are afterwards made, the bank can not be held liable for paying the check so altered.[97] So also a depositor, who signs checks in blank to be used by a certain employee in his business, has been held to be chargeable by the bank for money paid on a check which was stolen and filled out by an unauthorized employee.[98] The liability of a bank to its depositor for payment of a check on a forged indorsement does not protect a depositor who is in fault in entrusting the check to one he has reason to suppose would make a fraudulent use of it,[99] or in issuing a check to a fictitious person.[1] If the indorsement of a check which was paid by the bank to the bearer, who misappropriated the proceeds, was made in such manner as fairly to indicate that it was intended to be in blank, the loss should fall on the depositor whose negligence caused the mistake, although he claimed the indorsement was for deposit only.[2] If bearer drafts or drafts intentionally made to a fictitious payee (which in law are bearer drafts) are drawn by an agent either expressly or by implication of law authorized so to do, and such drafts are cashed in the belief that the indorsements are the genuine signatures of the payees named therein, a bank so cashing such drafts is not liable, but the loss must be borne by the principal who has so expressly or by conduct

N. Y. S. 274; Trust Co. *v.* Conklin, 65 Misc. Rep. 1, 119 N. Y. S. 367.

Ohio.—Burnet *v.* Woods, etc., Sav. Co. *v.* German Nat. Bank, 4 O. Dec. 290, 3 N. P. 84; Kuhn & Sons *v.* Frank, 7 Wkly. L. Bull. 134, 8 O. Dec. Reprint 345, 6 O. Dec. 1142; Dodge *v.* National Exch. Bank, 30 O. St. 1; S. C., 20 O. St. 234, 5 Am. Rep. 648; Weisberger Co. *v.* Barberton Sav. Bank Co., 84 O. St. 21, 95 N. E. 379, 34 L. R. A., N. S., 1100.

Pennsylvania.—Houser *v.* National Bank, 27 Pa. Super. Ct. 613.

Texas.—Weinstein *v.* National Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23.

Utah.—Brixen *v.* Deseret Nat. Bank, 5 Utah 504, 18 Pac. 43.

Virginia.—National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826.

96. Negligence in drawing the check as in excusing the bank from liability.—Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657.

97. Timbel *v.* Garfield Nat. Bank, 121 App. Div. 870, 106 N. Y. S. 497; Trust Co. *v.* Conklin, 65 Misc. Rep. 1, 119 N. Y. 367; National Dredging *v.* Farmers' Bank (Del.), 6 Pen. 586, 69 Atl. 607; Houser *v.* National Bank, 27 Pa. Super. Ct. 613; Snyder *v.* Corn Exch. Nat. Bank, 221 Pa. 599, 70 Atl. 876.

98. Checks signed in blank and filled out without authority.—Trust Co. *v.* Conklin, 65 Misc. Rep. 1, 119 N. Y. S. 367.

99. Negligence in entrusting check to improper person.—Snyder *v.* Corn Exch. Nat. Bank, 22 Pa. 599, 70 Atl. 876.

1. Issuance of check to fictitious person.—Snyder *v.* Corn Exch. Nat. Bank, 221 Pa. 599, 70 Atl. 876.

2. Indorsement apparently intended to be in blank.—Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657.

A depositor who, on making a loan on the security of a vendor's lien note, drew his check for the amount of the loan payable to the borrower, and the bank paid the check on the forged indorsement of the borrower's agent, the depositor, having acquired the property in excess of the amount of the check on foreclosing the security, could not recover against the bank for its wrongful payment of the check. Dycus *v.* Commonwealth Nat. Bank (Tex. Civ. App.), 148 S. W. 1127.

permitted such agent to operate.[3] Where an employee had authority to indorse drafts in favor of his employer, and a bank paying a draft on the employee's blank indorsement had no notice that the employee was without authority to collect drafts properly indorsed, a payment by the bank to the employee of a draft indorsed by him in blank was valid as against the employer.[4] The depositor is only chargeable with the duty of ordinary care

3. Bearer drafts drawn by authorized agent.—Bartlett *v.* First Nat. Bank, 156 Ill. App. 415, affirmed in 93 N. E. 337.

4. Payment on blank indorsement of authorized employee.—Texas Seating Co. *v.* Farmers', etc., Nat. Bank (Tex. Civ. App.), 134 S. W. 807.

Other instances of negligence excusing bank.—Plaintiff, a broker, discounted a forged bill for an entire stranger, purporting to be drawn on and accepted by P. & H., and in payment gave the forger his check on defendant bank, payable to the supposed acceptors, whose name the forger indorsed thereon, and obtained the money from the bank. Held, that plaintiff did not use due diligence in discounting the bill, and that he could not shift the duty of ascertaining the forgery on the bank by making his check payable to the acceptors, and giving it to the forger. Smith *v.* Mechanics', etc., Bank, 6 La. Ann. 610.

A broker purchased from a stranger a state warrant drawn to the order of, and indorsed by, the secretary of the state senate, and in payment thereof gave his check, payable to the indorser's order, delivering it to the stranger, who represented himself to be the indorser. The check was afterwards paid by the drawee to a bona fide holder, who had taken it upon a forged indorsement. Upon discovering that the state warrant was a forgery, the drawer claimed of the bank the money paid on the forged indorsement. Held, that he can not recover, as he can not complain that the bank failed to protect him from the devices of a person who had defrauded him. Levy *v.* Bank, 24 La. Ann. 220, 13 Am. Rep. 124.

The attorney for a building and savings company made a fraudulent application to said company for a loan for a pretended client, who was in fact nonexistent. The company negligently left the arrangement of the loan largely to the attorney, and after the loan was granted a check was drawn, payable to the order of the supposed borrower, and delivered to the attorney, who indorsed the payee's name, and also his own name, upon which the bank paid him the amount. Held, that the payment was valid as against the company. Burnet Woods, etc., Sav. Co. *v.* German Nat. Bank, 4 O. Dec. 290, 3 N. P. 84.

W., being indebted to R., whose place of business he knew to be 48 Walker street, New York City, drew a check in favor of R., without stating his place of business, and inclosed it in a letter with an envelope which he by mistake addressed to R., 48 Walker street, Cleveland, Ohio, to which place it was sent. The carrier found no person of that name on Walker street, but found a man whose name was R. on another street, to whom he delivered the letter. Such person took the check, and, indorsing the name of R. on the back, obtained cash from one who deposited the check in a bank in Cleveland. The latter bank indorsed it to another bank, guaranteeing prior indorsements, and this bank indorsed it, guaranteeing prior indorsements, and it was presented to the drawee bank, who paid it and charged it to W.'s account, having no knowledge of the mistake. Held, that as the drawer of the check was first at fault, and as negligence contributed to the wrongful appropriation, he could not recover the amount so charged to his account from the drawee bank. Weisberger Co. *v.* Barberton Sav. Bank Co., 84 O. St. 21, 95 N. E. 379, 34 L. R. A., N. S., 1100.

A party, in the course of a real estate transaction with an imposter, a woman, believing her to be the person whose name she assumed, drew a check to her in such name, and delivered it to a broker who was interested in the transaction. The broker introduced the woman to a trust company, and identified her as the person named as the payee in the check, and the trust company cashed it and paid her the money. The trust company, clearing through a bank, indorsed the check, expressly guaranteeing prior indorsements, as also did the bank. The check was paid by the bank upon which it was drawn, and that bank, upon being advised by the drawer that the signature of the payee was a for-

and diligence.[5] The law of the relation between a bank and its depositor does not hold the latter to an extremely high degree of care which would make it impossible for an imposter to obtain from him a check payable to his alleged principal.[6] While the drawer of a check may be liable where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alteration, it is not the law that he is bound so to prepare the check that nobody else can successfully tamper with it.[7] Merely giving a

gery, paid him the amount of the check, and brought suit against the bank which was its immediate indorser to recover the amount of the check. Held, that a verdict was properly directed for the defendant, upon the ground that treating the action, as it should be, as one by the drawer of the check to recover the money as paid to the wrong person, it would be unreasonable and unjust to permit him to escape the natural consequences of his own neglect and mistake by holding the bank at fault for not making the complete inquiry that he ought to have made primarily, to ascertain if the person to whom he caused the check to be delivered was in fact the person whom he believed, and thus represented her to be. Central Nat. Bank *v.* National Metropolitan Bank, 31 App. D. C. 391.

5. Degree of care and diligence required of depositor.—National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826.

Where a person to whom a check was delivered is not the person to whom the proceeds are intended to go, but is one who fraudulently pretends to be the agent of the person by whose name the payee is described in the check, the rule is that, unless the drawer was negligent in delivering the check to the supposed agent to be delivered by him to his principal, the payee named in the check, the bank will not be protected in paying it on the forged indorsement of the latter. In such a case the question is whether, in view of the nature of the transaction and the situation of the parties, the drawer of the check omitted to exercise ordinary care and prudence. Houser *v.* National Bank, 27 Pa. Super. Ct. 613.

If a depositor, without the knowledge of his bank, causes a rubber stamp to be made, which is a substantial fac simile of his bank signature, that fact will not prevent his recovering from the bank money which it has paid out in checks that were forged by the aid of an unauthorized use of said stamp, provided the depositor has used the care of an ordinarily prudent man in guarding the stamp from improper use. Robb *v.* Pennsylvania Co., 3 Pa. Super. Ct. 254.

6. Houser *v.* National Bank, 27 Pa. Super. Ct. 613.

7. Houser *v.* National Bank, 27 Pa. Super. Ct. 613; Critten *v.* Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529, modifying judgment in 60 App. Div. 241, 70 N. Y. S. 246.

Facts held not to show negligence of depositor excusing bank.—Deposits were made in a bank for plaintiff, by her brother and a passbook issued in her name, which was delivered to her; but it afterwards passed into the hands of her brother, who drew checks on her deposit, signing her name to the checks without her knowledge or consent. The bank cashed the checks, but they were never returned to her after cancellation, and no statement of her account was made to her for 18 months and until her brother died and she made demand for her money. A false signature was entered in the bank signature book, but there was no evidence to show how it came there. Held, that plaintiff was not negligent as a matter of law, and the bank was liable to plaintiff for the deposits. Second Nat. Bank *v.* Gibboney (Ind. App.), 87 N. E. 1064.

Plaintiff's confidential clerk prepared checks payable to certain creditors of plaintiff, each check being presented to plaintiff for signature, who compared it with the original bill, and placed it in an envelope directed to the payee, which he sealed, and placed in the mailing drawer. The clerk, in making the checks, left spaces between the dollar mark and the figure of the amount where it was punched and written, and afterwards stole the checks from the mailing drawer, raised them by perforating additional figures, and also writing them in the spaces left by him, then erased the name of the payee, and substituted "Cash," on which he obtained money from the defendant bank on which they were drawn. Held, in an action to recover

stranger a check in exchange for money is not such negligence on the part of the drawer as will excuse the bank on which it is drawn for paying the check, after it has been raised to a higher amount by the drawee without authority.[8]

the amount thus added, that plaintiff was not guilty of such negligence as to discharge the bank of its liability. Critten *v.* Chemical Nat. Bank, 60 App. Div. 241, 70 N. Y. S. 246, judgment modified in 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529.

A bank paid out a depositor's money on what purported to be a check signed by him which was in fact signed by his clerk, and forged. There was no evidence that the clerk had, or was supposed to have, any authority to sign the depositor's name, and it was shown that the forgery was committed on a blank form taken from the depositor's check book, which was left lying about during the day; that it was stamped with a hand stamp sometimes used on his checks, which was accessible to any one in the office; that the clerk was allowed to fill up checks, and was introduced by the depositor to the offices of the bank as the person who was authorized to receive money on the depositor's checks. Held, that the bank was nevertheless liable. Mackintosh *v.* Eliot Nat. Bank, 123 Mass. 393.

A loan broker negotiated with an attorney in good repute, claiming to be acting as agent to procure a loan for the owner of certain land. Notes secured by mortgage were drawn up and the broker, after examining the title and the property, accepted the securities, and gave the lawyer his check payable to the landowner. As a matter of fact, the owner of the land had been dead for some time before the transactions, and the acts of the lawyer were fraudulent. The lawyer forged the name of the deceased landowner to the check, and the bank paid it. Held, that the broker was guilty of no negligence in the transaction preventing him from recovering the amount of the check from the bank. Murphy *v.* Metropolitan Nat. Bank, 191 Mass. 159, 77 N. E. 693, 14 Am. St. Rep. 595.

The forger of a check used one of the printed forms which the purported drawer was in the habit of using in its dealings with the drawee. The forger had twice bought checks like the forged one, and the drawer's cashier, in a letter of advice of the sale of the first check to the forger, at his request inclosed his signature, as he was a stranger in the drawee's city. For the checks bought the forger had paid one-fourth per cent premium, a fact which excited the suspicion of the drawer's cashier, but which he did not communicate to the drawee. Held, that the facts did not excuse the drawee's payment of the forged check. Leavitt *v.* Stanton (N. Y.), Lalor's Supp. 413.

A real-estate agent negotiated a loan from plaintiff to a third person, and presented to plaintiff a note and mortgage apparently executed by such person, whom plaintiff had not met in the transaction. The latter thereupon delivered to the agent his check, payable to the order of the supposed borrower, which was cashed by defendant bank. Afterwards it appeared that the agent had forged the signatures to the note and mortgage and the indorsement on the check. It was a custom of the place for real-estate agents to negotiate loans, and the character of this agent was not known to be bad. Held, the delivery of the check to the agent was not such carelessness on the part of plaintiff as to exempt the bank from its liability to him for the amount paid out. Brixen *v.* Deseret Nat. Bank, 5 Utah 504, 18 Pac. 43.

8. National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826.

"Drawing the check in favor of the stranger was not the proximate cause of the loss. The forgery was the immediate cause, and that could have been as readily perpetrated by an acquaintance. To hold that giving a check to a stranger, where no business relation existed between the drawer and himself, was sufficient evidence of negligence to excuse the bank and impose the loss upon the drawer, if the check was forged by raising it to a larger amount than it was given for, would be to release the banks from the just responsibility imposed upon them by the law as custodians of the customer's money, and expose the depositor to a risk and danger that would greatly impair the usefulness of the bank as a safe place of deposit." National Bank *v.* Nolting, 94 Va. 263, 267, 26 S. E. 826.

Negligence of Depositor Must Be Proximate Cause of Loss.—Where a bank is negligent in paying forged checks, the depositor will not be estopped by his own negligence from claiming the amount so paid unless such negligence was directly connected with the forgery.[9] The negligence of a depositor, unless the direct and proximate cause of the payment of a check bearing the forged indorsement of a payee, will not relieve the bank from liability to the depositor therefor.[10]

Negligence a Question for the Jury.—The question whether the depositor or the bank paying forged or altered checks was negligent may be a question for the jury upon the evidence.[11]

9. Negligence of depositor must be directly connected with forgery.—New York Produce Exch. Bank *v.* Houston, 95 C. C. A. 251, 109 Fed. 785.

10. Jordan Marsh Co. *v.* National Shawmut Bank, 201 Mass. 397, 86 N. E. 740.

Where a depositor is fraudulently induced to deliver to a person, who is not entitled to it, a check made payable to another, who is also not entitled to payment, the depositor's negligence in suffering the fraud to be practiced on it is not the proximate cause of payment made by the drawee on the forged indorsement of the payee's name, without any investigation as to its genuineness. Jordan Marsh Co. *v.* National Shawmut Bank, 201 Mass. 397, 87 N. E. 740.

In an action by a depositor to recover from a bank the amount of his deposits, the bank claimed to be allowed for checks which it had paid. It appeared that the checks themselves were genuine, but the indorsements were forged, and that the depositor had, from time to time, made the checks, in good faith, in favor of a supposed creditor, and had delivered them to his confidential clerk of the creditor, on the clerk's statement that the amounts drawn for were due for goods purchased, and the clerk had forged the indorsements and drawn the money. Held no defense to the bank. Making the checks on the clerk's statements was not negligence, or, if it were, it was not negligence which contributed to the forgery, or to mislead the bank into paying without proper identification of the signature. Welsh *v.* German American Bank, 42 N. Y. Super. Ct. 462, affirmed in 73 N. Y. 424, 29 Am. Rep. 175.

A stranger, with whom a firm sustained no business relation, obtained from its cashier a bank check for $10 in exchange for $10 in currency. When the check was presented to and paid by the bank, it had been raised to $500. Held, that the bank was liable for the loss, the firm's negligence being too remote to affect the forgery. National Bank *v.* Nolting, 94 Va. 263, 26 S. E. 826.

The fact that plaintiff loan association was negligent in issuing checks payable to its members on forged applications for withdrawals, the means of verifying the signatures being at hand, is no defense to an action by plaintiff to recover the amount of such checks paid by defendant bank on forged indorsements of the payees' names. Harlem, etc., Loan Ass'n *v.* Mercantile Trust Co., 10 Misc. Rep. 680, 31 N. Y. S. 790, 64 N. Y. St. Rep. 494.

The mere possession by a bank depositor, without notice to the bank, of a rubber stamp making a fac simile of his signature, does not render him liable for loss of money paid out on checks forged therewith. Robb *v.* Pennsylvania Co., 186 Pa. 456, 41 Atl. 49, 41 L. R. A. 695, 65 Am. St. Rep. 868.

A bank depositor was not negligent, as matter of law, in the care of a rubber stamp making a fac simile of his signature, with which his office boy, who was not suspected of dishonesty, forged checks, where he placed it in a compartment in a safe, locked the compartment, and put the key thereof in a drawer in the safe, behind some papers, put the key to the drawer in another unlocked drawer, and then locked the safe, and put the key thereof in a box on another safe. Robb *v.* Pennsylvania Co., 186 Pa. 456, 41 Atl. 49, 41 L. R. A. 695, 65 Am. St. Rep. 868.

11. Negligence question for jury.—Whether the depositors are estopped, by the negligence of their representative, to dispute the correctness of the account as rendered by the bank from time to time, is, in view of all the circumstances of this case, a mixed ques-

§ 148 (3b) Estoppel or Ratification.—The drawer of a check may be estopped, by the course of dealing between him and the drawee, to assert that a check which the drawee has paid is a forgery.[12] A customer of a bank, who has a deposit account and is in the habit of drawing checks thereon, and who, by words or acts, causes the bank, acting upon such reasonable grounds as prudent business men generally act to make payment on a forged check, will not be allowed, as against the bank, to set up the

tion of law and fact, and as there is, under the evidence, fair ground for controversy as to whether the officers of the bank exercised due caution before paying the altered checks, and whether the depositor omitted, to the injury of the bank, to do what ordinary care and prudence required of him, it was not proper to withdraw the case from the jury. Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657.

12. Estoppel of drawer to set up forgery.—Kuhn & Sons *v.* Frank, 7 Wkly. L. Bull. 134, 8 O. Dec. Reprint 345, 6 O. Dec. 1142.

The rule that payment of a forged check by a bank is not good as against a depositor does not apply where the depositor's negligence contributed to the payment, or he was estopped to deny that it was valid. Otis Elevator Co. *v.* First Nat. Bank, 163 Cal. 31, 124 Pac. 704.

Where the acts and conduct and methods of business or filling up of checks on the part of a depositor were such as to warrant a bank in paying forged or fraudulently altered checks, such conduct on the part of the depositor was the proximate cause of the loss, and the bank is not liable for payments made on such checks. National Dredging Co. *v.* Farmers' Bank (Del.), 6 Pen. 580, 69 Atl. 607.

Where a bank received a typewritten letter from one of its depositors, authorizing an employee of the depositor to sign the name of the depositor to the checks, and the bank sent a messenger with the letter to the depositor, notifying it that the bank would not accept the typewritten signature of any officer of the depositor, but would require the written signature of an authorized officer to such letter, and the next day what purported to be a properly signed letter to that effect was received, and the party purporting to have been authorized thereafter drew checks on the bank in the name of the depositor, it justified a finding that payments made by the bank on checks so drawn were proper. Scanlon-Gipson Lumber Co. *v.* Germania Bank, 90 Minn. 478, 97 N. W. 380.

It was the custom of a grain dealer, doing business at a place by an agent, to furnish the agent with checks on a bank, signed in blank, to be also signed by the agent when used in payment for grain. Such a check, after having been signed in blank by both principal and agent, was stolen and filled out by a third person, and was presented to and paid by the bank. Held that, as between the customer and the bank, the customer was liable for the loss. Snodgrass *v.* Sweetser, 15 Ind. App. 682, 44 N. E. 648.

Where a dealer in corn arranged with a bank to cash the checks of his agent given for the purchase of corn, and each check bore a memorandum of the amount purchased, the truthfulness of the memoranda could at any time have been tested by such dealer by inspecting the corn in the cribs; but it was no part of the duty of the bank and it could not be held responsible if some of the checks so drawn and cashed by it did not represent actual purchases. Armour *v.* Greene County State Bank, 50 C. C. A. 339, 112 Fed. 631.

Where a dealer in corn arranges with a bank to cash the checks of his agent given for the purchase of corn, and such agent issues checks, purporting to represent, but in fact not representing, such purchase, and the bank in good faith cashes such checks, and there is no negligence on the part of such banker, the loss must fall on the dealer, who, by his selection of such agent, made the loss possible. Armour *v.* Greene County State Bank, 50 C. C. A. 339, 112 Fed. 631.

Where plaintiff's servant had ostensible authority to receive payment of checks drawn and presented in the manner in which he presented and received payment of two forged checks prepared in such a way as not to present evidence of the forgery on the face thereof, plaintiff, and not defendant bank, was required to bear the loss. Otis Elevator Co. *v.* First Nat. Bank, 163 Cal. 31, 124 Pac. 704.

forgery.[13] A purchaser of a draft can not recover from the drawing bank on the person to whom it was sent forging the payee's indorsement, where the bank warned him against sending the draft to that person, a stranger who represented himself to be the payee's agent.[14] So, also, the depositor may, by his own words or acts, be held to have ratified the forgery or fraudulent alteration.[15] Where the circumstances are such as to amount to a direction from the drawer to the bank to pay without reference to the genuineness of indorsements, or are equivalent to a subsequent admission that the indorsement is genuine, in reliance upon which the bank is induced to alter its position, the bank will not be chargeable with the loss.[16] It has been held, however, that the mere silence of a depositor in regard to misapplication of his funds by a bank will not estop him from recovery, in the absence of evidence that the bank was prejudiced thereby.[17] Where a bank pays a check on a forged indorsement of the payee, the drawer does not lose his right to recover the amount of the bank by receiving, without knowledge of the wrongful payment, the check as one properly paid and charged to his account by the bank.[18] Where, however, in an action against a bank to recover a deposit, in which plaintiff denies that a check for the

13. Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

14. Kelley *v.* Planters', etc., Nat. Bank (Tex. Civ. App.), 135 S. W. 1142.

15. **Ratification of forgery or alteration.**—In an action by a depositor against a bank to recover his balance, it appeared that plaintiff kept a bank account with defendant; that the bookkeeper of plaintiff kept the cash account, made the deposits, etc., and that his relation towards plaintiff was well understood in the bank; that the bookkeeper of plaintiff drew a check on the bank for $2,500, to which he forged plaintiff's signature, which was an amount above the account to the credit of plaintiff in the bank; that notice was given by the bank that plaintiff had overdrawn his account, who, on being shown the check for $2,500, said he had not signed it, but did not say that it was a forgery; and, on seeing his bookkeeper, he reported back to the bank that it was all right. Subsequently the bookkeeper drew another check on the bank for $1,700, and again forged the signature of the plaintiff thereto, which the bank paid on presentation. On discovering the second forgery by the bookkeeper, six months after the first, plaintiff denounced the act. Held, that the act of the plaintiff in ratifying the first act of forgery made by his bookkeeper exonerated the bank from all liability for having paid it; that his afterwards keeping the bookkeeper in his confidential employ misled the bank, and threw it off its guard; that, having approved and ratified the first forgery, the bank was excused for paying subsequent checks similarly drawn; that the plaintiff had, by his own acts, caused the injury, and he must, therefore, bear the loss. De Feriet *v.* Bank, 23 La. Ann. 310, 8 Am. Rep. 597.

Evidence as to ratification held admissible—On the issue whether a depositor in a bank has ratified the payment by it of a check drawn payable to the order of a person named, and fraudulently altered by erasing the name of the payee, evidence that the bank had previously paid checks of the depositor, showing upon their face alterations in the name of the payee, held inadmissible. Dana *v.* National Bank, 132 Mass. 156.

16. Armstrong *v.* Pomeroy Nat. Bank, 46 O. St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am St. Rep. 655; Dodge *v.* National Exch. Bank, 30 O. St. 1; S. C., 20 O. St. 234, 5 Am. Rep. 648; Burnet Woods, etc., Sav. Co. *v.* German Nat. Bank, 4 O. Dec. 290, 3 N. P. 84, reversed on another point, 39 Wkly. L. Bull. 175.

17. **Silence of depositor as a ratification.**—Fifth Nat. Bank *v.* Iron City Nat. Bank, 92 Tex. 436, 49 S. W. 368, affirming 47 S. W. 533.

18. **Receipt of check by depositor as one properly paid and charged to his account**—Bank *v.* Merchants' Nat. Bank, 91 N. Y. 106.

amount sued for, which defendant had paid, was signed by her or by her authority, it appears that she received the proceeds of the check with knowledge of the fact that the money had been paid by defendant thereon, or the money was deposited to plaintiff's credit in another bank, and drawn out by her or by her authority, she was not entitled to recover.[19] Where a check drawn by a depositor is paid to the wrong person the indorsement having been forged, and the depositor has neither by act nor representation induced the bank to pay out the money on the forged indorsement, the depositor is not estopped from suing the bank, from the fact, that he, without objection, received statements from the bank showing the payment of the check.[20] This is in accordance with the general rule that estoppel in pais only operates in favor of one who, induced by the acts or representations of another, so changes his position that injury would result if the truth were known.[21]

§ 148 (4) Laches of Depositor in Discovering Forgery or Notifying Bank Thereof.—In General.—It is the duty of a depositor in a bank, on discovering that it has paid and charged to his account either a check bearing his forged signature as drawer or his check on the forged indorsement of the payee, to promptly notify the bank of the forgery.[22] Such notification must be given with reasonable promptness, according to the circumstances of the business,[23] and the neglect of a drawer of a check

19. Phœnix Nat. Bank *v.* Taylor, 113 Ky. 61, 23 Ky. L. Rep. 2307, 67 S. W. 27.

20. **Receipt of statements by depositor as estoppel of suit against bank.**—Masonic Ben. Ass'n *v.* First State Bank, 99 Miss. 610, 55 So. 408.

Plaintiff's general clerk, who was employed to keep books, collect accounts, and make deposits, indorsed the check of a third person payable to plaintiff in plaintiff's name, and procured the money thereon, for which he failed to account, from the barkeeper of a saloon, in accordance with a neighborhood custom. The clerk had never indorsed plaintiff's name to checks for transfer before to plaintiff's knowledge, except in indorsing checks for deposit he had used a rubber stamp reading, "Pay to the Northern National Bank. Joseph Rosenberg," for that purpose. Held, that plaintiff was not estopped from denying the validity of the indorsement, or the authority of the clerk to indorse the same, as against a bank paying the check. Rosenberg *v.* Germania Bank, 44 Misc. Rep. 233, 88 N. Y. S. 952.

21. Masonic Ben. Ass'n *v.* First State Bank, 99 Miss. 610, 55 So. 408.

22. **Duty of depositor to notify bank of forgery.**—McNeely Co. *v.* Bank, 221 Pa. 588, 70 Atl. 891.

23. Califf *v.* First Nat. Bank, 37 Pa. Super. Ct. 412.

A bank paid a check on a forged indorsement, and the drawer of the check delayed for six weeks after discovery of the forgery to notify the bank thereof. The bank in which the check was first deposited had failed in the meantime, and the bank on which the check was drawn, if it had had timely notice, could have saved itself from loss. Held, that it was not liable to the drawer. Cunningham *v.* First Nat. Bank, 219 Pa. 310, 68 Atl. 731.

Delay in suing a bank for paying a check on a forged indorsement until after the death of the person probably guilty of the forgery was no defense to the action, where the forgery was concealed from plaintiff until near the time of the death of such person. Judgment, 110 App. Div. 236, 97 N. Y. S. 274, affirmed in Kearny *v.* Metropolitan Trust Co., 186 N. Y. 611, 79 N. E. 1108.

The neglect of a drawer of a check, for more than a month after discovering that it had been paid upon a forged indorsement, to notify the bank that it will hold it responsible there-

for an unreasonable time after discovering that it had been paid upon a forged indorsement, to notify the bank that it will hold it responsible therefor, has been held to relieve the bank from liability,[24] even though it had notice of the forgery as soon as the drawer had.[25] In some jurisdictions it is expressly provided by statute that no bank shall be liable to a depositor for the payment of a forged check unless, within a specified time (usually one year) after the return to the depositor of the voucher of payment, such depositor shall notify the bank that the check was forged.[26] The depos-

for, released the bank from liability, even though it had notice of the forgery as soon as the drawer had. United States *v.* National Exch. Bank, 45 Fed. 163.

One whose name was forged to an indorsement of checks which were paid by defendant bank was not under a duty to give notice to the bank of the forgery until he had knowledge of the facts tending to show it, and was not estopped from asserting lack of knowledge, unless he was guilty of negligence. Schnabel *v.* Hanover Nat. Bank, 78 Misc. Rep. 35, 137 N. Y. S. 727.

Provisions in passbook as to notice.—The passbook contained a statement that, "unless notice of any errors, irregularities, or vouchers is given within ten days, the account will be regarded as conclusively stated and adjusted at the balance found due as per passbook." The slips of returned vouchers stated that "reclamation for errors and all objections to entries made or to vouchers returned should be made with due diligence." Held, that forgery was scarcely embraced within the term "errors and irregularities," and that, in any event, it was modified by the notice on the slips, which only required due diligence. Clark *v.* National Shoe, etc., Bank, 32 App. Div. 316, 52 N. Y. S. 1064, judgment affirmed in 164 N. Y. 498, 58 N. E. 659.

24. Negligence in giving notice in relieving bank.—United States *v.* National Exch. Bank, 45 Fed. 163.

A depositor, failing to promptly notify a bank of its discovery of forgeries, can not recover of the bank irrespective of whether the bank could have protected itself had it been promptly notified. McNeely Co. *v.* Bank, 221 Pa. 588, 70 Atl. 891.

The duty of a depositor upon discovering that the bank has paid and charged to his account, either a check bearing his forged signature as drawer, or his check on the forged indorsement of the payee, is to promptly notify it of the forgery. A delay of a week or two weeks after the discovery of the forgery is too late, and will be so found by the court as a matter of law. The fact that the discovery of the forgery was not made until after the forger's death is immaterial if the depositor does not notify the bank for a week or two weeks after the discovery, as the reason for the rule is based on the right of the bank to proceed immediately and promptly against the wrongdoer, and to take what measures it may deem proper to recover the money, and the court can not say as a matter of fact and of legal certainty that after the death of the forger the bank can do nothing. Murray *v.* Real Estate Title Ins. & Trust Co., 39 Pa. Super. Ct. 438.

Where notes purporting to have been made by H., payable to A. and J., and discounted by A. at various banks, are paid by H. and J., though claimed by them to have been forged by A., they, having knowledge that other notes were made and indorsed in like manner, on failing to warn the banks of such forgery and against discounting such other notes, will be estopped from pleading, as against such banks, that such other notes were forged. Parkersburg Nat. Bank *v.* Hannaman (W. Va.), 60 S. E. 242.

25. United States *v.* National Exch. Bank, 45 Fed. 163.

26. Statutory provision as to notice.—Shattuck *v.* Guardian Trust Co., 145 App. Div. 734, 130 N. Y. S. 658; Pratt *v.* Union Nat. Bank, 77 N. J. L. (50 Vr.) 117, 75 Atl. 313.

A corporation made a deposit with a trust company, organized under the banking law, payable only on checks signed by the president and treasurer. The president forged the signature of the treasurer and obtained the deposit on such forgery. The president left the passbook with the company to be balanced, and the passbook, when balanced, and the vouchers, were returned to him. The president delivered the passbook to the treasurer, who made

itor's delay in notifying a bank of a forged indorsement of a check after discovery will not, it would seem, be a defense to an action against the bank to recover the amount thereof, unless the bank was injured thereby;[27] and

inquiries of the secretary of the company of the way in which the money had been drawn, and laws informed that it had been drawn by the president on checks. Held to show such a delivery of the vouchers to the corporation as to set in operation Negotiable Instruments Law (Consol. Laws 1909, c. 38), § 326, providing that no bank shall be liable to a depositor for the payment of forged checks, unless, within a year after the return to the depositor of the voucher of payment, he shall notify the bank that the check was forged. Shattuck *v.* Guardian Trust Co., 145 App. Div. 734, 130 N. Y. S. 658.

Statute not retroactive.—Act April 13, 1908 (P. L. p. 428), providing that no bank shall be liable to a depositor for the payment of a forged check unless within one year from the return to the depositor of the voucher of such payment such depositor shall notify the bank of such fact, is prospective and not retroactive. Pratt *v.* Union Nat. Bank, 77 N. J. L. (50 Vr.) 117, 75 Atl. 313.

Manner of notice.—Under Negotiable Instruments Law (Consol. Laws 1909, c. 38), § 326, providing that no bank shall be liable to a depositor for the payment of a forged check unless, within a year after the return to the depositor of the voucher of payment, he "shall notify the bank" that the check was forged, a real notice addressed to the officers having authority to receive it, is essential. Shattuck *v.* Guardian Trust Co., 145 App. Div. 734, 130 N. Y. S. 658.

27. Laches of depositor not a bar to recovery in absence of resultant injury to bank.—Pratt *v.* Union Nat. Bank, 77 N. J. L. (50 Vr.) 117, 75 Atl. 313; Harlem, etc., Loan Ass'n *v.* Mercantile Trust Co., 10 Misc. Rep. 680, 31 N. Y. S. 790, 64 N. Y. St. Rep. 494; Murphy *v.* Metropolitan Nat. Bank, 191 Mass. 159, 77 N. E. 693, 14 Am. St. Rep. 595.

Where a bank allowed over three months to elapse before it returned to a depositor a forged check drawn on his account and payable to "currency or bearer," that it had paid without requiring the bearer's indorsement or identification, and there was no evidence that the bank could have retrieved its loss if notified of the forgery, the depositor's neglect within a reasonable time after the return of his canceled checks to examine them, and give notice of the forgery, was not a defense to an action to recover the money paid on such check; and hence the bank was not prejudiced by an erroneous instruction to the effect that the depositor was not guilty of negligence in failing to examine the checks and bank book, and that he became bound to give notice of the forgery only after he had discovered it. Janin *v.* London, etc., Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82.

The jury were properly instructed to find for plaintiff unless defendant was deprived of an opportunity to save itself from loss by his failure to examine the checks and bank book, and to give notice of the forgery. Janin *v.* London, etc., Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82.

Any negligence of a depositor in not discovering that an indorsement on a check returned to him by the bank was forged was not prejudicial to the bank, and did not estop the depositor to repudiate the payment made by the bank on the forged indorsement, where it appeared that the bank paid the check a little over a month after it was drawn and several months before it was returned to the depositor, and made the payment in reliance upon a guaranty of indorsements made by another bank. Judgment, 110 App. Div. 236, 97 N. Y. S. 274, affirmed in Kearny *v.* Metropolitan Trust Co., 186 N. Y. 611, 79 N. E. 1108.

Where a depositor neglects to verify vouchers returned to him by the bank with his record thereof, or fails to discover and notify the bank of forgeries, he does not thereby estop himself from claiming that they are forgeries, but his liability is limited to the damages caused thereby to the bank. Judgment, 60 App. Div. 241, 70 N. Y. S. 246, modified in Critten *v.* Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529.

Any negligence of a depositor in not discovering that an indorsement on a check returned to him by the bank was forged was not prejudicial to the bank, and did not estop the depositor to repudiate the payment

the question as to whether or not a bank has been prejudiced by a depositor's failure, upon examination of his account, to detect and report a forgery, is a question for the jury.[28]

Duty of Depositor as to Examination of Passbook and Vouchers.—According to some decisions it would seem to be held that the depositor does not owe to the bank the duty to examine his passbook, when the same has been balanced and returned to him with the canceled checks or vouchers, and the fact that such an examination would have disclosed the forgery or alteration will not be a defense in an action by the depositor against the bank to recover money paid out upon a forged or altered check or forged indorsement.[29] According to the weight of authority, however, it would

made by the bank on the forged indorsement, where it appeared that the bank paid the check a little over a month after it was drawn and several months before it was returned to the depositor, and made the payment in reliance upon a guaranty of indorsement made by another bank. Kearny v. Metropolitan Trust Co., 110 App. Div. 236, 97 N. Y. S. 274, affirmed in 186 N. Y. 611, 79 N. E. 1108.

In an action against a bank to recover money paid by it on three checks drawn by complainant, payable to T.'s order, and delivered to W., who forged indorsements thereof by T., it appeared that his transactions with W. covered a period of 18 months, during which he turned over to W. 35 checks, all payable to T.'s order, 32 of which were paid on indorsements like those on the three checks in question, and all of which complainant claimed were forgeries; that during such period his account was balanced three times, and he never examined it until after "this litigation" arose; and that he knew T.'s signature, and the signatures on all the checks were forgeries except possibly two. Held, that recovery was not prevented by complainant's negligence, it appearing that there had been no loss to complainant or the bank on account of the 32 checks, and hence no cause to challenge an inspection of the indorsements thereon. Pollard v. Wellford, 99 Tenn. 113, 42 S. W. 23.

28. Prejudice to bank question for jury.—Weinstein v. National Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23.

Plaintiff, a bank, kept deposits with defendant bank. By direction of plaintiff's cashier defendant applied plaintiff's deposit to payment of such cashier's personal debt to plaintiff, and returning him the note so paid and collateral held to secure it, sent plaintiff, at the end of the month, a statement showing such application of its deposit; to this no objection was made until nearly a year later, when suit was brought for the money so misapplied. The cashier was insolvent and had then become a fugitive. Held, that under these circumstances defendant's plea of estoppel should be submitted to the jury; the court could not say as matter of law that there was no evidence that it had been injured by plaintiff's silence. Fifth Nat. Bank v. Iron City Nat. Bank, 92 Tex. 436, 49 S. W. 368, affirming 47 S. W. 533.

29. View that depositor does not owe bank duty to examine passbook and cancel checks.—Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731, Seld. Notes 219; Welsh v. German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399.

A drawer of a check owes no duty to the drawee or to an indorsee to investigate as to the genuineness of an indorsement, or for that purpose to examine with diligence the check upon its return. German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399.

Where a bank pays checks to which a depositor's signature had been forged, such depositor is not precluded from recovering the amount so wrongfully paid by the fact that the bank had balanced his book, and returned it with the checks, which he did not question until a long time thereafter, when, having discovered the error, he notified the bank within a reasonable time. Its only effect, in the absence of loss of any right by the bank, caused by the delay, is to cast on the depositor the burden of proving fraud, error, or mistake in the account. Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731, Seld. Notes 219; Frank

seem that under the custom stated, it is the duty of the depositor to examine within a reasonable time and with ordinary care the account rendered in the passbook and vouchers returned to him by the bank, and to report any errors discovered, without unreasonable delay,[30] and, according

v. Chemical Nat. Bank, 37 N. Y. Super. Ct. 26.

Where a bank returns a check to a depositor as evidence of a payment made by his direction, the depositor may assume that the bank has ascertained that the indorsements on the check are genuine and that no unauthorized payment has been made. Kearny *v.* Metropolitan Trust Co., 110 App. Div. 236, 97 N. Y. S. 274, affirmed in 186 N. Y. 611, 79 N. E. 1108.

Where the check of a customer is payable to a certain person or order, it is the duty of the drawee to pay it only upon a genuine indorsement; and therefore, where such checks are paid on forged indorsements, the fact that they were returned to the depositor when his passbook was written up, and were received by him without objection, does not relieve the bank from liability, as the drawer is not presumed to know the payee's signature, and his failure to discover the forgery is not negligence. Shipman *v.* Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821.

A depositor is not bound to look for forged signatures among his checks when his book is balanced and the checks returned to him, and will not be presumed to have acquiesced in the account charging him with the payment of such check, where he has failed for more than a reasonable time to examine the checks and discover the forgery. Cincinnati Nat. Bank *v.* Creasy & Sons, 18 Wkly. L. Bull. 410, 10 O. Dec. 121.

When checks are returned to a depositor by a bank, he is not charged with notice of forged indorsements. Guaranty State Bank, etc., Co. *v.* Lively (Tex. Civ. App.), 149 S. W. 211.

Notice must be given promptly, however, as soon as the forgery is discovered, and the check must be returned to the party upon whom the loss is sought to be cast; thus affording him reasonable opportunity to protect himself from loss. Van Wert Nat. Bank *v.* First Nat. Bank, 6 O. C. C. 130, 3 O. C. D. 380, affirmed in 52 O. St. 630, 44 N. E. 1142.

That the bank made up the account between it and the drawer of the check, and returned him the book containing the account, and showing payment of the check, which book was returned by him for three years before complaint was made regarding the payment, is not such laches on the part of the drawer as relieves the bank from liability; there being nothing in the account to put the drawer on inquiry as to the forged indorsement. Atlanta Nat. Bank *v.* Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96.

30. Prevailing rule that depositor must examine passbook and vouchers returned. — *United States.* — Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657; Armour *v.* Greene County State Bank, 50 C. C. A. 339, 112 Fed. 631.

Alabama.—First Nat. Bank *v.* Allen, 100 Ala. 476, 14 So. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80.

Delaware.—National Dredging Co. *v.* Farmers' Bank, 6 Pen. 580, 69 Atl. 607.

Louisiana. — Israel *v.* State Nat. Bank, 124 La. 885, 50 So. 783.

Massachusetts. — Jordan Marsh Co. *v.* National Shawmut Bank, 201 Mass. 397, 87 N. E. 740.

Missouri.—Kenneth Inv. Co. *v.* National Bank, 96 Mo. App. 125, 70 S. W. 173.

New Jersey.—Pratt *v.* Union Nat. Bank, 77 N. J. L. (50 Vr.) 117, 75 Atl. 313.

Pennsylvania.—Califf *v.* First Nat. Bank, 37 Pa. Super. Ct. 412.

Texas.—Weinstein *v.* National Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23; First Nat. Bank *v.* Iron City Nat. Bank, 92 Tex. 436, 49 S. W. 368.

Virginia.—First Nat. Bank *v.* Richmond Elect. Co., 106 Va. 347, 56 S. E. 152, 7 L. R. A., N. S., 74.

The sending of his passbook by a depositor to the bank to be balanced and returned with vouchers is, in effect, a demand to know what the bank claims to be the state of his account, and the returning of the book with the vouchers is the answer to the demand, and imports, in effect, a request by the bank that the depositor will in proper time examine the account so rendered and either sanction or repudiate it. The depositor can not therefore without injustice to the bank

to these authorities, where a depositor's passbook has been balanced and returned to him with forged or fraudulently altered checks, the failure of the depositor to notify the bank within a reasonable time that such checks were forged or fraudulently altered will, if the delay be caused by his failure to use due care in examining his passbook and vouchers, or to give notice, constitute a defense, in the absence of negligence by the bank, to such checks, to the extent of loss sustained by the bank in consequence of such negligence of the depositor.[32] The return, to a depositor, of his check with

omit all examination of his account, and his failure to make it within a reasonable time is inconsistent with the object for which he obtains and uses his passbook. National Dredging Co. *v.* Farmers' Bank (Del.), 6 Pen. 580, 69 Atl. 607.

Though the passbook of a depositor, balanced at intervals by the bank, and returned to him, is only an account stated, and not conclusive, yet where he omits altogether to examine the charges therein, and the canceled checks returned as vouchers therewith, and so fails to discover that the amounts of a number of checks have been raised by his clerk, to whose exclusive care he has intrusted his account with the bank, and consequently is unable to give timely notice of the frauds to the bank, he is guilty of such negligence that, in an action by him to recover the amount paid upon the altered checks, it is error for the court to direct a verdict in his favor. Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657.

It is the duty of a depositor to know whether his account with a bank is correct, and promptly to report a forgery when detected, and if he negligently fails to make the examination and consequent discovery, when it could have been discovered, it is as if he had expressly admitted the genuineness of the forged checks, and he will not afterwards be permitted to deny their genuineness, provided the bank has been prejudiced by his failure. Weinstein *v.* National Bank of Jefferson, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23.

Plaintiff's checks were always signed by himself and written by himself or his clerk. On November 21, 1905, his passbook was returned with the checks paid to that date, and three of the cancelled checks, which were payable to bearer, and were not shown by the stubs of his check book, were in a handwriting entirely different from that of plaintiff or his clerk, except the signature, which was an exact imitation of plaintiff's signature. Plaintiff discovered these facts at the time, but did not notify the bank, claiming at trial that he thought the fact that the checks were not shown in his stubs might be explained by his forgetting to enter them, and he was not sure at the time that they were forged. On January 25, 1906, 18 other checks forged in the same manner were returned to him, when he notified the bank and sued to recover the entire amount of the forged checks. Held, that the fact that the checks, except the signature, were in a strange handwriting, was sufficient to arouse plaintiff's suspicion and require him to inform the bank, and he could not recover the amount of the forged checks paid after November 21st. Israel *v.* State Nat. Bank, 124 La. 885, 50 So. 783.

Depositors' agent made the deposits and had the custody of the passbook, and when it was balanced delivered it only with the genuine checks, which were not numerous. The only verification made was to compare such checks with the stubs. If the depositors had inquired of their agent for typewritten check lists, stated in the book to have been returned, forgeries by him against the account would have been discovered. If they had looked at the book they would have seen that the credit balance did not tally with that disclosed by the checks and stubs, and if a computation had been made it would have disclosed that a proper amount of interest had not been credited, as shown by their ledger book kept by the agent. Held, that the depositors did not exercise reasonable care in inspecting the account, and were guilty of gross negligence in failing to avail themselves of the evidence furnished by the bank to discover the forgery. Morgan *v.* United States Mortg., etc., Co., 125 App. Div. 22, 109 N. Y. S. 274.

32. National Dredging Co. *v.* Farmers' Bank (Del.), 6 Pen. 580, 69 Atl.

a forged indorsement, together with his balanced passbook, casts on him only the duty of exercising reasonable care and diligence to examine the vouchers and the account as stated by the bank, and to inform the bank of

607; Wind *v.* Fifth Nat. Bank, 39 Mo. App. 72.

In an action against a bank to recover a deposit, it appeared that the money was paid out by defendant upon checks to which plaintiff's name was forged by his clerk; that the forgeries covered a period of six months; and that monthly during this period defendant furnished plaintiff a statement of his account, and returned him all checks that it had paid on the account. Held, that the bank was only liable for payments made before the furnishing of the first monthly statement. First Nat. Bank *v.* Allen, 100 Ala. 476, 14 So. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80.

Upon plaintiff's discovery of the forgeries, he caused his clerk's arrest, who then had upon his person eight forged checks, and defendant, in ignorance of the fact that it had been paying forged checks, made good the amount of the eight checks to plaintiff. Held that, as defendant was only liable for payments made before the furnishing of the first monthly statement, it could counterclaim the amount made good to plaintiff for the eight checks. First Nat. Bank *v.* Allen, 100 Ala. 476, 14 So. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80.

Where a husband learns that his wife has forged checks on his bank account, which have been paid, and he examines the checks and passbook, but fails to make any complaint to the bank, the latter is not liable to the husband for the payment of future checks forged by the wife. Neal *v.* First Nat. Bank, 26 Ind. App. 503, 60 N. E. 164.

Where a dealer in corn arranged with a bank to cash the checks of his purchasing agent, and such agent drew and had cashed at such bank checks purporting to but in fact not representing any purchase of corn, and indorsed by himself, and bearing the fictitious indorsement of the pretended payee, if the indorsement by such agent was irregular, it was the duty of such dealer, on the first of such checks being sent to him by the bank, to have notified the bank of such fact, and until so notified the bank was not negligent in receiving and paying such checks. Armour *v.* Greene County State Bank, 50 C. C. A. 339, 112 Fed. 631.

Where a depositor's passbook has been balanced and returned to him with forged or fraudulently altered checks, and the depositor has failed to notify the bank within a reasonable time that such checks were forged or fraudulently altered, due to negligence in examining the passbook and checks or in giving notice, neither the doctrine of ratification nor estoppel can be invoked by the bank as to such checks, but the damages sustained by the bank as a result of the neglect of duty by the depositor are susceptible of proof and measurement as in any other case of breach of duty imposed by contract. National Dredging Co. *v.* Farmers' Bank (Del.), 6 Pen. 580, 69 Atl. 607.

Where a depositor's passbook has been balanced and returned to him with forged or fraudulently altered checks, and the depositor has failed to notify the bank within a reasonable time that such checks were forged or fraudulently altered, due to negligence in examining the passbook and checks, or in giving notice, the bank is entitled to invoke the doctrine of equitable estoppel as to payments thereafter made on similar checks. National Dredging Co. *v.* Farmers' Bank (Del.), 6 Pen. 580, 69 Atl. 607.

Where the fraudulent alterations of checks for the payment of which suit was brought by a depositor against the bank were apparent, and if the treasurer of the depositor had at any time looked over the checks returned as vouchers their alteration and the fraud would have been discovered at once, and he assigned the duty of looking them over to the secretary of the depositor, who was himself the perpetrator of the fraud, though the knowledge of the forgery possessed by the secretary is in no respect to be attributed to the depositor, yet it is chargeable with such knowledge as an examination of the checks would have imparted to an honest employee previously unaware of the forgery, and, as it would have been chargeable with negligence for failure of such employee to discover and report such palpable alterations, it is equally chargeable with the default of its secretary. National Dredging Co. *v.* Farmers' Bank (Del.), 6 Pen. 580, 69 Atl. 607.

In an action against a bank to re-

any errors thus discoverable.[33] The depositor is under no duty to the bank where forged or fraudulently altered checks have been paid and charged in the account returned to him, to examine the same so that it will necessarily lead to discovery of the fraud, but, if he examines the forgeries personally and is himself deceived by their skillful character, his failure to discover it will not shift on him the loss which is in the first instance the loss of the bank.[34] While a bank book settled, balanced up, and checks returned to the depositor will become stated if not promptly examined and errors of amount pointed out for correction, yet the depositor is under no obligation to follow up and ascertain the genuineness of the indorsements that carry the title after the check has left his hands.[35] The duty of the depositor to make a reasonable examination of the account and checks does not extend to examination of signatures of payees of checks to determine their genuineness.[36] A depositor is not precluded from recovery, in a suit for his deposit, by his failure to report that his payee's indorsement, on a check returned to him with his book and charged to his account, was forged,

cover money paid on forged checks, the court charged that the bank would be liable unless plaintiff had neglected to examine his account and report the forgeries for such a length of time as worked an injury to the bank; that the bank was injured if, by reason of plaintiff's negligence, it lost the means of recovering the money, which it would have had if notified within a reasonable time; that if, by reason of plaintiff's delay, the opportunity of protection was lost, plaintiff would not be entitled to recover. Held not misleading. Weinstein *v.* National Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23.

In an action against a bank to recover money paid on forged checks, an instruction that, even though plaintiff was estopped by negligence from recovering for checks paid after the date of the balancing and return of his passbook and checks, he could, nevertheless, recover for forged checks paid before that date, was properly refused. Weinstein *v.* National Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23.

Delay held not unreasonable.—A depositor, who did not examine his canceled bank checks till 17 days after they were returned to him, is not guilty of such laches as will release the bank from liability for having paid one of the checks on a forged indorsement. Cincinnati Nat. Bank *v.* Creasy & Sons, 18 Wkly. L. Bull. 410, 10 O. Dec. 121.

33. Degree of care required of depositor.—Mechanics' Nat. Bank *v.* Harter, 63 N. J. L. 578, 44 Atl. 715, 76 Am. St. Rep. 224.

A depositor owes the duty of exercising reasonable care to verify vouchers returned to him by the bank by the record kept by him of the checks issued, to detect forgeries or alterations. Judgment, 60 App. Div. 241, 70 N. Y. S. 246, modified in Critten *v.* Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529.

34. National Dredging Co. *v.* Farmers' (Del.), 6 Pen. 580, 69 Atl. 607.

In an action by H. against a bank to recover the amount of an alleged balance due him as depositor, it being alleged that certain checks paid by him were forged, H. may give in evidence his check book containing the stubs of checks, for the purpose of showing, not the truth of any entry therein, or the fact that any particular entry had been therein made, but that there was not in fact anything disclosed therein, upon ordinary inspection, calculated to excite suspicion that a fraud had been committed by the party in whose custody it had remained. Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

35. Califf *v.* First Nat. Bank, 37 Pa. Super. Ct. 412.

A depositor, on return by the bank of its paid checks, is not bound to examine them to see that the indorsements are correct. United, etc., Trust Co. *v.* Central Nat. Bank, 185 Pa. 585, 40 Atl. 97.

36. Jordan Marsh Co. *v.* National Shawmut Bank, 201 Mass. 397, 87 N. E. 740.

where he did not know his payee's signature.[37] The presumption of correctness arising from the fact that after a bank account has been balanced, and the book and the canceled checks returned to the customer, a reasonable time for examining and comparing the checks and account has elapsed without objection being made, proceeds upon the ground simply of an implied admission. It is liable to be repelled by showing that an error or fraud—for instance, a forgery by the customer's confidential clerk—was not discoverable by the exercise of reasonable care and diligence, or that there was no such appearance of things as to excite the suspicion of a reasonable man, or that, for any reason, the party had not had an opportunity to examine the account.[38] The failure of a bank depositor to examine his account and give the bank prompt notice of his objections to the payment of forged checks is no defense to the depositor's right to recover the money so paid from the bank, if the bank's officers, by the exercise of reasonable care, could have detected the forgeries.[39]

Examination of Vouchers by Agent Committing Forgery.—According to some decisions it has been held that where the examination of the account and vouchers is left to a clerk, his knowledge will be the knowledge of the depositor, and it is then his duty to make it known.[40] The fact that such clerk was the forger is immaterial.[41] According to other decisions,

37. Pratt *v.* Union Nat. Bank, 77 N. J. L. (50 Vr.) 117, 75 Atl. 313.

Plaintiff, who, without negligence, delivers a check, payable to a third person, to an agent who has negotiated the loan for which the check was given, need not, when the check comes back from the bank in the ordinary course of business, investigate the genuineness of the indorsement; not being familiar with the payee's signature. Brixen *v.* Deseret Nat. Bank, 5 Utah 504, 18 Pac. 43.

38. Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

39. Failure of depositor to examine passbook, etc., no defense where bank has failed to exercise due care.—New York Produce Exch. Bank *v.* Houston, 95 C. C. A. 251, 169 Fed. 785; National Dredging Co. *v.* Farmers' Bank (Del.), 6 Pen. 580, 69 Atl. 607.

Where a bank has failed to exercise due care in detecting a forgery or fraud and paid out money of a depositor otherwise than in conformity to his order, the subsequent negligence of the depositor in failing to perform his duty to examine his passbook and vouchers with reasonable care and report to the bank within a reasonable time any errors or mistake, constitutes no defense. National Dredging Co. *v.* Farmers' Bank (Del.), 6 Pen. 580, 69 Atl. 607.

The negligence of a bank in paying to a clerk of the depositor a check which was plainly altered by the substitution of the word "Cash" for the name of the payee, and on which the number of dollars was also written over an erasure, without inquiry as to the alterations, renders the bank liable for loss thereby sustained, and contributes to the continuance of similar forgeries by the clerk, so as to defeat the liability of the depositor for loss to the bank from the payment of subsequently raised checks on the ground of his negligence in failing to examine the returned vouchers from the bank. Judgment, 60 App. Div. 241, 70 N. Y. S. 246, modified in Critten *v.* Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529.

40. Examination of vouchers by agent committing forgery.—First Nat. Bank *v.* Allen, 100 Ala. 476, 14 So. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80.

41. First Nat. Bank *v.* Allen, 100 Ala. 476, 14 So. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80.

Where a bank depositor made no examinations of its passbook and vouchers returned to it each month, except such as were made together with its cashier, who had forged checks each month, the depositor was charged with such knowledge as its cashier had in making the examination

however, a bank depositor is not bound by the examination of the bank's passbook, nor to be treated as though it had made none, where its clerk to whom it intrusts such duty had forged checks, which had been paid, if ordinary care was used in selecting the clerk.[42]

of the bank book and the inspection of the vouchers. First Nat. Bank *v.* Richmond Elect. Co., 106 Va. 347, 56 S. E. 152, 7 L. R. A., N. S., 74.

A., a depositor in a bank, having drawn his check thereon payable to B., A.'s clerk erased B.'s name, and the bank paid the face of the check to him as bearer. On the first of the following month the bank returned the check, with others, to A., with a monthly statement showing that the same had been paid; and after another monthly statement A. drew out the balance shown by such statements, making no objection to the payment of said check until 23 months after its payment. In suit by A. against the bank to recover the amount of the check, held, that the question of ratification was for the jury; that A. was bound to use due diligence in discovering the forgery, and was affected by the knowledge which his clerk had, who committed the forgery, and whose duty it was to examine the checks returned by the bank. Dana *v.* National Bank, 132 Mass. 156.

Where the clerk of a bank depositor made fraudulent alterations in checks, the depositor is chargeable with the knowledge thereof by such clerk, to whom he intrusted the examination of the vouchers, where a comparison of the check with the stubs of the check book would have disclosed such alterations to an innocent party previously unaware of the forgeries. Judgment, 60 App. Div. 241, 70 N. Y. S. 246, modified in Critten *v.* Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529.

Where, in an action by a depositor to recover of a bank sums alleged to have been paid out by it on forgeries, it appears that the forgeries were perpetrated by a confidential clerk of the depositor, who intrusted him with the balancing of his books, and that the bank, in honoring the checks, was not negligent, it is proper to direct a judgment for the bank, as the depositor alone can be held responsible for his failure to examine the checks after payment and reject them in a reasonable time. Myers *v.* Southwestern Nat. Bank, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672.

42. Kenneth Inv. Co. *v.* National Bank, 103 Mo. App. 613, 77 S. W. 1002.

Where a depositor, in the ordinary course of business, gives his passbook and canceled checks to his bookkeeper to be examined, and the bookkeeper is thereby enabled to conceal the fact that he had forged some of the checks, the depositor is not estopped by the delay in discovering the forgery from recovering the amount of the forged checks from the bank. Wachsmann *v.* Columbia Bank, 8 Misc. Rep. 280, 28 N. Y. S. 711, 59 N. Y. St. Rep. 232, affirming 6 Misc. Rep. 62, 26 N. Y. S. 885.

Where plaintiffs' confidential clerk had for years been employed and trusted, but had absented himself from business at different times, and was suspected of intemperance, but plaintiffs had no cause to doubt his honesty, they were justified in intrusting to him the duty of examining the checks drawn on their bank account, and are not estopped by such employment from maintaining an action against a bank for amounts paid to such clerk on checks raised by him, and which he was enabled to conceal by his examination of the checks on their return from the bank after payment. Critten *v.* Chemical Nat. Bank, 60 App. Div. 241, 70 N. Y. S. 246, judgment modified in 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529.

A depositor's bookkeeper, after procuring his employer's signature to checks for the pay roll, raised and cashed them, retained the excess, and when they were returned as vouchers, with a statement, he reduced them to the original amounts, altered the statement to correspond, and reported their correctness to his employer, who had an expert examine the accounts monthly. Held, that the depositor's failure to personally examine the vouchers and statements, or the accountant's failure to examine the statements, did not constitute negligence as against the bank. Clark *v.* National Shoe, etc., Bank, 32 App. Div. 316, 52 N. Y. S. 1064, judgment affirmed in 164 N. Y. 498, 58 N. E. 659.

Where checks forged by plaintiffs' confidential clerk, who filed out their checks, and had charge of their bank account, were paid by defendant,

§ 148 (5) Necessity of Returning Forged Paper and Demanding Payment.—A depositor whose forged check had been cashed by his banker must, immediately upon discovery of the forgery, return the check to the bank, and demand payment.[43] Mere notice of the forgery while the depositor holds the check to investigate the crime will release the bank from all liability for having cashed the spurious check.[44] It has been held, however, that though the drawer of a check, on discovering that the check has been cashed on a forged indorsement of the payee's signature, is negligent in not immediately tendering back the check, the bank is not thereby exempt from its liability to him for the sum thus paid out, unless it can show some actual damage.[45]

§ 149. Rights and Liabilities as between Banks.—Recovery Back of Payment on Forged Paper.—With regard to the rights and liabilities as between banks in the case of a payment of forged paper, the general rule is usually held to apply that the drawee of a bill or check is presumed to know the handwriting of his correspondent or drawer, and if he accepts or pays a bill in the hands of a bona fide holder, to which the drawer's name has been forged, he is bound by the act and can neither repudiate the acceptance nor recover the money, and where forged checks are accepted and paid by a drawee bank to another bank which has accepted and paid them in good faith the drawee bank can not recover back such payments,[46] at

charged to plaintiffs in their passbook, the book balanced, and the checks, including those forged, returned to the clerk, who assisted one of the plaintiffs in examining the account, which examination was made whenever the passbook was written up and vouchers returned, and the clerk, by abstracting the forged vouchers and by false balances and readings, prevented the forgeries from being discovered, held, that plaintiffs were not estopped from questioning the accuracy of the account, but could recover the balance, deducting the forged checks. Frank v. Chemical Nat. Bank, 84 N. Y. 209, 38 Am. Rep. 501.

43. Necessity of returning forged paper.—Van Wert v. First Nat. Bank, 6 O. C. C. 130, 3 O. C. D. 380.

44. Van Wert Nat. Bank v. First Nat. Bank, 6 O. C. C. 130, 3 O. C. D. 380.

Sufficient tender to support suit.—Defendant bank, in reliance on a forged indorsement, cashed a check drawn by plaintiff's assignor. Plaintiff's attorney took the check to defendant's executive officer, showed it to him, and told him that he wanted reimbursement. The officer, without raising any objection on the question of tender, referred plaintiff's attorney to defendant's counsel, who wrote a letter denying liability and refusing payment. Held, that there was a sufficient tender of the check to enable plaintiff to sue the bank. Judgment 110 App. Div. 236, 97 N. Y. S. 274, affirmed in Kearney v. Metropolitan Trust Co., 186 N. Y. 611, 79 N. E. 1108.

Facts held not to show negligence in tender of check.—Where the drawer of a check, on discovering that the check had been cashed on a forged indorsement of the payee's signature, immediately informs the bank which has cashed it, and notifies the bank that he will hold it responsible, and, on request by the bank to delay action, delays 24 days, tenders back the check, and demands the funds, and being refused, commences an action, such drawer is not guilty of negligence in not tendering back the check immediately on discovering the forgery. Brixen v. Deseret Nat. Bank, 5 Utah 504, 18 Pac. 43.

45. Necessity for resultant loss to bank.—Brixen v. Deseret Nat. Bank, 5 Utah 504, 18 Pac. 43.

46. Application, as between banks, of usual rule as to payment of forged paper.—Deposit Bank v. Fayette Nat. Bank, 90 Ky. 10, 13 S. W. 339, 7 L. R. A. 849; National Bank v. First Nat. Bank (Mo. App.), 125 S. W. 513; Na-

least, in the absence of negligence on the part of the other bank.[47] According to some decisions, however, a bank which pays forged checks drawn on it to another bank, which has cashed same, on subsequently discovering the forgery and demanding the money paid to the other bank before that bank has been placed in any worse position than it would have been, had the drawee refused payment when the checks were presented to it, may recover from such other bank the amount so paid it,[48] and in some jurisdictions, the

tional Park Bank *v.* Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; National Bank *v.* National Mechanics' Banking Ass'n, 55 N. Y. 211; National Bank *v.* National Mechanics' Banking Ass'n, 55 N. Y. 211; National Bank *v.* Grocers' Nat. Bank (N. Y.), 35 How. Prac. 412; First Nat. Bank *v.* Yost, 58 Hun 606, 11 N. Y. 862, 34 N. Y. St. Rep. 180; Salt Springs Bank *v.* Syracuse Sav. Inst. (N. Y.), 62 Barb. 101.

Where the drawee bank pays a check to another bank, which is a bona fide holder, such drawee can not recover the money back on discovering such check to be a forgery. National Bank *v.* First Nat. Bank (Mo. App.), 125 S. W. 513.

Defendant, a private banker, in the usual course of business, cashed checks drawn on plaintiff bank, and on the same day indorsed them for collection on his account, and mailed them to plaintiff. The checks were charged to the account of the drawers, who had sufficient funds on deposit with plaintiff to pay them, and the proceeds remitted to defendant in accordance with the usual course of dealing between him and plaintiff. The drawers did not take up their vouchers from plaintiff until two months afterwards, when it was discovered the checks were forgeries. Defendant had previously cashed checks for the payee, payable in the town where plaintiff was situated. Held, that defendant's indorsement of the checks did not, as to plaintiff, guaranty the signatures of the drawers, and he was not liable to refund the money. First Nat. Bank *v.* Yost, 58 Hun 606, 11 N. Y. S. 862, 34 N. Y. St. Rep. 180.

A bank which has paid a check drawn upon it can not recover back the money from the person to whom it was paid, upon the ground that the check was a forged one. Banks are bound to know the signatures of their depositors. National Bank *v.* Grocers' Nat. Bank (N. Y.), 35 How. Prac. 412.

Where forged checks on a bank, purporting to be drawn in the name of one of its principal depositors, and running through a period of five months, before the forgery is discovered, are accepted and paid by the drawee bank to other banks, which accepted and paid them in good faith, after inquiry of the drawee as to the depositor's account, the drawee bank must stand the loss. Deposit Bank *v.* Fayette Nat. Bank, 90 Ky. 10, 11 Ky. L. Rep. 803, 13 S. W. 339, 7 L. R. A. 849.

Application of rule where check sent through clearing house.—Defendant bank received in the course of business a forged check on deposit, and sent it through the clearing house, for payment, to plaintiff, another bank, on whom such check was drawn, apparently by one of its depositors. Plaintiff bank received the check as genuine, and paid it, and thereafter defendant paid over the greater part of the money to the person who made the deposit. Held, in an action to recover the money paid on the forged check, that the sending of such check through the clearing house to the plaintiff, and the failure to inform plaintiff that it had been received from a stranger, was not such negligence as would throw the loss on defendant. Commercial, etc., Nat. Bank *v.* First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554.

47. Defendant bank cashed a forged check drawn on plaintiff bank, purporting to be made by L., and after indorsement sent it to its correspondent for collection. Plaintiff paid the check when presented, relying on defendant's indorsement, knowing that the signature was not that of L. Held, that plaintiff could not recover the amount of the check from defendant after repudiation thereof by L., in the absence of any negligence by defendant. National Bank *v.* First Nat. Bank (Mo. App.), 125 S. W. 513.

48. Right as between banks to recover payments on forged checks.—Canadian Bank *v.* Bingham, 46 Wash. 657, 91 Pac. 185; Indiana Nat. Bank *v.* First Nat. Bank, 9 Ind. App. 185, 36 N. E. 382.

In National Bank *v.* National Mechanics' Banking Ass'n, 55 N. Y. 213, 14 Am. Rep. 232, the principle is thus stated "it is now settled both in Eng-

rule has been changed by statute, to the extent of making the mere fact of payment by the drawee not of itself a bar to the recovery of the money.[49] Such acts were not, however, intended to relieve a bank from the consequences of paying a forged check of a depositor, where the party receiving the money had, before notice of the forgery, innocently changed his condition on the faith of the bank's action.[50] In a number of instances the bank on which the check is drawn has been permitted to recover on the ground that the bank paying the check had neglected to make the proper inquiry as to the identity of the holder, who was a stranger; this being held to be such a want of precaution as to deprive the bank advancing the money of any superior equity as against the drawee bank.[51] The immunity accorded to

land and in this state that money paid under a mistake of fact may be recovered back, however negligent the party may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund." Quoted in Crocker-Woolworth Nat. Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169.

Defendant bank received, in the course of business, a forged check, on deposit, and sent it through the clearing house, for payment, to plaintiff, another bank, on whom such check was drawn, apparently by one of its depositors. Plaintiff bank received the check as genuine, and paid it, and thereafter defendant paid over the greater part of the money to the person who made the deposit. Held, in an action to recover the money paid on the forged check, that defendant was liable to plaintiff for such portion of the money received on the forged check as had not been paid to the party presenting it. Commercial, etc., Nat. Bank *v.* First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554.

The defendant, a bank, without suspicion of forgery, received in the course of business a forged check on deposit, and sent it through the clearing house for payment to the plaintiff, another bank, on whom such check purported to be drawn by one of the plaintiff's depositor's, and indorsed to the order of the person presenting it. The plaintiff received the check as genuine, and paid the amount, and the defendant thereafter paid the greater part of the money to the party who made the deposit. Plaintiff sued for the money so paid on the forged check. Held, that the law imposed on the plaintiff the obligation of knowing the signatures of its depositors, and that the defendant was not liable for such money received on the forged check as had been paid to the person presenting it. Commercial, etc., Nat. Bank *v.* First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554.

A check was drawn upon the A. Bank, which paid it to the B. Bank upon a forged indorsement of the payee's name. The B. Bank had received the check from a depositor, in the regular course of business. Afterwards the drawer of the check discovered the forgery, sued the A. Bank, and recovered judgment, which the A. Bank paid. The A. Bank then sued the B. Bank. It appeared that if the drawer and the A. Bank had taken measures at the time of the transaction to ascertain whether the indorsement was genuine, the forgery would have been discovered, and that the B. Bank could then, and for some time afterwards, have protected itself from loss, its depositor then being solvent, but afterwards becoming insolvent. Held, that the B. Bank was liable for the amount of the check, with interest from the time of payment. Corn Exch. Bank *v.* Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655.

49. Statutory provision as to recovery of payment on forged instrument.—Corn Exch. Nat. Bank *v.* National Bank (Pa.), 9 Phila. 133.

The right of the drawee bank under the Pa. Act of 1849, as to drafts, etc., to recover back the money from the bank with whom a forged check had been deposited, held not to depend on the right or ability of the latter to recover from the forger. Corn Exch. Nat. Bank *v.* National Bank, 78 Pa. 233.

50. Corn Exch. Nat. Bank *v.* National Bank (Pa.), 9 Phila. 133.

51. Negligence of other banks as depriving of superior equity as against drawee bank.—First Nat. Bank *v.*

the bona fide holder of forged paper, receiving payment from the drawee, is an exception to the general rule, allowing a recovery of money paid under mutual mistake of fact, and does not apply to one who has omitted a precautionary act or duty, usual or customary among bankers, such as the determination of the validity of the drawer's signature and the identification of the person to whom the payment is made.[52] Where a bank, without inquiry or identification of the person presenting a forged check drawn on another bank, pays such check, and indorses and presents it to the drawee, where it is paid without discovering the forgery, and in reliance on such indorsement, on subsequently discovering the forgery, and demanding the money paid to the paying bank, before such bank has been placed in any worse position than it would have been had the drawee refused payment when the check was presented to it, the drawee may recover from such paying bank the amount so paid,[53] unless the drawee was also at fault by

State Bank, 22 Neb. 769, 36 N. W. 289, 3 Am. St. Rep. 294; Peoples' Bank *v.* Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884; First Nat. Bank *v.* First Nat. Bank, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450. And see Deposit Bank *v.* Fayette Nat. Bank, 90 Ky. 10, 13 S. W. 339, 7 L. R. A. 849.

Defendant cashed a forged check, purporting to be drawn on plaintiff by one of its customers, without attempting to identify the person presenting it; and afterwards the check was allowed defendant as a credit on a settlement between the two banks. The nominal drawer was not a customer of defendant, and the check, which was payable to the payee or bearer, was indorsed by the payee. The check remained with plaintiff over a month before it was discovered to be a forgery, but defendant was notified immediately after the discovery, and the delay worked no prejudice to defendant. Held, that defendant was liable for the loss. First Nat. Bank *v.* First Nat. Bank, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450.

Where the payee of an unaccepted draft, to which the drawer's name has been forged and purporting to have been drawn by a bank in South Dakota on a bank in Illinois, indorsed the instrument generally and sells it to a Nebraska bank with whom the payee is acquainted, the drawee after paying the bill can not recover the money, unless he pleads and proves that the holder was negligent in purchasing the instrument or in indorsing it, or withheld from the drawee when the bills were paid some grounds for suspicion concerning its genuineness. State Bank *v.* First Nat. Bank, 87 Neb. 351, 127 N. W. 244.

52. Omission of usual precautions as effecting statutes as bona fide holder.— Bank *v.* McDowell County Bank, 66 W. Va. 545, 66 S. E. 761.

53. Canadian Bank *v.* Bingham, 30 Wash. 484, 71 Pac. 43, 60 L. R. A. 955; Peoples' Bank *v.* Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884.

"Where a loss which must be borne by one of two parties, alike innocent of the forgery, can be traced to the neglect or fault of either, it is reasonable that it should be borne by him, even if innocent of any intentional fraud, through whose means it has succeeded. Gloucester Bank *v.* Salem Bank, 17 Mass. 33." First Nat. Bank *v.* First Nat. Bank, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450.

When a custom is proved among the banks of a city, requiring a bank buying a check drawn upon another bank from a stranger to be satisfied of his title to the check, and allowing the bank upon which it was drawn to rely in paying it, upon the presumption that such previous caution had been exercised by the bank purchasing the check, and in such a case a forged check is bought by a bank without any such inquiry, and upon presentation to the bank named upon it as drawee is paid, the money may be recovered back in an action for money had and received. Ellis *v.* Ohio Life Ins., etc., Co., 4 O. St. 628, 64 Am. Dec. 610.

"To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was

omitting some duty resting on it.[54] A bank cashing for a third person a forged draft, if it acts in good faith, need not, however, to acquit itself of negligence, prove that before the purchase it inquired of the drawer whether the instrument was genuine or communicated with the drawee to know if the bill would be accepted.[55] Where the drawee bank was negligent in paying a check without any means of testing the genuineness of the drawer's signature, and the indorsing and forwarding bank was also negligent in failing to have the payee identified when he was unknown, the drawee bank can not recover the money paid from the collecting bank.[56]

Forged Indorsements.—With regard to the liability as between banks in the case of forged indorsements of drafts or checks, forwarded by another bank to the drawee bank and paid by the latter, the question would seem primarily to depend upon whether or not the forwarding bank is the owner or ostensible owner of the paper, or whether he is acting as the agent of another. If the forwarding bank owns such paper, or holds itself out as owner, it would seem that it will be liable, upon discovery of the facts, to refund to the drawee bank the amount mispaid,[57] provided its condition

placed upon the drawee, and that the vigilance of the drawee was not lessened, and that he was not lulled into a false security by any disregard of duty on his own part, or by the failure of any precautions which, from his implied assertion in presenting the check as a sufficient voucher, the drawee had a right to believe he had taken. Ellis *v.* Ohio Life Ins., etc., Co., 4 O. St. 628, 64 Am. Rep. 610; Rouvant *v.* San Antonio Nat. Bank, 63 Tex. 610; First Nat. Bank *v.* Ricker, 71 Ill. 439, 22 Am. Rep. 104." First Nat. Bank *v.* First Nat. Bank, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450.

54. Bank *v.* McDowell County Bank, 66 W. Va. 545, 66 S. E. 761.

In assumpsit by one bank to recover from another a balance on deposit, it appeared that a forged check was drawn on defendant bank in the name of plaintiff bank, and paid. The forger had previously purchased two checks from plaintiff bank, the cashier of which had, in a letter of advice of the sale of the first check, inclosed his signature, as he was a stranger, in the city. When the second check was sold, the cashier suspected that all was not right, but did not communicate his suspicions to defendant bank. The forged check was on one of the printed forms used by plaintiff bank, the printed name of another bank being stricken out, and the name of defendant bank written in, in red ink, in the handwriting of one of the clerks. Said form was cut from the book of the plaintiff bank kept on the teller's desk. Held, that these facts did not show such negligence as would render plaintiff bank liable for the loss. Leavitt *v.* Stanton (N. Y.), Labor's Supp. 413.

A forged check on plaintiff bank was received by defendant bank in the course of its business, in good faith, it having paid the full amount named therein, without notice of the forgery, and plaintiff, on presentment of such check by defendant, received and paid it. Held, that the facts that the forged check had on its face the forged signature of plaintiff's teller, which was overlooked at the time of presentment, and that the pretended drawer was not a customer of the bank, and had no account there, demonstrated that plaintiff's agents were guilty of great neglect. Salt Springs Bank *v.* Syracuse Sav. Inst. (N. Y.), 62 Barb. 101.

55. National Bank *v.* Farmers', etc., Bank, 87 Neb. 841, 128 N. W. 522; State Bank *v.* First Nat. Bank, 87 Neb. 351, 127 N. W. 244.

56. Bank of Williamson *v.* McDowell County Bank, 66 W. Va. 545, 66 S. E. 761.

57. Liability in case of payments on forged indorsements.—National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612.

A bank paying a check of one of its depositors, sent to it by another bank for payment, under the mistake of believing that the indorsement of the payee is genuine, when in fact it is forged, may recover the amount so paid in an action for money had and received against the bank which pre-

has not in the meantime changed, as that would be unjust.[58] If, however, the forwarding bank did not own the check or draft, but merely presented it for payment as the agent of another bank, it can not be required to repay, provided it has paid over the money to its principal before notice of the mistake. An implied warranty of genuineness accompanies the unrestricted indorsement and transfer of any negotiable instrument. It is an assurance to the drawee of its genuineness in all respects saving that of the money of the drawer alone, with which knowledge the drawee is charged.[59] Where, however, the money has not been paid over by the collecting bank to its principal, it is the duty of such collecting bank to return the money thus

sented the check. First Nat. Bank *v.* City Nat. Bank, 182 Mass. 130, 65 N. E. 24, 94 Am. St. Rep. 637.

Checks, indorsed without authority, and drawn upon the plaintiff bank, were presented to the plaintiff bank by the defendant bank, and were paid. The plaintiff bank, on learning the facts, paid the amount to its depositor. Held, that the amount so paid was recoverable from the defendant bank. Central Nat. Bank *v.* North River Bank, 44 Hun 114, 8 N. Y. St. Rep. 466.

Where a bank pays a check drawn upon it to a bank in the same city, which has received it from a depositor, with a forged indorsement, evidence that, by usage among banks in that city, it was the duty of the former bank to examine and satisfy itself of the genuineness of the indorsement, and to return the check immediately to the latter bank if not good, is incompetent. Corn Exch. Bank *v.* Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655.

A bank which indorsed a check containing a forged indorsement of a fictitious payee's name held liable to the drawee bank which paid the check. Guaranty, etc., Trust Co. *v.* Lively, (Tex. Civ. App.), 149 S. W. 211.

58. National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612; National Bank *v.* National Mechanics' Banking Ass'n, 55 N. Y. 211, 14 Am. Rep. 232; White *v.* Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612.

A forged order for the payment of money drawn on plaintiff bank was indorsed in blank by the forger, and was discounted by defendant bank, and by it indorsed to its correspondent "for collection." Defendant's correspondent presented the order to plaintiff, by whom it was paid, and the money was remitted to defendant. Held, that defendant, by indorsing the forged instrument, gave to it the appearance of a genuine transaction, and plaintiff was entitled to recover the amount so paid. First Nat. Bank *v.* First Nat. Bank, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221.

Where a bank paid to another a check drawn on the former, which had been raised, and in an action by the drawee against the other bank to recover the money plaintiff did not plead reliance on any representations by defendant as to the check, but merely set up its own belief in the genuineness thereof, a finding that defendant represented itself to be the absolute owner of the check was outside the issues. Crocker-Woolworth Nat. Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169.

Where a bank which had paid to another bank a local check drawn on the former, but which had been raised, sued to recover the amount so paid from the other bank, it would not be assumed, in the absence of evidence, that plaintiff relied on a supposed ownership of the check by the defendant bank; it being common knowledge that local checks are generally taken by banks for the purpose of collection merely. Crocker-Woolworth Nat. Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169.

59. Effect of general indorsement by collecting bank.—First Nat. Bank *v.* Northwestern Nat. Bank, 40 Ill. App. 640; Crocker-Woolworth Nat. Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169; Canal Bank *v.* Bank (N. Y.), 1 Hill 287; Corn Exch. Bank *v.* Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; Third Nat. Bank *v.* Merchants' Nat. Bank, 76 Hun 475, 27 N. Y. S. 1070, 59 N. Y. St. Rep. 359.

paid under mistake to the drawee bank,[60] and payments on a forged or altered check thus indorsed may be recovered back by the drawee bank,[61] where it loses nothing by the delay in discovering the forgery, or by the payment of checks.[62] Such indorsement, whatever may have been the purpose of that indorsement, would tend to divert the drawee bank from inquiry and scrutiny, for it gives to the paper the appearance of a genuine transaction.[63] It has been held, however, that an indorsement for collection on a check, made by one bank in sending it to another for payment, not being an indorsement for transfer, does not carry with it a guaranty of previous indorsements.[64] In an action by a bank which has paid to another

60. Where, a "raised check" is deposited with a bank for collection, and indorsed by it by a restrictive indorsement, in such manner that the indorsement conveys no representation that the collecting bank is the owner, and no such representation is made otherwise, and it is paid by the drawee, and the funds are paid by the collecting bank to the payee, the collecting bank can not be held liable by the drawee. Crocker-Woolworth Nat. Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169; National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612.

A check drawn by plaintiff bank was deposited in defendant bank, after being altered by its amount being raised, and its date and the name of its payee being changed, and was paid by the plaintiff through the clearing house; it receiving it with defendant's indorsement, reciting such payment and "indorsement guaranteed." Held, that this was equivalent to a guaranty of genuineness of all the check, including the indorsements (excepting only the signature of the drawer) on which plaintiff was entitled to rely; it in the absence of notice of the alteration, owing defendant no duty of investigation. Judgment, 62 Misc. Rep. 69, 115 N. Y. S. 998, reversed in New York Produce Exch. Bank *v.* Twelfth Ward Bank, 135 App. Div. 52, 119 N. Y. S. 988, citing White *v.* Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612; Metropolitan Nat. Bank *v.* Loyd, 90 N. Y. 530; Corn Exch. Bank *v.* Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655.

The right of plaintiff bank to recover of defendant bank money paid by the plaintiff to defendant on a check drawn on plaintiff, deposited with defendant after being raised and transferred by defendant to plaintiff with a guaranty of its genuineness, is not affected by the fact that, though the check was drawn seven days before the end of a month, and was not returned to its drawer by plaintiff with the checks paid that month, he did not suspect there was something wrong about it, and stop payment on it; no duty of extraordinary vigilance resting on plaintiff or the drawer, and mere lapse of time in discovering the fraud constituting no defense. New York Produce Exch. Bank *v.* Twelfth Ward Bank, 135 App. Div. 52, 119 N. Y. S. 988.

Indorsement held to guaranty all preceding signatures including that of maker.—A bank, by indorsing a check on another bank for the purpose of obtaining payment thereof, guaranties the genuineness of all preceding signatures, including the signature purporting to be that of the maker; and it is liable to the drawee for money received by it from the latter on such a check, the signatures to which are forged, notwithstanding the drawee is bound to know its depositors' signatures, where it loses nothing by the delay in discovering the forgery, or by the payment of the check. First Nat. Bank *v.* Northwestern Nat. Bank, 40 Ill. App. 640.

61. Crocker-Woolworth Nat. Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169; Bank *v.* Union Bank, 3 N. Y. 230.

62. First Nat. Bank *v.* Northwestern Nat. Bank, 40 Ill. App. 640.

"If appellant had lost anything by reason of the failure of appellee to at once discover the forgery or by its payment of the checks, the case would present a different aspect; but it has lost nothing by reason of anything that appellee has done." First Nat. Bank *v.* Northwestern Nat. Bank, 40 Ill. App. 640.

63. First Nat. Bank *v.* Indiana Nat. Bank, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221.

64. Effect of indorsement for collec-

bank a check drawn on the former bank, and transferred to the latter by a forged indorsement, it is immaterial whether the signature of the drawer of the check is genuine, since both parties are estopped to deny its genuineness.[65] It is competent for banks associated together in a clearing house arrangement to bind themselves by rules governing, as between themselves, the effect of their indorsements, and such rules as to them will supplant the express provisions of a statute as to the effect of a general indorsement of negotiable paper.[66]

Raised or Altered Paper.—In determining the rights and liabilities as between banks where the forgery consists in changing the body of the check so as to raise the amount, the usual rule applies that as the drawee is not charged with knowledge of the handwriting of whomsoever may have prepared the body of the check, he may, even if negligent, recover upon the ground of mistake,[67] provided that his recovery would not pass the burden of loss over to an innocent payee, who had changed his condition upon faith of payment.[68] That is to say, where the drawee has done any act to give currency to the paper, as by acceptance, etc., on the faith of which the holder has taken, or the condition of the holder will be altered for the worse in any way, as where he received the check for collection and paid over the proceeds to the principal before he received notice of the alteration, then the party paying is precluded from recovering by the ordinary rules of estoppel—otherwise not.[69] A bank having paid a check which it has certified, but which was altered by raising the amount after certification, is not estopped from recovering back the money paid.[70] Where a bank negligently

tion only.—First Nat. Bank *v.* City Nat. Bank, 182 Mass. 130, 65 N. E. 24, 94 Am. St. Rep. 637.

65. Estoppel to deny genuineness of drawer's signature.—First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247.

66. Validity of agreement as between banks as to effect of indorsement.—Crocker-Woolworth Nat. Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169.

67. Recovery of payments on raised or altered checks. — Crocker-Woolworth Nat. Bank *v.* Nevada Nat. Bank, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169. And see ante, "Raised or Altered Check," § 147 (1c).

In Third Nat. Bank *v.* Allen, 59 Mo. 310, plaintiffs were private bankers, and bought a raised check from a stranger. They presented it to plaintiff, the drawee, it was paid. Upon prompt discovery of the forgery and notification to the defendants a recovery was allowed.

68. Crocker-Woolworth Nat. Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169.

69. Crocker-Woolworth Nat. Bank *v.* Nevada Nat. Bank, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169.

70. Recovery of payment on certified checks subsequently raised or altered.—National Bank *v.* National Mechanics' Banking Ass'n, 55 N. Y. 211, 14 Am. Rep. 232, affirming 46 How. Prac. 374, 35 N. Y. Super. Ct. 282.

G. received from V. a check for $56.75 on plaintiff bank, and had it certified by the bank. He then raised the check to $15.006, and deposited it to his credit in defendant bank, who deposited it in the clearing house, and it was paid by plaintiff in the ordinary way in which accounts are there adjusted. Held, that defendant bank was liable to plaintiff bank for the difference between the genuine check and the amount to which it was raised. National Bank *v.* National Mechanics' Banking Ass'n, 46 How. Prac. 374, 35 N. Y. Super. Ct. 282, affirmed in 55 N. Y. 211, 14 Am. Rep. 232.

certifies a raised draft, which is thereupon deposited with another bank, which, relying on the negligent acts of the former bank in certifying, accepting and paying the draft, parts with the moneys on the demand of its depositor, it has been held that the first bank can not thereafter recover the amount back as moneys paid by mistake.[71]

71. Continental Nat. Bank *v.* Tradesmen's Nat. Bank, 173 N. Y. 272, 65 N. E. 1108, affirming 59 App. Div. 103, 69 N. Y. Supp. 82.

"There is no question but that the liability or obligation which a bank assumes in certifying a check drawn upon it is well settled by decisions of this court, and with such definiteness of expression as to lend to the rule thus settled the greatest weight. See Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67, 17 Am. Rep. 305, reversing 36 N. Y. Super. 470; Clews *v.* Bank, 89 N. Y. 418, 42 Am. Rep. 303. In Marine Nat. Bank *v.* National City Bank the plaintiff sued to recover from the defendant moneys which were alleged to have been paid by mistake. A check on the former had been altered as to date, payee, and amount, and on presentation had been duly certified. It was deposited with the defendant, and on the following morning its amount was paid by the plaintiff. The depositor with the defendant was unaware of the alterations, and, relying upon the certification alone, had given to the person offering the certified check its equivalent in gold. A judgment recovered by the plaintiff was upheld by this court, and the doctrine was laid down in strong language that the certifying bank was not deemed to warrant otherwise as to the check certified than the genuineness of the drawer's signature and the sufficiency of his credit, and it was said that 'there is no ground of reason or authority for extending the rule to matters not being especially within the knowledge of the certifying bank.' In that case there was no question of a loss by the defendant. It still had the moneys, and the question was solely as to its liability to refund them for having been paid under a mistake of fact. It had not changed its position." Continental Nat. Bank *v.* Tradesmen's Nat. Bank, 173 N. Y. 272, 65 N. E. 1108.

"In Clews *v.* Bank, 105 N. Y. 398, 11 N. E. 814; S. C., 114 N. Y. 70, 20 N. E. 852, the question discussed in the opinion was as to the liability of the defendant upon a foreign draft which it had certified, and which certification it had, upon the inquiry of a clerk of the plaintiffs, pronounced to be good. At the time of certification the draft had been altered in date, name of the payee and amount. The inquiry was made by the plaintiffs before taking it in payment for some bonds. It was held, as in the Marine Nat. Bank Case, that the defendant's liability was like that of the acceptor of a draft, and its certification 'guarantied the genuineness of the drawer's signature, and represented that it had funds of the drawer in its possession sufficient to meet the check, and it engaged those funds should not be withdrawn from it by the drawer to the prejudice of any bona fide holder of the check, and the certificate did not impose upon the defendant any further or greater responsibility.' It was said that: 'When a check has been raised by some person without authority before certification, the certifying bank can not be called upon, in consequence of its certification, to pay the amount of the raised check; and when a bank has thus certified a raised check by mistake, and subsequently pays the money thereon, without any culpable negligence on its part, it can recover the amount thus paid as money paid by mistake,' citing authorities. 'The certification of a check,' it was observed, 'never imports that there is money in the bank absolutely applicable to the payment of the amount named in the check. * * * It simply imports that the drawer has money to the amount of the check, which will not be withdrawn, and which will be paid upon the check if it is properly payable thereon.' In that case, which had several trials, a judgment finally recovered by the plaintiffs was affirmed, because it rested upon a finding by the jury of culpable negligence in the defendant in having answered the inquiry by the plaintiffs without referring to the information which it possessed." Continental Nat. Bank *v.* Tradesmen's Nat. Bank, 173 N. Y. 272, 65 N. E. 1108.

G. opened a bank account with plaintiff under the name of C., and in making deposits used for indorsing a rubber stamp. Thereafter he presented to

Notice and Demand for Restitution.—In determining the rights and liabilities as between banks in the case of payments on forged paper, the usual rule applies that to shift the loss sustained upon forged commercial paper, the holder must give prompt notice of the forgery, when discovered, and return the check to the party upon whom the loss is sought to be cast.[72] Reasonable opportunity must, if possible, be given the party upon whom the burden of forged paper is sought to be thrown, to protect himself from loss therein.[73] In order that the drawee bank may recover the amount paid on a forged check or order discounted by another bank and indorsed by it, notice and demand for restitution should be within a reasonable time.[74]

defendant bank a check payable to C.; the name of the maker being forged by G. Defendant certified it by stamping on it, "Good when properly indorsed," and the check was presented to plaintiff indorsed by C. with the usual stamp, and the amount of the check credited to C. by plaintiff. Subsequently defendant refused payment on the ground that the check was not properly indorsed; but before that plaintiff had paid the amount of the deposit of a check signed by C. Held, that defendant was liable to plaintiff as having certified a forged signature to a check which plaintiff in good faith had paid; the negotiable instruments law having rendered the certification an acceptance of the check by defendant and engagement that it was signed with the signature of an existing maker, who had authority to make the check, and that the payee existed and had capacity to indorse. Adam *v.* Manufacturers', etc., Nat. Bank, 63 Misc. Rep. 403, 116 N. Y. S. 595.

72. Necessity for notice and return of forged paper.—Van Wert Nat. Bank *v.* First Nat. Bank, 6 O. C. C. 130, 3 O. C. D. 380.

Under Act April 5, 1849, relating to commercial paper, which provides for the recovery of money paid on forged signatures, whether of drawers, acceptors, or indorsers, the right of recovery by the payor exists only in case of the exercise of the care and diligence, and the giving of the notice required by the settled rules of the law of negotiable paper. Iron City Nat. Bank *v.* Fort Pitt Nat. Bank, 159 Pa. 46, 28 Atl. 195, 23 L. R. A. 615.

Where a bank paid a forged check drawn on it, entered it on its books, and then apparently dismissed it from further attention, and the forgery was not discovered until five days afterwards, through an investigation started by another bank, from which it received it, the former bank is guilty of negligence, and cannot recover from the latter the amount so paid. Iron City Nat. Bank *v.* Fort Pitt Nat. Bank, 159 Pa. 46, 28 Atl. 195, 23 L. R. A. 615.

Where a bank, upon which a forged check is drawn, cashes such check for another bank, and upon discovering the forgery does not demand payment or reimbursement, but, on the contrary, for the purpose of keeping the matter quiet, pending an investigation, informs the other bank that the check was all right, the latter bank is released from all liability for its negligence in cashing the check in the first place, and the drawee bank is estopped from afterwards asserting the spurious character of the check as against the other bank. Van Wert Nat. Bank *v.* First Nat. Bank, 6 O. C. C. 130, 3 O. C. D. 380.

Where a bank which has paid out money by mistake on a raised check elects not to inform the bank from which it received it of the forgery, so that it may protect itself, but elects to proceed against the payee of the check, it is such conduct as will tend to preclude a recovery from the bank to which the money was originally paid. Continental Nat. Bank *v.* Metropolitan Nat. Bank, 107 Ill. App. 455.

73. Van Wert Nat. Bank *v.* First Nat. Bank, 6 O. C. C. 130, 3 O. C. D. 380.

Where a bank is released from liability for cashing a forged check by the negligence of its depositor, and then voluntarily makes good the depositor's loss, such bank can not thereafter recover the amount of the check from another bank from which the check had been received in settlement of balances. Van Wert Nat. Bank *v.* First Nat. Bank, 6 O. C. C. Ct. 130, 3 O. C. D. 380.

74. Notice and demand must be in reasonable time.—First Nat. Bank *v.* Indiana Nat. Bank, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221.

What is a reasonable time depends upon the circumstances of the case.[75] Mere space of time is not important, unless it be made to clearly appear that the holder will be put to more liability, trouble, or expense by a restitution then than if notice had been received earlier.[76]

§ 150. Overdrafts—§ 150 (1) In General.—An overdraft arises where a customer of a bank draws from it more money than is standing to his credit in his account with it.[77] But where he draws from the bank more money than is standing to his credit, but which is owed to him by the bank, the drawing is not an overdraft.[78]

75. First Nat. Bank *v.* Indiana Nat. Bank, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221.

A forged check, drawn on plaintiff bank, was cashed by defendant bank, and collected of plaintiff, who discovered the forgery the next day, and on that day, or the one following, plaintiff notified defendant of the forgery. Held, that the notification was in sufficient time to enable the plaintiff to recover back from the defendant the amount paid on the check. Third Nat. Bank *v.* Allen, 59 Mo. 310.

Where a forged check, purchased by another bank in good faith, is received in the course of business by the drawee, and passed to the credit of the bank that purchased it, and notice of the forgery is not given the bank so purchasing it until two months afterwards, such credit will be deemed a payment, and the amount can not afterwards be recovered. Bank *v.* Farmers', etc., Bank, 10 Vt. 141, 33 Am. Dec. 188.

76. First Nat. Bank *v.* Indiana Nat. Bank, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221.

Plaintiff bank paid defendant bank money on a forged order, made payable at plaintiff bank, bearing the general indorsement of the payee and of defendant, the latter being, "For collection." The person by whom the order purported to be drawn was a customer of plaintiff, and had directed it to pay orders drawn by him. The forgery was not discovered for four weeks. Held, that an answer alleging that at the time of the payment the payee had property from which the order could have been collected, but that before the discovery of the forgery the payee had departed with his property, was not sufficient to prevent recovery of the money paid defendant, as it did not show how long the payee and the property remained within reach, and therefore failed to show loss to defendant by unreasonable delay of plaintiff in discovering the forgery and notifying defendant. Indiana Nat. Bank *v.* First Nat. Bank, 9 Ind. App. 185, 36 N. E. 382.

Defendant bank received a check drawn on plaintiff for collection. After plaintiff had remitted to defendant, and defendant had paid the holder of the check, it was discovered that the payee's name was forged. Held, that delay of plaintiff in notifying defendant of the forgery did not relieve defendant from liability, where the only evidence of injury from the delay was that of defendant's cashier, who said: "If more seasonable notice had been given, the forger would have been arrested earlier, and more favorable results might have arisen." Third Nat. Bank *v.* Merchants' Nat. Bank, 76 Hun 475, 27 N. Y. S. 1070, 59 N. Y. St. Rep. 359.

Plaintiff bank received from a depositor a check drawn on defendant bank, and passed it through the clearing house, where it was charged to defendant, and credited to plaintiff. Defendant, after retaining the check three months, returned it to the clearing house, claiming it to be a forgery, contrary to the clearing-house rules, where it was charged back to and paid by plaintiff. Held, that plaintiff was entitled to recover the amount of the check from defendant, and that its payment to the clearing house after it had been wrongfully charged to it was not voluntary, and hence did not preclude a recovery. Bank *v.* Grocers' Bank, 2 Daly 289.

77. Overdrafts.—State *v.* Jackson, 21 S. Dak. 494, 113 N. W. 880.

78. Money owed drawer by bank.—It is immaterial that the drawer of a check did not have the amount of money necessary to pay the check deposited to his credit on the books of the bank at the time it was drawn, where the bank owed him the money and had the amount on hand with which to pay the check, and had agreed

Not Voluntary Payment.—The payment by a bank through the clearing house of a check which overdraws the depositor's account can not be treated as voluntary, with full knowledge of all the facts.[79]

Exchange for shipments of stock charged by a bank against a shipper of stock to whom it was advancing money is an overdraft, under an agreement by which a third person was to become liable for overdrafts of the shipper.[80]

Overdraft Is Loan.—An overdraft of the customer's account amounts to a simple loan of the money.[81]

Collateral Security for Overdrafts.—A letter to a banker inclosed a note, and asked the banker to discount it, and place the proceeds to the writer's credit, and, in that event, to charge a certain overdraft against the credit. The banker, having declined the discount, had no right to hold the note as collateral.[82]

§ 150 (2) By Whom Overdrafts Made.—An overdraft, by an agent, of his principal's account, with the knowledge of the cashier of the bank, the credit being extended to the principal, amounts to a simple loan of money.[83] A cause of action by a bank for an overdraft is established by proof of the drawing of a check for the amount by the agent to the order of the principal, and payment thereof on the indorsement of the president of the principal, there being no funds to the credit of the account.[84] An overdraft by the treasurer of a grand lodge on the defendant bank was a loan to the treasurer, individually, was paid when the account was credited with the proceeds of a certificate of deposit, and the bank, with knowledge of the trust character of the fund, could not accept any part thereof in payment of his debt, but is liable to the grand lodge for the amount of the overdraft.[85] Where the treasurer of a borough, also cashier of a bank, made an overdraft on his account as treasurer, the overdraft is in the nature of a loan to the treasurer and not to the borough, and where the treasurer had no authority to borrow money for the borough, and the borough did not ratify his act, the bank can not hold the borough liable for the overdraft.[86]

to pay it before it was drawn, for under those facts he is in the same position as he would be if he had had the money placed to his credit on the books of the bank. Hubbard *v.* Pettey, 37 Tex. Civ. App. 453, 85 S. W. 509, affirmed in 101 Tex. 643, no op., citing Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103, affirmed in 95 Tex. 680, no op.

79. Citizens' Cent. Nat. Bank *v.* New Amsterdam Nat. Bank (Sup.), 109 N. Y. S. 872, judgment affirmed in 128 App. Div. 554, 112 N. Y. S. 973.

80. Low *v.* Taylor, 41 Mo. App. 517.

81. Overdraft is loan.—Union Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. Ty. 248; Pittsburg *v.* First Nat. Bank, 230 Pa. 176, 79 Atl. 406.

An overdraft allowed by a bank is a loan due on demand, and hence, where a demand note is given therefor, a suit may be maintained thereon to the same extent as could have been maintained on the overdraft thereby segregated from the account. Hennessy Bros., etc., Co. *v.* Memphis Nat. Bank, 64 C. C. A. 125, 129 Fed. 557.

82. Bank *v.* White, 154 U. S. 660, 26 L. Ed. 307, 14 S. Ct. 1191.

83. Overdraft by agent.—Union Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. Ty. 248.

84. Marine Bank *v.* Butler Colliery Co., 52 Hun 612, 5 N. Y. S. 291, judgment affirmed in 125 N. Y. 695, 26 N. E. 751.

85. Washbon *v.* Linscott State Bank, 87 Kan. 698, 125 Pac. 17.

86. By treasurer of borough.—The

§ 150 (3) Right to Make or Refuse Overdrafts.—A bank may refuse to pay an overdraft.[87] Because banks often let good customers overdraw, the latter do not thereby acquire the right to do so when the bank deems it improper to permit it.[88] A bank is not obliged to make a partial payment upon a check exceeding the fund in bank subject to check, but, if it pay part, is entitled to take up the check as evidence of its payment.[89]

Right to Countermand Check.—The defendant notified the plaintiff not to allow the account to be overdrawn beyond a certain amount. Checks were drawn by one authorized by the defendant, exceeding the limit set by him, and the checks were paid by the plaintiff. The defendant could not, by mere notice, defeat the rights of holders of such checks, there being no ground for arresting payment, nor the right of the plaintiff to pay the same, and charge to the defendant's account.[90]

Duty to Inquire as to Disposal of Proceeds.—The bank is not required to inquire as to the disposition of the money drawn on checks made by the authority of the defendant in the prosecution of his business.[91]

§ 150 (4) Right to Recover Overdrafts.—A bank may recover the amount of an overdraft from the drawer.[92] The drawing of a check on

treasurer having presented the warrants upon which his overdraft was made to the borough auditors passing upon his account, and no appeal having been taken from their report, the bank, having secured such warrants from the auditors for temporary use in checking up the treasurer's account, could not retain possession thereof or use them to compel the borough to pay the treasurer's overdraft. Pittsburg *v.* First Nat. Bank, 230 Pa. 176, 79 Atl. 406.

87. Refusal to pay overdrafts.—Oddie *v.* National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Pratt *v.* Foote, 9 N. Y. 463, Seld. Notes 224; Spokane, etc., Trust Co. *v.* Huff, 63 Wash. 225, 115 Pac. 80.

A bank can not be required to pay a draft unless the drawer thereof has sufficient funds on hand in the bank to meet it. Gibbs Nat. Bank *v.* Citizens' Bank (Tex. Civ. App.), 108 S. W. 776.

Where the drawer of a draft was not authorized to overdraw his account and the draft was not accepted by the bank, the bank was not precluded from denying the authority of the drawer to draw the draft and its own responsibility and want of liability thereof. Gibbs Nat. Bank *v.* Citizens' Bank (Tex. Civ. App.), 108 S. W. 776.

Where another check not charged.—A bank may properly refuse to pay a check which will overdraw the depositor's account, though on the bank books the depositor's balance seems to be larger than the amount of the check because a check of his, paid by the bank two days before, has not yet been charged to such depositor. American Exch. Nat. Bank *v.* Gregg, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171.

88. St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390.

89. Partial payment.—Harrington *v.* First Nat. Bank, 85 Ill. App. 212.

90. Bremer County Bank *v.* Mores, 73 Iowa 289, 34 N. W. 863.

91. Bremer County Bank *v.* Mores, 73 Iowa 289, 34 N. W. 863.

92. Recovery of overdraft.—A bank may maintain an action against the drawer who has received moneys from their cashier on checks overdrawn. Franklin Bank *v.* Byram, 39 Me. 489, 63 Am. Dec. 643.

A bank is entitled to recover the amount of the overdraft as shown by the checks signed by the authorized officers of a corporation. Mahoney Min. Co. *v.* Anglo-Californian Bank, 104 U. S. 192, 26 L. Ed. 707.

Where a company had power, under its charter, to raise money in that mode, for use in its corporate business, and since an indebtedness thus created would, in the usual course of business,

a bank where the drawer keeps his account implies a promise by him to the bank to pay if the bank will honor it, and his account is thereby overdrawn.[93]

Paid by Mistake.—A payment, in the ordinary course of business, of a check by a bank upon which it is drawn under the mistaken belief that the drawer has funds in the bank subject to check, is not such a payment under mistake of fact as will permit the bank to recover the money so paid.[94]

be evidenced by the checks of its president and secretary, the presumption should be indulged, not only that those officers, in making an overdraft, did not exceed their authority, but that the moneys thus obtained were paid over to or received by the company. But that is a mere presumption, arising from the conduct of the parties, as well as from the general mode in which corporations organized for profit conduct their business. That presumption, if not, under the special circumstances of this case, conclusive, might have been overthrown by affirmative proof of want of authority, express or implied, in the president and secretary of the company to make overdraft checks, and by proof that the company did not receive the money paid thereon by the bank. Mahoney Min. Co. *v.* Anglo-Californian Bank, 104 U. S. 192, 26 L. Ed. 707.

But where an agent of an English insurance company kept a deposit with a bank in his own name as agent, and had been allowed to make a large overdraft, the bank could not hold the insurance company liable to repay same to the bank, when the bank must have known, from the circumstances, that the draft was made to remit to the company what was due it from the agent. It was the bank's loss. Central Nat. Bank *v.* Royal Ins. Co., 103 U. S. 783, 26 L. Ed. 459; Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693, approved in Union Stock Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 34 L. Ed. 724, 11 S. Ct. 118.

93. Implied promise to repay.—Thomas *v.* International Bank, 46 Ill. App. 461.

Where the overdraft of a bank depositor is accidental, it negatives the idea of an express or actual contract, and an action thereon is not within Act March 11, 1836, § 14, authorizing a judgment by default in an action on a "contract for the loan or advance of money." Farmers', etc., Bank *v.* Sellers (Pa.), 2 Miles 329.

94. Paid by mistake.—Riverside Bank *v.* First Nat. Bank, 20 C. C. A. 181, 74 Fed. 276; National Bank *v.* Burkhart, 100 U. S. 686, 25 L. Ed. 766; City Nat. Bank *v.* Burns, 68 Ala. 267, 44 Am. Rep. 138; National, etc., Trust Co. *v.* McDonald, 51 Cal. 64, 21 Am. Rep. 697; Boylston Nat. Bank *v.* Richardson, 101 Mass. 287; Consolidated Nat. Bank *v.* First Nat. Bank, 129 App. Div. 538, 114 N. Y. S. 308; Citizens' Bank *v.* Schwarzschild, etc., Co., 109 Va. 539, 64 S. E. 954, 23 L. R. A., N. S., 1092; Spokane, etc., Trust Co. *v.* Huff, 63 Wash. 225, 115 Pac. 80.

In Oddie *v.* National City Bank, 45 N. Y. 735, 6 Am. Rep. 160, it was said: "When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in Pratt *v.* Foote, 9 N. Y. 463, Seld. Notes 224, but if it accepts such a check and pays it, either by delivering the currency, or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine. In the case of a deposit, the bank becomes at once the debtor of the depositor, and the title of the deposit passes to the bank. The bank always has the means of knowing the state of the account of the drawer, and, if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise." Spokane, etc., Trust Co. *v.* Huff, 63 Wash. 225, 115 Pac. 80.

In National Bank *v.* Berrall, 70 N. J. L. 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821, it was said: "As between the holder of a check and the bank upon which it is drawn, the latter is bound to know the state of the depositor's account. Before paying the check it must take into consideration whether it was drawn against funds, and whether the order for payment, evidenced by the check, has subsequently been revoked. Therefore, where a bank receives in the ordinary course of business a check, drawn upon it and presented by a bona fide holder, who is without notice of any infirmity therein, and the bank pays the amount of the check to such holder, it finally exercises its option to pay or not to pay, and the transaction is closed as

The remedy of the bank is against the drawer. It is the duty of a bank to know the state of its depositor's account, and if it makes a mistake in this respect it must abide the consequences.[95] A bank paid a check, erroneously supposing that it had funds of the drawer. The messenger, to whom the bank made payment, paid over in good faith the money to the payee. The bank could not recover the amount from the messenger.[96]

Overdraft by Agent.—If a principal allows his agent to habitually overdraw the account, in excess of his express authority, regularly paying the same, the bank may assume that the principal will cancel subsequent overdrafts.[97]

between the parties to the payment." Spokane, etc., Trust Co. *v.* Huff, 63 Wash. 225, 115 Pac. 80.

On Oct. 6, 1909, E. had on deposit in the appellant's bank subject to check the sum of $297, and L. had on deposit therein subject to check the sum of $48. During the banking hours of that day they severally withdrew their respective deposits. On the same day, and about one hour after the bank had closed its doors to the general public, the respondent, H., appeared at the bank with the check of E. for the sum of $297, and the check of L. for the sum of $48, both dated upon that day, and presented the checks to the bank's assistant secretary for payment. The assistant secretary thereupon caused inquiry to be made of the bookkeeper and the paying teller of the bank to ascertain whether the drawers of the checks had sufficient funds on hand to meet the checks, and, on being informed that they had, paid the checks to the respondent. When the books of the bank were balanced for the day, the overpayment was discovered, and on the next day the checks were tendered the respondent and repayment of the sums demanded. Repayment was refused, whereupon the present action was brought to recover the amount so paid. Held, the bank could not recover. Spokane, etc., Trust Co. *v.* Huff, 63 Wash. 225, 115 Pac. 80.

C. deposited certain collaterals with P., K. & Co., bankers and members of the Chicago clearing house, with the understanding that he should have a right to draw checks on them to within 10 per cent. of the value of the securities. On August 5, 1881, C. drew his check for $4,000, which was deposited with the defendant bank, also a member of the clearing house, to his credit, and went into the exchanges for collection though the clearing house on the morning of August 6th. Under the rules of the clearing house, each member was required to pay its balances to the clearing house by 12 o'clock, and any check which was found not to be good when returned from the clearing house to the bank against which it was drawn was to be returned to the bank which collected it through the clearing house by half past 1 o'clock of the same day. When C.'s check came from the clearing house into P. K., & Co.'s bank, his account was examined, and the collaterals deemed sufficient to pay that check, and others drawn on them by him, and they were handed over to the bookkeeper, to be charged into his account. At 42 minutes past 1, P., K. & Co. heard that C. had failed, when a second examination was had, and it was found that a mistake had been made, whereupon the check was sent to defendant bank, and payment demanded at 15 minutes before 2 o'clock, and refused. P., K. & Co. brought suit against defendant to recover the amount of the check as money paid under mistake. Held, that they were not entitled to recover. Preston *v.* Canadian Bank, 23 Fed. 179, distinguishing Merchants' Nat. Bank *v.* National Eagle Bank, 101 Mass. 281, 100 Am. Dec. 120.

A bank, on establishing and explaining the mistake, may recover back from a depositor an excess drawn out through an erroneous double entry on the ledger copied into the depositor's bank book as two deposits. McLean County Bank *v.* Mitchell, 88 Ill. 52.

95. Manufacturers' Nat. Bank *v.* Swift, 70 Md. 515, 17 Atl. 336, 14 Am. St. Rep. 381; National Bank *v.* Berrall, 7 N. J. L. 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821; Spokane, etc., Trust Co. *v.* Huff, 63 Wash. 225, 115 Pac. 80.

96. Penacook Sav. Bank *v.* Hubbard, 58 N. H. 167.

97. Merchants', etc., Nat. Bank *v.* Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750.

Recovery from Agent.—A bank paid a check, erroneously supposing that it had funds of the drawer. The messenger, to whom the bank made payment, paid over in good faith the money to the payee. The bank can not recover the amount from the messenger.[98]

Overdraft Payable on Condition.—In an action by a bank to recover the amount of a check drawn upon it by the defendant, and paid by the bank, though the defendant had no funds on deposit, a claim by the defendant that the check grew out of an intended horse trade, which was not consummated, and that the bank was notified not to pay it, is fully met and disposed of by the finding of the jury that the check was to be paid, even if the horse trade fell through, and that the payment was made before notice not to pay was received.[99]

Paid through Fraud.—Where money is fraudulently obtained from a bank on an overdraft, the title thereto remains in the bank, and it may be followed and reclaimed in the hands of any person who has not taken it in good faith, and allowed an equivalent therefor; and therefore, where the identical money is deposited in another bank, the defrauded bank may have an injunction restraining the withdrawal of the same.[1]

§ 150 (5) Interest on Overdrafts.—In the absence of an agreement to that effect, a bank is not entitled to interest on an overdraft,[2] except from the time of demand.[3] The presentation of an account by a bank for money paid out upon the checks of the depositor, with the balance struck, amounts to a demand for payment, and in action to recover such balance, the account being for money alone, the bank may recover interest, although there was no contract to pay interest, nor any usage of the parties requiring it.[4] Where an overdraft is settled by the execution of a note payable on demand, the amount due bears interest from the date of the settlement.[5] Under an agreement to pay interest which fails to specify the rate, it is proper to charge the legal rate.[6] The custom of banks to charge ten per centum in-

98. Penacook Sav. Bank *v.* Hubbard, 58 N. H. 167.

99. Frankenberg *v.* First Nat. Bank, 33 Mich. 46.

1. Tradesman's Bank *v.* Merritt (N. Y.), 1 Paige 302.

2. Interest on overdraft.—In the absence of an agreement to that effect, a bank in Illinois is not entitled to interest on overdrafts of a depositor. Ownes *v.* Stapp, 32 Ill. App. 653.

In a suit to recover back money obtained from a bank by an overdraft, without any agreement to pay interest thereon, if the plaintiffs claim interest, the defendant may give evidence of facts tending to show that he did not procure the money wrongfully, nor detain it unjustifiably. Hubbard *v.* Charlestown, etc., R. Co. (Mass.), 11 Metc. 124.

3. In an action of debt on the official bond of the cashier of a bank for overdrafts made by him as a private depositor, it was held that the bank was entitled to interest only from the time he went out of office, or from a demand, if one had been made earlier, and not from the date of each overdraft. Union Bank *v.* Sollee (S. C.), 2 Strob. 390.

4. Casey *v.* Carver, 42 Ill. 225.

5. Hennessy Bros., etc., Co. *v.* Memphis Nat. Bank, 64 C. C. A. 125, 129 Fed. 557.

6. Rate of interest.—Where defendants agreed, in writing, to pay interest to the bank on their overdrafts, but failed to specify the rate of interest, it is proper to allow interest at 7 per cent. Loan, etc., Bank *v.* Miller, 39 S. C. 175, 17 S. E. 592.

terest on overdrafts, and to compute interest on the basis of thirty days to the month, does not legalize the charge, the statute allowing only six per centum interest in the absence of contract.[7]

§ 150 (6) Application of Deposits to Overdrafts.—Where a depositor who has made overdrafts makes a general deposit the bank may apply it to the overdrafts.[8] The rule applies to a subsequent deposit of a trust fund made in the depositor's individual name.[9] But it does not apply to a special deposit of state funds.[10]

7. Talbot *v.* First Nat. Bank, 106 Iowa 361, 76 N. W. 726, affirmed in 185 U. S. 172, 46 L. Ed. 857, 22 S. Ct. 612.

8. **Application of subsequent deposits.**—Where a bank depositor made a deposit to the credit of his general account, and the bank was not notified that he intended such deposit to be applied in payment of the depositor's note held by another bank, the bank of deposit was entitled to apply such deposit against the depositor's overdrafts. First Nat. Bank *v.* City Nat. Bank, 102 Mo. App. 357, 76 S. W. 489.

When a customer of a bank who has overdrawn his account makes a deposit, the presumption is, in the absence of evidence, that the deposit was general and was made and received towards the payment of the overdraft. Nichols *v.* State, 46 Neb. 715, 65 N. W. 774.

Where a depositor, after overdrawing his account, made deposits in excess of the overdraft, the balance due by him at the close of the account was an indebtedness created as of the date of the last items of debit on the account, and not as of the date of the original overdraft, as payments made on a running account, when no appropriation is made by either party, must be applied in discharge of the oldest debit on the account. Grant County Deposit Bank *v.* Points, 22 Ky. L. Rep. 105, 56 S. W. 662.

9. **Deposit of trust fund.**—Where a person who has overdrawn his account with a bank deposits therein money held by him, as treasurer of a school district, such deposit will constitute a payment of the overdraft, where it is made in his own name, and the bank acquiesces in his use of it as his own, and so treats it, though knowing that it is public money. Hale *v.* Richards, 80 Iowa 164, 45 N. W. 734.

10. **Special deposit.**—A state created two funds, which it deposited in plaintiff bank in two separate accounts, one of which was subject to the payment of general expenses, but the other only to the payment of interest and principal to accrue on certain canal bonds payable at the bank at maturity, of which it had notice. Plaintiff allowed the state to overdraw the general fund account to an amount exceeding the credit to the canal fund deposit. Held, that the bank, having permitted the overdraft with notice of the special nature of the canal fund deposit, was not entitled to apply that fund to the payment of the overdraft as against holders of the bonds. United States Bank *v.* Macalester, 9 Pa. St. (9 Barr) 475.

Deposit to pay particular overdraft.—The treasurer of a corporation was short in his accounts, and overdrew his account as treasurer at plaintiff bank to pay checks on him by the corporation. By agreement with the bank he deposited his own funds to protect his overdrafts, but also checked from his treasurer's accounts to pay his private debts. Later, without authority, he executed the note of the corporation to cover his shortage. The amount of his private funds deposited, minus the amount checked out to pay his private debts, left a remainder which was smaller than the amount of his shortage as treasurer by about the amount of the unauthorized note. Held that, as the deposits of private funds were by agreement made to protect the overdrafts as treasurer, the bank could not, as against the corporation, apply them to the deficit arising from the checks in payment of individual indebtedness, and hence could not recover on the note on the ground that the corporation had received the benefit thereof. Judgment, 94 N. W. 945, affirmed on rehearing in Van Buren County Sav. Bank *v.* Stirling Woolen Mills Co., 125 Iowa 645, 101 N. W. 477.

S., who was defendant's treasurer, and president of plaintiff bank, through an arrangement with plaintiff's cashier was given credit for a check drawn by defendant for the amount due from him as its treasurer, as the proceeds

Deposit by Another.—Where the defendant's brother had deposited funds in his own name which the defendant claimed as his, an agreement between the defendant and the bank that the bank should hold the amount as a cash item until it was determined to whom the money belonged would not create any lien on the fund, nor deprive the depositor of his right to withdraw it, it not being claimed that he was a party to the agreement, and, in an action on an overdraft, the defendant could not defend on the ground that the bank had breached its agreement, and paid to the defendant's brother the fund in question, more than enough to pay the overdraft, though the bank might be liable for breach of the contract.[11]

§ 150 (7) Action to Recover Overdrafts.—Where a bank brings assumpsit against a depositor for the amount of an overdraft, this is a waiver of the tort, and is subject to the general right of set-off.[12]

Limitation of Actions.—The statute of limitations begins to run from the date of the monthly balance struck in the bank book of a depositor.[13]

Admissibility of Evidence.—All evidence going to show the state of account between the bank and the depositor, including checks, drafts, and

of defendant's deposit in a former bank operated by S., on the latter's execution of a check on the old bank for the difference between the old bank's credit with plaintiff and the amount of the check. S. was in default in a large amount in his accounts as defendant's treasurer at the time, which the arrangement with plaintiff's cashier was made to conceal. Thereafter, defendant's account with plaintiff being overdrawn without its knowledge, as the result of the check in favor of the old bank being charged to its account, S. deposited his private funds from time to time to cover such overdraft, and on one occasion deposited $2,500 of his own funds to pay a particular overdraft. Held, in an accounting between defendant and plaintiff bank, that defendant was entitled to credit for such special deposit. Van Buren County Sav. Bank *v.* Stirling Woolen Mills Co., 94 N. W. 945, affirmed in 125 (Iowa), 645, 101 N. W. 477.

A banker, who was also treasurer of a corporation, kept his account on the bankbooks in the form of an account between the corporation and the bank. He became short in his accounts as treasurer, and on reorganization of the bank as a savings bank, and the giving of a check by the corporation in favor of the treasurer on the old bank for the amount which that bank, regarded as identical with that which the treasurer, owed the corporation, the treasurer agreed with the cashier of the savings bank that, inasmuch as the old bank did not have a credit with the savings bank equal to the amount of the check, this amount should be placed to the credit of the treasurer, as such, on the savings bank's books, and he should draw a check on that bank in favor of the old bank for the difference between the amount due the corporation from the old bank and the amount of the old bank's credit with the savings bank, which check should be charged to the account of the treasurer as such. A passbook was issued to the corporation, which showed the former, but not the latter, check. The corporation had no direct account with the savings bank. Held that, as the cashier had no authority to accept the worthless check on the old bank and charge the savings bank with the amount thereof, and as the corporation could not accept only that part of the arrangement accepting the check which was favorable to it, it was not entitled to be credited with amount of the worthless check without being debited with the amount of the other. Judgment, 94 N. W. 945, affirmed on rehearing in Van Buren County Sav. Bank *v.* Stirling Woolen Mills Co., 125 Iowa 645, 101 N. W. 477.

11. Jefferson Sav. Bank *v.* Irving, 145 Iowa 48, 123 N. W. 937.

12. Action to recover overdrafts.—Bank *v.* Macalester, 9 Pa. 475.

13. Union Bank *v.* Knapp (Mass.), 3 Pick. 96, 15 Am. Dec. 181.

notes paid, is admissible in action by a bank for overdraft.[14] Where the defendant drew a check, and thereafter paid the amount of it to the payee, without receiving the check in return, a year afterwards, the plaintiff bank, the drawee of the check, paid it, when the defendant had no funds in the bank, evidence of a custom of the bank to pay overdrafts of solvent drawers is inadmissible, as such a custom should not be encouraged.[15]

Weight and Sufficiency of Evidence.—The defendant must prove by a preponderance of evidence that he made a deposit.[16] The fact of payment is prima facie evidence that the bank had funds to the credit of the drawer equal to the amount thereof.[17] And therefore a bank can not recover for money paid on overdrafts without evidence, other than the checks, showing the state of the account.[18]

§ 151. Depositors' Passbooks and Accounts.—Purpose of Passbook.—The object of a passbook is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank.[19]

14. Admissibility of evidence.—Jack *v.* Moyer, 187 Pa. 87, 40 Atl. 1013.

Where the defendant in an action by a bank to recover on an overdraft alleges payment, and introduces deposit certificates, the validity of which is questioned, the defendant may introduce letters, checks, etc., showing his possession of the money alleged to have been deposited with the bank at the time the certificates were issued. Cox *v.* Bank (Tenn.), 63 S. W. 237.

A complaint by a bank for overdraft, though counting only on checks of defendant's agent H., but which refers to all checks by check number and date of payment, allows of proof of checks signed by R., an assistant of H., who had been authorized by defendant and H., as the latter had told plaintiff, to sign checks in his absence. Wheatley *v.* Kutz, 19 Ind. App. 293, 49 N. E. 391.

Deposit check.—In an action by a bank to recover for overdrafts, though one draft received from defendants by plaintiff was not accompanied by the usual deposit check, deposit checks which accompanied other deposits are competent evidence of the amount received from defendants. Gladstone Exch. Bank *v.* Keating, 94 Mich. 429, 53 N. W. 1110.

Check as evidence of part payment.—A bank is not obliged to make a partial payment upon a check exceeding the fund in bank subject to check, but, if it pay part, is entitled to take up the check as evidence of its payment. Harrington *v.* First Nat. Bank, 85 Ill. App. 212.

15. Lancaster Bank *v.* Woodward, 18 Pa. 357, 57 Am. Dec. 618.

16. Weight and sufficiency of evidence.—A depositor, on receiving notice that his account was overdrawn, agreed to settle the next day, but subsequently claimed that deposits made by him had not been credited by the bank, though pointing out no particular deposit which had not been credited. About two years later, after an action had been commenced against him on the overdraft, he produced postal-card receipts which showed amounts greater than those credited to him on the dates of the receipts, and which differed from his letters accompanying the deposits. His testimony as to the deposits was corroborated in many respects. The postal-card receipts were apparently reinked. The deposition of an expert showed that the figures had been raised and retraced, and that the date had been altered. The bank's journal showed a deposit of the amount as credited to defendant on the date of the receipt, and that the books balanced at the end of that day. Held, that defendant did not establish, by the preponderance of the evidence, that he made the deposits. Garret *v.* Bank (Tenn.), 53 S. W. 250.

17. Bank *v.* Wilson, Fed. Cas. No. 943, 3 Cranch, C. C. 213; Bank *v.* Washington, Fed. Cas. No. 940, 3 Cranch, C. C. 295; Bank *v.* McCrea, Fed. Cas. No. 849, 3 Cranch, C. C. 649; State Bank *v.* Clark, 8 N. C. 36.

18. State Bank *v.* Clark, 8 N. C. 36.

19. Purpose of passbook.—Scanlon-

Duty to Examine Passbook.—The sending of his passbook to be written up and returned with the vouchers, is, in effect, a demand to know what the bank claims to be the state of his account. And the return of the book, with the vouchers, is the answer to that demand, and, in effect, imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it.[20] The depositor must examine within a reasonable time and with ordinary care the account rendered in the passbook and the vouchers returned by the bank to him, and report any error discovered without unreasonable delay.[21] But the failure of a depositor to examine his passbook within a reasonable time after it has been balanced does not estop him from subsequently showing the incorrectness of the balance as given by the bank.[22] The depositor's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business.[23] The depositor may commit the examination to an agent.[24]

Gipson Lumber Co. *v.* Germania Bank, 90 Minn. 478, 97 N. W. 380.

It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657.

20. Duty to examine passbook.—Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657; Scanlon-Gipson Lumber Co. *v.* Germania Bank, 90 Minn. 478, 97 N. W. 380.

Where a depositor was notified by the bank that on his account there was a balance in his favor of a certain sum, his attention was necessarily called to the entire account. American Nat. Bank *v.* Bushey, 45 Mich. 135, 7 N. W. 725.

21. Must examine in reasonable time.—Brown *v.* Lynchburg Nat. Bank, 109 Va. 530, 64 S. E. 950.

Ten days can not be arbitrarily fixed as sufficient time, under all circumstances, for a bank depositor to examine his passbook, after it has been balanced and returned to him with canceled vouchers. Kenneth Inv. Co. *v.* National Bank, 103 Mo. App. 613, 77 S. W. 1002.

Two years.—In American Nat. Bank *v.* Bushey, 45 Mich. 135, 7 N. W. 725, the depositor was held estopped after two years.

22. Rettig *v.* Southern Illinois Nat. Bank, 147 Ill. App. 193.

23. Degree of care in examining.—The examination by the depositor of his account need not be so close and thorough as to exclude the possibility of any error whatever being overlooked by him. Nor is the depositor wanting in proper care, when he imposes upon some competent person the duty of making that examination and of giving timely notice to the bank of objections to the account. If the examination is made by such an agent or clerk in good faith and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657.

24. Examination by agent.—If the depositor, in the ordinary course of business, commits the examination of the bank account and vouchers to competent clerks or agents under proper supervision, and they fail to discover checks which are forged, the duty of the depositor to the bank is discharged, although the principal, if he had made the examination personally, would have detected them. The alleged duty, at most, only requires the depositor to use ordinary care; and if this is exercised, whether by himself or his agents, the bank can not justly complain, although the forgeries are not discovered until it is too late to retrieve its position or make reclamation from the forger, where its own officers have exercised due care. Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657.

When the agent commits the for-

Acquiescence by Failure to Examine.—It may be stated as a general proposition of law that the ordinary writing up of a bank book, with a return of vouchers or statement of accounts, precludes no one from ascertaining the truth and claiming its benefit.[25] But the depositor's silence is an admission that the entries are correct.[26] Although a general depositor

geries, which misled the bank and injured the depositor, and, therefore, has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination—without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily upon the principal, can not be deemed the equivalent of performance by the latter. Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657.

"Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, can not be made, in this action, to depend upon a calculation whether the criminal had, at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank. An inquiry as to the damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgeries might be proper if this were an action by it to recover damages for a violation of his duty. But it is a suit by the depositor, in effect to falsify a stated account, to the injury of the bank, whose defense is that the depositor has, by his conduct, ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration and payment from the person committing the forgeries was, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectively, exercising it." Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657. See Robb *v.* Vos, 155 U. S. 1, 39 L. Ed. 52, 15 S. Ct. 4.

25. **Acquiescence by failure to examine.**—Such undoubtedly is a correct statement of a general rule. It was made in First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. Ed. 229, a case where the account included a check in respect to which it was subsequently discovered that the name of the payee had been forged. But it did not appear that either the bank or the drawer of the check was guilty of negligence. The drawer was not presumed to know the signature of the payee; his examination of the account would not necessarily have disclosed the forgery of the payee's name; therefore his failure to discover that fact sooner than he did was not to be attributed to want of care. Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657.

But the principle ought not to be so extended as to invite or encourage such negligence by depositors in the examination of their bank accounts, as is inconsistent with the relations of the parties or with those established rules and usages, sanctioned by business men of ordinary prudence and sagacity, which are or ought to be known to depositors. Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657.

26. Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed 811, 6 S. Ct. 657.

Where a passbook is balanced, and the checks and book returned to the customer, and no question is raised as to the correctness of the entries in such book, the silence is an admission of their correctness, and so stands until overcome by evidence. McLaughlin *v.* First Nat. Bank, 71 Ill. App. 329.

A depositor sustains such relation to his bank that he is bound to give heed

in a bank has presumptively acquiesced in his account as rendered by the bank, by retaining without objection the passbook written up and balanced by the bank, yet when the depositor is able to point out specifically error, mistake, or forgery in the account, he ought to be allowed restitution, unless the error, mistake, or forgery was induced by his negligence, and to make the restitution would work a special damage to the bank.[27]

Where New Passbook Given.—Where a depositor opens a second and separate account for which he receives a new deposit book and is not required to surrender the old book, and afterwards he ceases to draw on the old account and only uses the new account, a subsequent balancing of the new account and return of the vouchers, without anything to indicate that the new account is a continuation of the old one, has not the effect of an account stated as against a balance due upon the old account, and he is not conclusively estopped to demand the balance of the old account.[28]

Assignment by Transfer of Passbook.—A delivery to a donee, of a deposit book issued by a savings bank containing entries of deposits to the credit of the donor, with the intention to give the donee the deposits represented by the book, and accompanied with appropriate words of gift, is a sufficient delivery to constitute a valid gift of such deposits, without assignment of transfer in writing.[29]

Effect of Crediting on Passbook.—A check deposited with a bank by a customer, and credited to his account, in his passbook, thereupon became the property of such bank, and for the amount thereof it became indebted to him, where the evidence offered for the purpose of showing that it had not been received and credited as money is conflicting.[30]

Computing Account.—The rule which governs in keeping the account between a bank and a depositor is that as money is paid and drawn out, or other debts and credits are entered by the consent of both parties, in a general banking account of a customer, a balance may be considered as struck at the date of each payment, or entry on either side of the account.[31] Where, in an action against a bank to recover the amount of a certain draft alleged

to the periodical statements coming from the bank in connection with the return of his passbook showing the balancing of his account. If he interposes no objection to such statements, the presumption naturally follows that he deems them correct, and the bank has the right to rely on such presumption and act upon it in the future. National Bank *v.* Tacoma Mill Co., 104 C. C. A. 441, 182 Fed. 1.

After two years.—Where a depositor was notified by the bank that on his account there was a balance in his favor of a certain sum, his attention was necessarily called to the entire account, and it became his duty to examine it, and the fact that he made no objection and at once acted on the notification and drew out the admitted balance, and for nearly two years never interfered, further tended to show acquiescence in the account. American Nat. Bank *v.* Bushey, 45 Mich. 135, 7 N. W. 725.

27. Kenneth Inv. Co. *v.* National Bank, 96 Mo. App. 125, 70 S. W. 173.

28. Second Nat. Bank *v.* Thompson, 44 Pa. Super. Ct. 200.

29. Polley *v.* Hicks, 58 O. St. 218, 50 N. E. 809.

30. Moore *v.* Riverside Bank, 25 Misc. Rep. 720, 55 N. Y. S. 615.

31. Wasson *v.* Lamb, 120 Ind. 514, 22 N. E. 729, 6 L. R. A. 191, 16 Am. St. Rep. 342.

to have been erroneously issued by the plaintiff's finance keeper, who was also assistant cashier of the defendant bank, and not credited to the plaintiff, it appeared that the defendant had drawn two drafts in favor of the plaintiff, the court should have instructed that the amount of such drafts should have been deducted from any claim of the plaintiff against the defendant on the first draft.[32]

Liability of Bank to Third Persons.—Where a third person, anticipating entering into a contract with a depositor, inquired of the bank as to the depositor's account and was by the bank induced to believe a certain entry true and correct, and in consequence of such belief entered into the contract and was defrauded and suffered loss, the bank is liable for deceiving such person.[33]

Actions.—Although a certificate of deposit is, by its terms, payable only on return, an action may lie without a return thereof.[34] Where the certificate is lost, and has not been endorsed by the payee, he may maintain an action against the bank without tendering an indemnity against future liability.[35]

Evidence.—Entries in a bank depositor's passbook made by the bank's officers are admissible in evidence as to the amount due the depositor.[36]

32. Supreme Tent Knights *v.* Port Huron Sav. Bank, 137 Mich. 627, 100 N. W. 898, 109 Am. St. Rep. 690.

33. Liability of bank to third persons.—An entry upon a "passbook" purporting to show that the owner of the book has credit in a bank for a specified balance is not, of course, conclusive or binding upon the bank, but where a banker issued and delivered such a book containing an entry of this kind which was ab initio false, and where after this had been done, a third person who had seen the book applied to the banker for information as to the genuineness and accuracy of the apparent credit, at the same time disclosing his reasons for making the inquiry, and the banker, while expressly declining to give, in terms, the information thus sought, did by concealing the truth, or by other means, induce the inquirer to believe the entry in the book was true and correct, and in consequence of such belief to make with the owner of the book a contract whereby such inquirer, though exercising due care in the premises, was defrauded and suffered loss, the banker, if from particular circumstances of the case he was under an obligation to communicate to the inquirer the exact truth of the matter, is, within proper limits, liable in damages to the latter on account of such loss, whether or not the banker intended to aid in the fraud. James *v.* Crosthwait, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631.

34. Return of passbook as prerequisite to suit.—The fact that a certificate of deposit is, by its terms, payable "on return," will not prevent an action therein without a return thereof. Citizens' Nat. Bank *v.* Brown, 45 O. St. 39, 11 N. E. 799, 4 Am. St. Rep. 526; Brown *v.* Citizens' Nat. Bank, 9 Wkly. L. Bull. 361, 8 O. Dec. Reprint 792.

35. Indemnity in action on lost passbook.—Where a certificate of deposit payable to a certain person or order is lost by the payee, and the same has never been indorsed by him, he may maintain an action at law thereon against the maker, without tendering an indemnity against future liability. Citizens' Nat. Bank *v.* Brown, 45 O. St. 39, 11 N. E. 799, 4 Am. St. Rep. 526; Brown *v.* Citizens' Nat. Bank, 9 Wkly. L. Bull. 361, 8 O. Dec. Reprint 792.

36. Evidence.—Bank *v.* Rockmore & Co., 129 Ga. 582, 59 S. E. 291; Lucks *v.* Northwestern Sav. Bank (Mo. App.), 128 S. W. 19.

A passbook given to a creditor in a savings bank, the entries in which are shown to have been made by an officer of the bank, is admissible in evidence against the bank and is prima facie evidence that the bank is indebted to the depositor for the balance shown by the book. Atlanta,

The entries are prima facie[37] but not conclusive evidence.[38] A deposit statement rendered by a bank to a depositor, upon the latter's application, showing the balance in favor of such depositor, is sufficient evidence without further testimony of the bank's indebtedness to the depositor.[39]

§ 152. Certificates of Deposit—§ 152 (1) In General.—A certificate of deposit is ordinarily defined to be a written acknowledgment by a bank or banker of the receipt of a sum of money on deposit which the bank or banker promises to pay to the depositor, to the order of the depositor, or to some person or to his order, and its form must determine its negotiability.[40]

etc., Banking Co. *v.* Close, 115 Ga. 939, 42 S. E. 265.

An entry in a bank book is equivalent to a receipt for money, and is consequently evidence of a loan, and of a contract for repayment on demand. It is sufficient to establish the relation of debtor and creditor between the parties. Flanders *v.* Maynard, 58 Ga. 56.

37. Atlanta, etc., Banking Co. *v.* Close, 115 Ga. 939, 42 S. E. 265.

Entries in a bank depositor's passbook made by the bank's officers make a prima facie case apart from any positive testimony in corroboration. Lucks *v.* Northwestern Sav. Bank (Mo. App.), 128 S. W. 19.

38. James *v.* Crosthwait, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631.

A request for an instruction in an action to recover a deposit treating the passbook as conclusive as to the amount was properly refused. Bank *v.* Rockmore & Co., 129 Ga. 582, 59 S. E. 291.

39. Carey *v.* Clayton, 11 Ga. 434.

40. Certificates of deposit.—First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334; Gueydon Bros. *v.* Quintanilla, 2 Tex. App. Civ. Cases, § 617.

As to certificates of deposit by national banks, see post, "Certificates of Deposit," § 265.

"A certificate of deposit is ordinarily a promissory note for the payment of an amount which it certifies to be deposited in bank." (2 Danl. Neg. Inst., § 1698.) Gueydon Bros. *v.* Quintanilla, 2 Tex. App. Civ. Cases, § 617. See, also, Moore *v.* Hanscom (Tex. Civ. App.), 103 S. W. 665, reversed in 101 Tex. 293, 106 S. W. 876.

"A writing which acknowledges that a sum of money has been deposited by a party, and that it is subject to his order, is evidence of a present liability to pay the amount specified, or, in other words, is a certificate of deposit." State *v.* Buttles, 10 West. L. J. 309, 1 O. Dec. 520.

A paper signed by bank A, addressed to bank B, dated June 14, 1887, and stating that W. had deposited a certain sum to the credit of bank B for the use of K., is in its legal character a certificate of deposit, for the certificate stated that W. had deposited so much money, and bank A telegraphed to bank B that W. would come with so much money, and it intended that bank B should take the paper as money, which it did, and bank A entered the paper on its books as being its own check upon itself. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 33 L. Ed. 747, 10 S. Ct. 450.

The certificate is a contract by bank A offering to the plaintiff to become its debtor in the sum of $200,000, and asking it to become a creditor of bank A, for the benefit of K., the object being to convert a credit in Cincinnati, for which W. had paid, into a credit in Chicago with the plaintiff, as the banker of K. for the use of that firm. The plaintiff accepted this offered contract, assumed the relation of creditor to bank A for the use of K., and at once gave them credit for $200,000, thus fully complying with the contract. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 33 L. Ed. 747, 10 S. Ct. 450.

Distinguished from loan.—A national bank had through an employee deposited money with a savings bank, and subsequently, upon a request for more money, the national bank wrote, offering to deposit more money, but refusing to make a loan. In response it received a certificate of deposit with a letter, asking that it be placed to the credit of the savings bank. The certificate was issued to L., the president of the savings bank, and was by him indorsed to A., an employee of the

Acknowledgment of Fund on Deposit.—An instrument executed by the cashier of a bank, which merely certifies that on a prior date named a party had a stated sum on deposit to its credit in the bank, but which contains no words of negotiability or promise to pay, is not a certificate of deposit, or an obligation of the bank upon which an action can be maintained, but is merely evidentiary in character.[41]

Acknowledgment of Receipt of Special Deposit.—A receipt for money, stating that the sum named therein is especially deposited, and due on demand, is a certificate of deposit.[42] But it has been held that where an acknowledgment of a receipt of money by a bank shows that the deposit was made only for safe keeping as a special deposit the word "payable" used in connection with such acknowledgment will not be construed as an absolute promise to pay money but only an agreement to deliver the special deposit and the paper can not be held to be either a certificate of deposit or a promissory note.[43]

Deposit of Money.—To give an instrument the character of a certificate of deposit, the deposit on which it is based must be one of money,[44] and not of a check.[45]

Payable in Money.—If an obligation be to deliver specific articles or a package of money left on deposit, although the obligation arises from an express promise, this does not, although reduced to writing, constitute a promissory note; nor does a like promise coupled with an acknowledgment of the deposit of such things constitute a certificate of deposit.[46]

Certificate as Money.—A certificate of deposit may be equivalent to money when accepted as such, and certainly is so where the certificate is afterwards paid to the recipient thereof.[47] But a certificate not yet due is

national bank, who, in turn, indorsed it to the bank, which gave credit on its books to the savings bank for the amount of the certificate. The certificate was marked "Paid," taken up, and renewal certificates issued from time to time in the same way. After failure of the savings bank, recovery was sought on the last certificate, which was issued directly to A., and signed by the cashier of the savings bank. Held, that the transaction was a loan, and not a deposit; and hence did not create a preferential claim. Carroll *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500.

41. Modern Woodmen *v.* Union Nat. Bank, 47 C. C. A. 667, 108 Fed. 753.

42. Smiley *v.* Fry, 100 N. Y. 262, 3 N. E. 186.

43. First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334.

44. Deposit of money.—Darden *v.* Banks, 21 Ga. 297; First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334.

45. Deposit of check.—An instrument was sued on by an indorsee in due course of business, which is as follows: "First National Bank, Farmersville, Texas, April 2, 1877.—$2180.—Thomas Wilkerson has deposited in this bank twenty-one hundred and eighty and 00-100 dollars in cks. payable to the order of himself on the return of this certificate properly indorsed, one day after date. (Signed) L. E. Bumpass, cashier." It was conceded that cks. meant checks. Held, that the paper was not negotiable. First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334.

46. Payable in money.—The word payable is a descriptive word, meaning "capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable." And to pay means to discharge one's obligation to another. First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334.

47. Certificate as money.—Where

not the equivalent of money, for the purpose of paying a debt, unless accepted as such.[48]

Promissory Note.—The state courts generally have treated certificates of deposit payable to order as notes, and the principles adopted by the state courts in coming to this conclusion, are fully sustained by the writers of treaties on bills and notes.[49]

Promise to Pay.—A certificate of deposit, issued by a bank, certifying that a stated sum of money is deposited to the credit of a third person, subject to the check of such third person, and over which no control is reserved to the depositor, is the equivalent of a written promise by the bank to pay such third person the stipulated amount upon presentation of the deposit certificate.[50]

Chose in Action.—A certificate of deposit is a subsisting chose in action and represents the fund it describes.[51]

Bond or Undertaking.—A certificate of deposit is not an undertaking, within the meaning of a statute requiring an undertaking for a certain sum to be filed as a condition precedent to a new trial. Nor is such a certificate

certain persons gave a joint and several note for the purpose of raising money, and their agent received a certificate of deposit, which certificate was afterwards duly paid upon presentation, the signors of the note can not escape from their responsibility upon the plea that a certificate of deposit was not money. Poorman *v.* Woodward (U. S.), 21 How. 266, 16 L. Ed. 151.

A certificate of this kind was a means of advance that in all probability suited these borrowers, who resided in Ohio, quite as well as the gold or silver would have done. It was to the same effect as if the agent had received the money, and deposited the specie, subject to his own check on the cashier of the bank. This certificate was actually paid in cash to the agent of the parties to the note, for such the bona fide holder was. Poorman *v.* Woodward (U. S.), 21 How. 266, 16 L. Ed. 151.

48. Where a certificate of deposit in a bank, payable at a future day, was handed over by a debtor to his creditor, it was no payment, unless there was an express agreement on the part of the creditor, to receive it as such; and the question, whether there was or was not such an agreement, was one of fact to be decided by the jury. Downey *v.* Hicks (U. S.), 14 How. 240, 14 L. Ed. 404.

"The transaction, in fact, was only a dealing with credits. No money was drawn from the bank, or deposited in it. By the certificate, the credit of the bank was given in addition to the credit of the original debtor. Such a transaction, without a special agreement to receive the certificate in payment, would make it a collateral security only. A receipt for the amount, executed at the time, would not affect the question." Downey *v.* Hicks (U. S.), 14 How. 240, 14 L. Ed. 404.

The bank being insolvent when the certificate of deposit became due, there was no ground for imputing negligence in the collection of the debt by the holder, as no loss occurred to the original debtor. Downey *v.* Hicks (U. S.), 14 How. 240, 14 L. Ed. 404.

If the evidence showed that, after the maturity of the certificate, the original debtor admitted his liability to make it good, the jury should have been instructed that this evidence conduced to prove that the certificate was not taken in payment. Downey *v.* Hicks (U. S.), 14 How. 240, 14 L. Ed. 404.

49. Promissory note.—Miller *v.* Austen (U. S.), 13 How. 218, 14 L. Ed. 119; Downey *v.* Hicks (U. S.), 14 How. 240, 14 L. Ed. 404; Bank *v.* Merrill (N. Y.), 2 Hill 295.

50. Lamar, etc., Drug Co. *v.* First Nat. Bank, 127 Ga. 448, 56 S. E. 486.

51. Chose in action.—Basket *v.* Hassell, 107 U. S. 602, 27 L. Ed. 500, 2 S. Ct. 415; Philpot *v.* Temple Banking Co., 3 Ga. App. 742, 60 S. E. 480.

amendable so as to make it an undertaking within the statute.[52]

Post Note.—The post notes mentioned in the Revised Statutes of the United States are not time certificates of deposit.[53]

§ 152 (2) Power of Bank to Issue Certificates.—A banking corporation authorized to receive deposits and exercise the usual powers incidental to the business of banking has the power to issue certificates of deposit.[54]

Under Statute Giving Power to Savings Banks.—The authority of a bank to issue certificates of deposit, payable at a certain time, with interest, is not curtailed by a statutory provision, expressly vesting such power in savings banks.[55]

Under Statute Forbidding Issuance of Bills, etc.—A certificate of deposit payable in current bank bills is within a statute forbidding the issuance of bills designed for circulation not payable in gold or silver coin.[56] A statute providing that no national bank shall issue post notes to circulate as money, does not apply to time certificates of deposit, representing an actual loan.[57] An engagement of a banking association in the form of a certificate of deposit payable at a future day is, in legal effect, a promissory note, within a statute providing that no banking association shall issue or put in circulation any bill or note of said association unless the same shall be made payable on demand, and without interest; and such certificate is therefore void.[58]

52. Shamokin Bank *v.* Street, 16 O. St. 1.

53. Post notes, mentioned in § 5183 of the United States Revised Statutes, are post notes to circulate as money, and not time certificates of deposit, representing an actual loan; and hence such certificates do not come within the prohibition of this section against the issue of past notes by national banks. Logan County Nat. Bank *v.* Williamson, 2 O. C. C. 118, 1 O. C. D. 395.

54. Power of bank to issue.—Francois *v.* Lewis, 68 Minn. 409, 71 N. W. 621; Citizens' Sav. Bank *v.* Blakesley, 42 O. St. 645.

The power to issue certificates of deposit necessarily follows from the power to receive deposits. Citizens' Sav. Bank *v.* Blakesley, 42 O. St. 645.

55. Civ. Code, § 576; Abbott *v.* Jack, 136 Cal. 510, 69 Pac. 257.

56. Under statute forbidding issuance of bills, etc.—A certificate of deposit, payable in current bank bills, is within St. 1837 (Cobb's Dig., p. 102), § 2, forbidding the issue of bills, etc., designed for circulation, not payable in gold or silver coin. Darden *v.* Banks, 21 Ga. 297.

Act Dec. 26, 1837, made penal the paying away of any bank bill intended for circulation as paper money having longer time than three days to run, or payable otherwise than in gold or silver. Held, that certificates of deposit payable to order, with interest from date, are not void, within such act. Hargroves *v.* Chambers, 30 Ga. 580.

A certificate printed on bank note paper, and signed by the president and treasurer of a corporation, stating that there was due from the corporation to R., or bearer, five dollars, value received, payable one year after date, with interest, is within Act March 22, 1817, prohibiting any corporation other than a banking association from making, issuing, or circulating any note or engagement of credit in the nature of a bank note; and therefore a corporation issuing such certificates is liable to the penalties prescribed by the act. Hazleton Coal Co. *v.* Megargel, 4 Pa. 324.

57. Rev. St., § 5183; Logan County Nat. Bank *v.* Williamson, 2 O. C. C. 118, 1 O. C. D. 395.

58. St. 1840, p. 306, § 4; Leavitt *v.*

Time and Demand Certificates.—In Illinois it has been held that banks have no power to issue time certificates of deposit, and such certificates, if issued, are void.[59] A certificate of deposit is within a statute of New York providing that no banking association shall issue or put in circulation any bill or note unless the same shall be made payable on demand.[60] But a banking corporation organized under the laws of Minnesota,[61] Georgia[62] or Ohio[63] has power to make interest bearing time certificates of deposit. By an individual banker, in a statute providing that no banking association or individual banker shall issue or put in circulation any bills or notes of such association or banker unless the same shall be payable on demand, is meant a bank composed of one individual owner. The statute does not apply to a private banker's issue of a certificate of deposit payable three months after date.[64]

Interest-Bearing Certificates.—See elsewhere.[65]

§ 152 (3) Validity of Certificates.—Consideration for Issuance.—A certificate of deposit issued without consideration is void.[66] But where

Palmer, 3 N. Y. 19, 51 Am. Dec. 333. But see Pelham *v.* Adams (N. Y.), 17 Barb. 384.

Certificates of deposit given by a bank in New York, and payable in Philadelphia, are not "bills or notes issued or put into circulation," within the meaning of the act of 1840, to regulate the currency of the state of New York. Curtis *v.* Leavitt (N. Y.), 17 Barb. 309.

59. Time certificates.—Bank *v.* Farnsworth, 18 Ill. 563.

60. Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333, decided under statute of 1840, p. 306, § 4.

A certificate of deposit issued by a banking association is a promissory note, and void, if payable six months after date, with interest, to the order of a particular person. Bank *v.* Merrill (N. Y.), 2 Hill 295.

61. Francois *v.* Lewis, 68 Minn. 409, 71 N. W. 621.

62. Certificates of deposit issued to and made payable to the order of a depositor on their face, with interest from date, were not obnoxious to the Act of December 26, 1837, "to restrain, prevent and make penal the paying away, etc., any bank bill, etc., intended and for circulation, etc., as paper money, having a longer time than three days to run after its date before redeemable, etc., payable otherwise than in gold and silver." Hargroves *v.* Chambers, 30 Ga. 580.

63. Logan County Nat. Bank *v.* Williamson, 2 O. C. C. 118, 1 O. C. D. 395.

64. Under statute requiring certificate to be payable on demand.—Banking Act, § 20 (Scates' Comp. St., p. 115), provides that "no banking association or individual banker shall issue or put in circulation any bills or notes of such association or banker, unless the same shall be payable on demand." The act requires bankers to certify to the secretary of state the name to be used in business, place of business, capital stock, names of stockholders, and terms of association. Held, that by "individual banker" was meant a bank composed of one individual only, and incorporated under the act; and hence § 20 did not apply to a private banker's issue of a certificate of deposit payable three months after date. Hunt *v.* Divine, 37 Ill. 137.

65. Interest-bearing certificates.—See post, "Power of Banks to Issue Certificates," § 152 (2); "Interest Bearing Certificates," § 152 (4).

66. Consideration for issuance.—The deposit of money in a bank, and the issuance of a certificate payable to the depositor, or, in case of her death, to another, do not, where there is no consideration therefor, constitute a valid contract between the depositor and the bank for the benefit of the other, which the latter can enforce on the depositor's death before the sum is withdrawn. Judgment, 39 App. Div. 99, 56 N. Y. S. 693, affirmed in Sullivan *v.* Sullivan, 161 N. Y. 554, 56 N. E. 116.

Certain persons, who were directors both of a savings bank and of a national bank, procured money from the

a bank issued a certificate of deposit for the accommodation of the depositor, and another loaned money to the depositor on the faith of the certificate, though with knowledge that it was accommodation paper, the bank is liable therefor.[67] And when a certificate of deposit, stating that a depositor had deposited in the drawing bank a certain amount of money, is delivered to and accepted by the plaintiff bank, who is the payee, as money to that amount, and is placed by the plaintiff to the credit of the beneficiary named, a receiver of the drawing bank is estopped, in an action on the certificate, to claim that no consideration was received by the bank for the certificate.[68] Where a new bank was reorganized from an old bank, with the same owners, a certificate of deposit issued by the old bank is sufficient consideration for a certificate of deposit issued by the new bank.[69]

Issued on Void Security.—Certificates of deposit issued by a bank as

former on two notes made by a third person to them, and given for the payment of stock of the national bank, issued in the name of such third person for their benefit. They represented that the savings bank would have to carry the notes but a short time, and that the national bank would take care of them. These persons were behind in their accounts with the national bank, and the savings bank allowed them to overdraw their accounts with it to a large amount, which was used in settling their accounts with the national bank. Thereafter the savings bank delivered the notes and the check to the national bank, which issued to it a certificate of deposit for an amount covering the whole amount represented by them. Held, that this certificate of deposit was without consideration and void. Murray *v.* Pauly, 56 Fed. 962.

67. Holland Trust Co. *v.* Waddell, 75 Hun 104, 26 N. Y. S. 980, 56 N. Y. St. Rep. 868.

68. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 33 L. Ed. 747, 10 S. Ct. 450.

69. Certificate issued by bank before reorganization.—Partners doing business as a county bank issued a certificate of deposit. The firm was succeeded by a national bank, of which one of the partners was president. The holder of the certificate brought it in with some cash, and, at the president's direction, the cashier issued the national bank's certificate for the amount represented by the old certificate and the cash. Held, that the national bank, having received the cash, and taken the old certificate as so much cash on the authority of its president, gave its president credit for the amount of the old certificate, and could not set up a want of consideration for its own certificate of deposit. Logan County Nat. Bank *v.* Williamson, 2 O. C. C. 118, 1 O. C. D. 395.

A firm of private bankers, after issuing a certificate of deposit, ceased to do a general banking business, and were immediately succeeded by an incorporated savings bank, which proceeded to conduct its business in the rooms formerly used by the private bankers, the members of the private banking concern having, moreover, been made trustees of the corporation, one its president and another its cashier, the latter having full control of its business. After the organization of the bank, the person to whom the certificate of deposit had been issued by the private concern presented such certificate at the bank, and the cashier of the latter canceled it, and issued to the depositor a certificate of deposit of the incorporated bank in lieu thereof, and charged the amount to the private concern. The certificate so issued was renewed from time to time for two years, during which time the private concern was continually redeeming its certificates formerly issued, either with the bank's money or certificates, the private firm being in fact insolvent and debtor to the bank, though in good credit therewith. It was held that the surrender of the certificate of the private concern, and the right to pursue them thereon, was a sufficient consideration to support the certificate of the bank issued in lieu thereof; and furthermore that the facts estopped the bank from asserting that its certificate was without consideration. Citizens' Sav. Bank *v.* Blakesley, 42 O. St. 645.

a loan to a depositor, and not for bonds deposited by him as security for the loan for which certificates the depositor gave the bank his check, which was duly paid, were valid in his hands, though the bonds were worthless.[70]

Issued in Aid of Rebellion.—A certificate of deposit executed by a bank within the confederate lines, is null and void, and in violation of the law and policy of the government of the United States forbidding commercial intercourse with rebels.[71]

Funds to Be Used for Illegal Purpose.—The fact that a certificate of deposit was issued for the purpose of transferring funds from one bank to another to be used by the person to whose use it was transferred for an illegal purpose, is no defense to an action by the latter bank against the former upon the certificate.[72]

Signed by President and Cashier.—A statute providing that contracts made by banks and all notes and bills by them issued and put in circulation as money shall be signed by the president or vice-president and the cashier is directory, and a certificate of deposit signed by the president but not by the cashier[73] or signed by the cashier but not by the president or

70. **Issued on void security.**—Kavanagh *v.* Bank, 239 Ill. 404, 88 N. E. 171; Pryor *v.* Bank, 240 Ill. 100, 88 N. E. 288.

71. Morrison *v.* Lovell, 4 W. Va. 346.

72. **Illegality of purpose for which issued as defense.**—When the plaintiff received the deposit from K., it was bound to honor their checks against it; and it could not refuse to pay them on the ground that K. intended to make an improper use of the money. If W. and K. were engaged in gambling, and the former had deposited money in bank A to be transferred to the plaintiff, in order that K. might check out the amount from the plaintiff's bank in payment of losses sustained in the gambling transactions, and both banks knew that the money was to be so used, still bank A having received the deposit, could not refuse to pay it over to the plaintiff, and the plaintiff, having received it, could not refuse to honor the checks of K. drawn against it. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 33 L. Ed. 747, 10 S. Ct. 450.

It is a suit on a contract made by bank A with the plaintiff; and the receiver can not defend it on the ground that the plaintiff knew that if it paid over the money to K. as the bank requested, the money would be used in an illegal transaction, such as cornering the market. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 33 L. Ed. 747, 10 S. Ct. 450.

Although the statute of Illinois makes void any contract "for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play or bet to any person or persons so gaming or betting," this is not a suit against K. & Co. to recover money lent to them; nor is it true that the plaintiff advanced money to them to assist them in attempting to corner the market. It is not averred in the answer, nor proved, that K. & Co. were engaged in such an attempt. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 33 L. Ed. 747, 10 S. Ct. 450.

Although the contract between the two banks was made in the state of Illinois, it was to be performed in the state of Ohio; and, the receiver being estopped from saying that W. did not deposit the $200,000 in bank A to the credit of the plaintiff, it is the law of Ohio (Ehrman *v.* Insurance Co., 35 Ohio St. 324) that he can not be heard to say that the plaintiff acquired the certificate of deposit in connection with an illegal transaction. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 33 L. Ed. 747, 10 S. Ct. 450.

73. **Signed by president.**—In an action against the indorser of a certificate of deposit issued by an association in fact, organized under the general banking law of New York, which certificate was signed by the president, but not by the cashier, it was held that the want of a cashier's cer-

vice-president,[74] is valid.

Delivery to Depositor.—The fact that a certificate of deposit was in the possession of the bank of issue at the time of the commencing the action, and was never actually delivered to the payee named, is no defense to an action thereon by such payee, when it appears that there had been a constructive delivery to the payee through his agent, and that the possession of the bank had been obtained by paying the certificate on the agent's unauthorized indorsement of the payee's name.[75]

§ 152 (4) Interest-Bearing Certificates.—A bank has authority to issue a certificate of deposit payable at a certain time, with interest.[76]

After Maturity.—A certificate returnable at a fixed period and bearing interest for that period bears interest after maturity until paid as well as before maturity.[77] Although a certificate of deposit payable on demand after a stated period provides that it shall not bear interest after maturity, the holder thereof is entitled to legal interest from the time the bank fails or refuses to meet a demand of payment when due.[78] But one who takes, in payment of an antecedent debt, and with notice of its dishonor, a certificate of deposit drawing interest only until its maturity, can not recover interest after maturity, in an action on the certificate, where the bank is willing to pay the certificate; the original holder contesting the indorsee's title, and no damage by delay in payment being alleged.[79]

Discontinuance or Reduction.—After maturity the bank may reduce

tificate was unavailing as a defense, because the association might, by a course of practice, render itself liable on such instrument, though not executed in the mode prescribed, and because it did not appear on the face of the instrument that it was executed by an association organized under such banking law. Kilgore *v.* Bulkley, 14 Conn. 362.

74. **Signed by cashier.**—Section 21 of the general banking act (Laws 1838, p. 250), providing that "contracts made by such association, and all notes and bills by them issued and put in circulation as money, shall be signed by the president or vice president and the cashier thereof," is directory merely, and a certificate of deposit signed by the cashier only may be valid. Barnes *v.* Ontario Bank, 19 N. Y. 152.

75. Honig *v.* Pacific Bank, 73 Cal. 464, 15 Pac. 58.

76. **Interest-bearing certificate.**—Abbott *v.* Jack, 136 Cal. 510, 69 Pac. 257.

A banking corporation organized under the general laws of Minnesota, which authorize it to receive deposits and to exercise the usual powers incidental to the business of banking, has the power to make interest-bearing time certificates of deposit. Francois *v.* Lewis, 68 Minn. 409, 71 N. W. 621.

The State Bank can lawfully receive deposits, and agree to pay interest thereon; and such a transaction does not become illegal by the issuing of a certificate of deposit bearing interest, even if the issuing of such certificate were illegal. Pelham *v.* Adams (N. Y.), 17 Barb. 384.

77. **Interest after maturity.**—Where a certificate of deposit was payable to the order of the depositor on return of the certificate 60 days after date, with interest at the rate of 6 per cent per annum, it bears interest after maturity as well as before. Payne *v.* Clark, 23 Mo. 259.

A certificate of deposit, which, by its terms, matures six months after date, and bears 6 per cent interest from date, continues to bear the same rate of interest after maturity until paid. Cordell *v.* First Nat. Bank, 64 Mo. 600.

78. First Nat. Bank *v.* State Bank, 15 N. Dak. 594, 109 N. W. 61.

79. Kinney *v.* Hynds, 7 Wyo. 22, 49 Pac. 403, 52 Pac. 1081.

the rate of interest by notice to the depositor.[80] Where a certificate of deposit was issued to the probate judge reciting that the fund deposited was to accumulate for an heir, who had refused to take his distributive share, and that it was to bear interest until the bank gave ten days' notice of a reduction or discontinuance, the debt was one due to the probate judge and a notice of discontinuance of interest addressed to the heir or to the register of probate was insufficient, where such notice was not brought to the knowledge of the probate judge.[81]

Forfeiture by Withdrawal of Deposit.—Where a depositor withdraws a certificate of deposit before the expiration of the time limit, he waives interest.[82]

§ 152 (5) Renewal Certificates.—A bank issued a certificate of deposit made payable in certain notes, made so payable by the erasure of words on a printed form. Upon the presentation of the certificate for payment, the notes had not been collected; the teller was directed to return the certificate, but as the signature was torn he was instructed to prepare and transmit a duplicate. In doing so, he carelessly omitted to make the erasure in the printed form and to state that the certificate was payable in certain notes. The second certificate was given in payment for the first, and was only a substitute for it.[83] The surrender, by the holder of a certificate of deposit, who has commenced an action thereon, of the old certificate, and acceptance of new ones, puts an end to the action, and it is proper to grant a nonsuit.[84]

80. Right to reduce after maturity.—Bank *v.* Harrison, 11 N. Mex. 50, 66 Pac. 460.

81. Notice of discontinuance or reduction.—On the refusal of an heir to receive his distributive share, the amount thereof was deposited in defendant bank in accordance with Pub. St. 1882, c. 144, § 16. The certificate of deposit was issued to the probate judge, and recited that the fund was to accumulate for the distributee, and contained a promise to pay the fund to the probate judge, or his assigns, with interest at a specified rate, until defendant should give 10 days' notice of a reduction of the rate or a discontinuance of the interest. Held, that the debt was due to the probate judge, the distributee having but an equitable interest therein, and a notice of discontinuance of the payment of interest addressed to the distributee, or to the register of probate, was insufficient, where such notice was not brought to the knowledge of the probate judge. Cole *v.* New England Trust Co., 209 Mass. 594, 86 N. E. 902.

82. Bank *v.* Harrison, 11 N. Mex. 50, 66 Pac. 460.

83. Renewal certificate.—A bank, on receiving certain notes as a special deposit, issued a certificate for the amount thereof, made on a printed form, from which the words "in current funds" were erased, and "in certain notes" substituted. The certificate was marked "Special Deposit." Having been transferred, this certificate was sent by the holder to the bank for payment. The notes had not then been collected, and the teller was directed by the cashier to return the certificate; but, as the signature was torn, he was instructed to prepare and transmit a duplicate certificate. In doing so, he carelessly omitted to change the printed form by erasing "in current funds," and substituting "in certain notes." Held, that there was no ground for a claim that the second certificate was given in payment for the first; that it was only a substitute for it; and that the receiver of the bank was only required to surrender to the holder the notes constituting the special deposit, for which the original was issued. Niblack *v.* Cosler, 74 Fed. 1000, affirmed in 26 C. C. A. 16, 80 Fed. 596.

84. Manuel *v.* Mississippi R. Co., 2 Pa. 198.

§ 152 (6) Construction of Certificates.—A certificate of deposit issued by a bank certifying that a second sum is deposited to the credit of a third person, subject to his check, and over which no control is reserved to the depositor, is equivalent to a written promise by the bank to pay such third person a stipulated amount on presentation of the certificate.[85] If there is a discrepancy between the amount stated in the body of a certificate of deposit and the amount stated in the margin, the amount stated in the body will govern.[86]

§ 152 (7) Title to Funds Deposited.—Where on the refusal of an heir to receive his distributive share, the amount thereof was deposited in a bank and a certificate of deposit issued to the probate judge reciting that the fund was to accumulate for the benefit of the heir, the bank was the debtor of the probate judge and the distributee had but an equitable interest.[87] A husband deposited money in a bank, and took a certificate jointly in the names of himself and wife, and stated to the banker that he did so to enable the wife to draw the money on his death; and he was informed by the banker that the latter would pay either him or the wife. The husband gave the certificate to his wife to keep, but there was no evidence that he intended to part with the title thereto. Such evidence is not sufficient to show that the money was left with the banker as trustee, his obligation being similar to that of the maker of the note.[88]

On Insolvency of Bank.—Where a certificate of deposit recites that the depositor has placed a certain sum in the bank, payable in current funds on the return of the certificate properly indorsed, such deposit is a general deposit, and, the bank becoming insolvent, the depositor must be remitted to the position of a general creditor only.[89]

§ 152 (8) Transfer of Certificates—§ 152 (8a) In General.—The negotiability of a certificate of deposit is determined by its form.[90] A certificate of deposit issued by a bank for a sum certain, payable to any person or order, or to any person or his assignees, is, in effect, a negotiable promissory note.[91]

85. Construction of certificate.—Lamar, etc., Drug Co. *v.* First Nat. Bank, 127 Ga. 448, 56 S. E. 486.

86. Payne *v.* Clark & Bros., 19 Mo. 152, 59 Am. Dec. 333.

87. Title and interest to fund.—Cole *v.* New England Trust Co., 200 Mass. 594, 86 N. E. 902.

88. In re Brown's Estate, 113 Iowa 351, 85 N. W. 617.

89. Woodhouse *v.* Crandall, 99 Ill. App. 552, judgment affirmed in 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385.

90. Transfer of certificate.—First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334.

91. Miller *v.* Austen (U. S.), 13 How. 218, 14 L. Ed. 119; Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Hanna *v.* Manufacturers' Trust Co., 104 App. Div. 90, 93 N. Y. S. 304; Howe *v.* Hartness, 11 O. St. 449, 78 Am. Dec. 312; Citizens' Nat. Bank *v.* Brown, 45 O. St. 39, 11 N. E. 799, 4 Am. St. Rep. 526. See, also, State *v.* Buttles, 10 West. L. J. 309, 1 O. Dec. 520.

Such a certificate, payable to order, is negotiable, when properly endorsed, under Ohio statute making promissory notes negotiable by endorsement. Miller *v.* Austen (U. S.), 13 How. 218, 14 L. Ed. 119.

A certificate of deposit payable to

Payable at Bank.—Under a statutory provision that notes and bills payable at a bank, or some other designated place, are commercial paper, and that all contracts other than bills of exchange, notes payable at a bank, and paper issued to circulate as money, are subject to all defenses prior to notice of transfer, a banker's certificate of deposit, payable on its return properly indorsed, with the banker's name and address at its heading, contained no sufficient designation of a place of payment to render it commercial paper, and hence it was subject to defenses.[92]

Payable on Return of Certificate.—The negotiability of a certificate of deposit is not affected by a provision that it is payable on the return of the certificate, such provision being only an express statement of the law applicable to all negotiable notes, and not a condition precedent to the payment of the certificate.[93] But it has been held that a certificate payable only on its return is not negotiable.[94]

Payable in Currency.—The fact that a certificate of deposit is made payable in currency does not affect its negotiability.[95] A certificate of deposit, payable to the depositor's order in current funds, on the return of the certificate properly indorsed, must be regarded as the promissory note of the bank, assignable under the statute.[96]

Recital That Certificate Is Not Transferable.—A certificate of de-

order and signed by the cashier of the bank is negotiable and according to the law merchant the indorser thereof is liable on his indorsement. Carey *v.* McDougald, 7 Ga. 84.

An instrument in the following terms: "Atlanta, Ga., February 11, 1873. This is to certify that Mike Lynch has deposited in the Dollar Savings Bank three hundred and fifty dollars, subject to his order, on the following terms: interest at seven per cent on call and ten per cent by the year. J. M. Willis, cashier," and indorsed in blank by Lynch, the payee, is in effect a negotiable promissory note, payable generally on demand, and due immediately, and no demand, notice or protest is necessary to charge the indorser. Lynch *v.* Goldsmith, 64 Ga. 42.

Issued by savings bank.—A certificate of deposit issued by a savings institution payable to the depositor or order is a negotiable instrument, and must be produced and delivered up upon demand for payment. Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603.

92. Code 1876, § 2094; Renfro *v.* Merchants', etc., Bank, 83 Ala. 425, 3 So. 776.

93. Payable on return of certificate.—Citizens' Nat. Bank *v.* Brown, 45 O. St. 39, 11 N. E. 799, 4 Am. St. Rep. 526. See, also, Brown *v.* Citizens' Nat. Bank, 9 Wkly. L. Bull. 361, 8 O. Dec. 792, reversing 16 Wkly. L. Bull. 421, 9 O. Dec. 707.

94. A bank certificate of deposit: "A. has deposited in this bank four hundred and forty dollars, subject to his order, payable only on the return of this certificate," is not negotiable, and will not entitle the holder, to whom it was indorsed after the funds of A. were attached, to claim the deposit as against the attaching creditor. Lebanon Bank *v.* Mangan, 28 Pa. 452.

95. Payable in currency.—The fact that such a certificate was payable, by its terms, in currency, was held in Howe *v.* Hartness, 11 O. St. 449, 78 Am. Dec. 312, not to affect its negotiability, although the term "currency" was then regarded as including the bank bills of sundry specie paying banks outside of the state of Ohio as well as those of the same character within the state; this term, in its enlarged meaning thus indicated, being equivalent to the word "money" as used in the Ohio statutes relating to negotiable instruments. See, also, Citizens' Nat. Bank *v.* Brown, 45 O. St. 39, 11 N. E. 799, 4 Am. St. Rep. 526; Miller *v.* Austen (U. S.), 13 How. 218, 14 L. Ed. 119.

96. National State Bank *v.* Ringel, 51 Ind. 393.

posit which recites that it is not transferable, but also recites that the sum deposited can not be drawn unless the receipt is returned signed by the depositor and thus making it payable upon presentation by any one after having procured the signature of the depositor, is not intended to be nonassignable.[97]

By Delivery.—A delivery of a certificate of deposit as a gift constitutes an equitable assignment of the money for which it calls.[98]

§ 152 (8b) Mode of Transfer.—The transfer of a certificate of deposit is governed by the same rules which control other promissory notes, and which vary according to the instrument's form. If it be payable to bearer, it may be transferred by delivery; but if payable to order, it should be indorsed. And when payable to order, mere manual delivery, without indorsement or proof of valuable consideration, would not be evidence of title.[99]

By Indorsement.—A certificate of deposit for a sum certain, payable to a certain person, or assignees or order, being negotiable note, is negotiable by indorsement.[1]

To a County.—The transfer of a certificate of deposit in a mode otherwise sufficient to pass the property therein to a county is not avoided by its deposit in the county treasury without the authority of a warrant of a county auditor required by the statute of Ohio to establish the independent treasury of the state.[2]

97. Recital that certificate is not transferable.—At the head of a certificate of deposit appeared the words "Not transferable." The certificate also provided that the "sum can not be drawn unless this receipt is returned signed by the depositors," thus making it payable upon presentation by any one after having procured the signature of the depositor. Held, that the words "Not transferable" were only intended as notice that the instrument was not issued or received as a negotiable instrument under the law merchant, and was not intended to make it nonassignable. Dollar *v.* International Banking Corp., 10 Cal. App. 83, 101 Pac. 34.

98. By delivery.—Basket *v.* Hassell, 107 U. S. 602, 27 L. Ed. 500, 2 S. Ct. 415; Philpot *v.* Temple Banking Co., 3 Ga. App. 742, 60 S. E. 480.

99. Mode of transfer.—Gueydon Bros. *v.* Quintanilla, 2 Tex. App. Civ. Cases, § 617; First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334.

Where a certificate of deposit is payable to bearer, it may be transferred by delivery. Gueydon Bros. *v.* Quintanilla, 2 Tex. App. Civ. Cases, § 617.

Where a certificate of deposit is payable to order, mere manual delivery without indorsement is not evidence of title. Gueydon Bros. *v.* Quintanilla, 2 Tex. App. Civ. Cases, § 617.

1. By indorsement.—Howe *v.* Hartness, 11 O. St. 449, 78 Am. Dec. 312; Citizens' Nat. Bank *v.* Brown, 45 O. St. 39, 11 N. E. 799, 4 Am. St. Rep. 526.

Where a certificate of deposit is payable to order, it must be indorsed in order to transfer. Gueydon Bros. *v.* Quintanilla, 2 Tex. App. Civ. Cases, § 617.

2. To a county.—The warrant of a county auditor, required by § 8 of "the act to establish the independent treasury of the state of Ohio," passed April 12, 1858, is neither a condition nor muniment of title; and the transfer of a banker's certificate of deposit, in a mode otherwise sufficient to pass the property therein to the county, will not be avoided by its deposit in the county treasury without the authority of such warrant. Shanklin *v.* Madison, 21 O. St. 575.

§ 152 (8c) Rights and Liabilities of Parties—§ 152 (8ca) Of Bank.—A bank receiving a deposit and issuing a certificate therefor, which the depositor assigns, is concerned only in knowing before paying to the assignee that the assignment binds the assignor.[3]

Under Oral Agreement between Bank and Depositor.—A bank can not set up an oral agreement with the depositor as against a holder for value and without notice of a certificate of deposit payable on demand.[4] An oral agreement between the managing officer of a corporation making a deposit for the corporation and the bank does not prevent the corporation or a bona fide assignee of the certificate of deposit from collecting the deposit without complying with such oral agreement.[5]

Liability on Promise to Indorser.—Where the bank of issue stated to an endorser that the certificate would be paid and on the faith of such statement the endorser did not take steps against the payee, and the bank in the meantime permitted the depositor to overdraw his account, the bank is estopped as against the endorser from setting up the fact of the overdraft.[6]

Where Signature to Certificate Forged.—The bank of issue of a certificate of deposit is, as against a payee without negligence and against a bona fide holder for value, bound to know the signature of such payee and is liable for all forged signatures accepted by the bank as genuine.[7]

3. **Of bank.**—Dollar *v.* International Banking Corp., 13 Cal. App. 331, 109 Pac. 499.

4. **Oral agreement with depositor.**—A bank discounted a note upon an oral understanding that the proceeds should not be paid until the 15th of the month, but delivered to the payee this certificate: "Deposited * * * Dec. 5th discount $3,412.50." The payee transferred the certificate, and failed before December 15th. Held, that the certificate, prima facie, represented an undertaking by the bank to pay the amount stated in it to the depositor on demand, and its transfer carried all the rights possessed by him to the transferee. First Nat. Bank *v.* Clark, 42 Hun 16, 5 N. Y. St. Rep. 262.

5. Where a bank received a deposit from a corporation through its managing officer, and issued a certificate of deposit therefor stipulating that the money could not be withdrawn unless the certificate was returned signed by the depositor, etc., an oral contract, made between the bank and the managing officer to the effect that the managing officer must show his authority to act for the corporation before the deposit can be withdrawn, did not prevent the corporation or a bona fide assignee from collecting the deposit, without complying with the oral agreement. Dollar *v.* International Banking Corp., 13 Cal. App. 331, 109 Pac. 499.

6. **Liability on promise to indorser.**—Defendant bank issued a certificate of deposit, which was indorsed and delivered by the payee and another to plaintiff bank, with directions to credit the same to the account of another, which was done. Subsequently defendant bank stated to the second indorser that the certificate would be paid on presentment. Defendant bank permitted the customer to overdraw his account, and when the certificate was presented it refused to pay it, except the difference between the amount of the overdraft and the certificate. The second indorser could and would have taken steps promptly to recoup against the payee if defendant bank had not notified him that the certificate would be paid. Held, that defendant bank was estopped as against the second indorser from interposing any defense against the amount due on the certificate, and plaintiff bank could assert such estoppel and recover the face value of the certificate. Old Nat. Bank *v.* Exchange Nat. Bank, 50 Wash. 418, 97 Pac. 462.

7. **Where signature to certificate forged.**—First Nat. Bank *v.* Bremer, 7 Ind. App. 685, 34 N. E. 1012, 52 Am. St. Rep. 461.

A bank is bound to know the handwriting of the payee of a certificate of

The relation between the bank and the depositor is not changed by the acceptance of the certificate with the forged signature, but the bank is still the debtor of the depositor for the amount of the certificate.[8] The bank of issue can recover from the holder presenting a certificate of deposit with a forged signature thereto the amount paid in redemption thereof,[9] except

deposit issued by it, and is liable for all forged signature accepted as genuine. Stout v. Benoist, 39 Mo. 277, 90 Am. Dec. 466.

A banker's certificate of deposit payable to the depositor's order was stolen from the depositor, and his name forged upon it. The certificate came into the hands of a bona fide holder, and was presented by him to the banker, who paid it. In a suit by the latter to recover back the amount so paid, it was held that the banker was bound to know the signature, and that he could not recover. Stout v. Benoist, 39 Mo. 277, 90 Am. Dec. 466.

Forgery by agent.—A bank is liable to a person to whom it issues its certificate of deposit payable to his order, where it pays the certificate to an agent of such person upon his forged indorsement thereon of the name of his principal. Gueydon Bros. v. Quintanilla, 2 Tex. App. Civ. Cases, § 617.

Where bank negligent.—Where a bank paid a forged certificate of deposit to a city bank, through which it cleared without inspection, and under circumstances giving it no previous opportunity for inspection, such payment will not of itself preclude a recovery of the amount so paid; but the bank, under such circumstances, is bound to use due diligence in inspecting the paper as soon as it is afforded an opportunity, and in giving notice of the forgery; and if, by its failure so to do, the bank receiving payment is prejudiced, such negligence will defeat a recovery. Allen v. Fourth Nat. Bank, 59 N. Y. 12.

8. Bank remains debtor of depositor.—A certificate of deposit was stolen from the payee, his indorsement forged thereon, and, after being accepted and paid by several banks, whose indorsements appeared thereon, it was paid by the bank which issued it. Held, that the payee, having been free from negligence, and having, immediately on discovery of the theft, notified the bank which issued it, has relation to such bank was not changed, but it was still indebted to him on the certificate. First Nat. Bank v. Bremer, 7 Ind. App. 685, 34 N. E. 1012, 52 Am. St. Rep. 461.

9. Liability of subsequent holder.—A bank issued a certificate of deposit to a person who could not read or write. The certificate was stolen, and was paid by another bank, which forwarded it to the bank of issue, where it was paid; subsequently, upon discovering that the indorsement was a forgery, the bank issuing the certificate sued the bank which forwarded it for the amount so paid. Held, that it was entitled to recover, as the issuing bank had a right to rely upon the identification of the depositor by the bank through which the certificate was collected. State Nat. Bank v. Freedmen's Sav., etc., Co., Fed. Cas. No. 13,324, 2 Dill. 11.

Where collecting bank not holder for value.—The Marine Bank issued a certificate of deposit, payable to A. or order. The indorsement of A. was afterwards forged upon it, and it was passed to B. bona fide, for value. B. remitted it to C., and C. to D., who, being a customer of the Merchants' Bank, deposited it with the latter bank for collection, and was credited with the amount. The Marine Bank paid the amount to the Merchants' Bank, but afterwards discovered the forgery, demanded back the money, and paid the amount to the rightful payee. At the time of the payment to the Merchants' Bank, D. had an amount to his credit at the bank larger than the amount of the certificate. A few days afterwards it was less, but at the time of the discovery of the forgery, and notice thereof, it was again greater. In an action by the Marine Bank against the Merchants' Bank to recover the amount, it was held that the latter bank was not a bona fide holder for value, as the credit to D., on the books of the bank, of the amount of the draft, was not conclusive upon the bank, but might be corrected on discovery of the forgery; and therefore the Marine Bank was entitled to recover back the amount paid. Merchants' Bank v. Marine Bank (Md.), 3 Gill 96, 43 Am. Dec. 300.

against a bona fide holder for value,[10] as the bank of issue has the right to rely upon the representation of the genuineness of the signature or indorsement by person through whom the certificate is collected.[11] Although the indebtedness for which a certificate of deposit was issued was of fraudulent origin, an indorser has a right to indorse it, where the certificate was issued to a person giving a certain name, and was by him negotiated after the indorsement of the plaintiff was obtained. The certificate was issued to an actual person who gave a certain name, and in this transaction, for all purposes is known, and can be legally held under that name, as well as any other he may have or assume, so that it is not the case of a certificate drawn payable to a fictitious person, neither is the certificate a forgery, but a genuine certificate.[12]

Where Signature to Certificate Obtained by Fraud.—Where the indorsement of a certificate of deposit is procured by a trick practiced on the depositor, and the bank issuing it pays it to the indorsee with notice of the facts, the depositor or his assignee may recover from the bank the amount of the certificate.[13]

10. Stout *v.* Benoist, 39 Mo. 277, 90 Am. Dec. 466.

A bank issued a certificate of deposit to one "J. Strodtmann," receiving his signature, which was placed in its books. The bank mailed such certificate to the payee at a distant place, but it was received by another, who forged the payee's name, and negotiated it to a bona fide purchaser for value, and it was thereafter successively indorsed several times. The last holder obtained payment thereof, the forgery being then unknown. The forged name contained only one "n." Held, that the last holder, being a bona fide purchaser for value, was not liable to refund the amount to the bank which had been obliged to pay it to the real payee. Merchants' Bank *v.* Marine Bank (Md.), 3 Gill 96, 43 Am. Dec. 300.

11. State Nat. Bank *v.* Freedmen's Sav., etc., Co., Fed. Cas. No. 13,324, 2 Dill. 11.

12. Issued to person intended.—A bank issued a certificate of deposit in part payment for a forged draft to a person giving his name as O. M. T., who indorsed it to the order of A. C., and, in order to have it cashed at another bank, after indorsing it as A. C., secured the indorsement of a third party, who acted in good faith, and without any knowledge of the fraudulent inception of the paper, as did the bank cashing it. The certificate was protested, and the indorser duly notified, who paid in with knowledge of the original fraud, and thereupon sued the bank issuing the certificate. Held, that the certificate was not a forgery or issued to a fictitious person, and plaintiff had the right to make the indorsement he did, being ignorant of the fraudulent inception of the paper, and, when he made it, he assumed the liability of an indorser of commercial paper; and that the status of plaintiff when he made the indorsement and the equities which then controlled and protected his rights continued until he was fully reimbursed for the payment so made, unaffected by any after-acquired knowledge concerning the fraud originally practiced. Beckwith *v.* Webber, 78 Mich. 390, 44 N. W. 330.

"The record shows that the plaintiff has done precisely this, and nothing more; and the judgment should be affirmed. The status of plaintiff when he made his indorsement, and the equities which then controlled and protected his rights, continued until he was fully reimbursed in the amount he was obliged to pay from the makers and prior indorsers of the certificate; and it could make no different with his legal or equitable rights what he may have heard or ascertained in regard to fraud in the original consideration after his liability had been once established." Beckwith *v.* Webber, 78 Mich. 390, 44 N. W. 330.

13. Currey *v.* Joplin Sav. Bank, 100 Mo. App. 532, 74 S. W. 1036.

§ 152 (8cb) Of Depositor.—To Revoke Transfer.—Where a depositor delivered his certificate to the bank, indorsed to the sheriff, with directions to pay him the money whenever he should deliver to the bank for deposit a certificate of redemption of certain lands, and the sheriff never complied with the condition or made any claim to the money or certificate, the depositor may recall his deposit, and payment of the money to him by the bank discharges it from all liability.[14] A gift causa mortis of a certificate of deposit, with proper words of gift at the time of delivery, is not defeated by the subsequent giving of a check, although the check is not presented until after the death of the donor, and therefore the bank could pay same to the donee.[15]

§ 152 (8cc) Of Indorser.—The liability of an indorser is the same as upon the indorsement of any other promissory note.[16] Where a certificate of deposit worth only thirty-three and one-third per centum of its face value is indorsed by a vendee to his vendor, and there is evidence that the indorser does not intend to be bound by his indorsement, but only makes it in order that the indorsee may collect money, the inference, applicable to bills and notes, that the indorser intends to be bound by his indorsement does not apply.[17]

§ 152 (8cd) Of Transferee.—A certificate of deposit issued by a bank, and made payable to order or bearer, is negotiable, and a bona fide purchaser thereof before maturity is protected to the same extent as an innocent holder of other negotiable paper.[18]

Holder in Good Faith.—The mere fact of rumors that the payee of a certificate of deposit and the drawer bank were speculating in grain, where there is no evidence that the holder had any knowledge thereof, is not sufficient to put the holder on inquiry, and he is protected against the receiver of the bank.[19] It is no defense to an action on a certificate of deposit

14. Of depositor—To revoke transfer.—McGorray *v.* Stockton Sav., etc., Soc., 131 Cal. 321, 63 Pac. 479.

15. Philpot *v.* Temple Banking Co., 3 Ga. App. 742, 60 S. E. 480.

16. Of indorser.—Gueydon Bros. *v.* Quintanilla, 2 Tex. App. Civ. Cases, § 617. See, also, First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334.

17. Funk *v.* Ellis, 3 O. Dec. 310.

18. Of transferee.—Kirkwood *v.* First Nat. Bank, 40 Neb. 484, 58 N. W. 1016, 24 L. R. A. 444, 42 Am. St. Rep. 683; S. C., 40 Neb. 497, 58 N. W. 1135, following First Nat. Bank *v.* Security Nat. Bank, 34 Neb. 71, 51 N. W. 305, 15 L. R. A. 386, 33 Am. St. Rep. 618

19. Holder in good faith.—In an action on a certificate of deposit, stating that W. had deposited in the drawing bank a certain amount of money, and which was accepted by the plaintiff bank as money to that amount, and placed to the credit of K., the beneficiary named, it appeared that plaintiff, who was K.'s banker, had several times before accepted certificates from the same bank similar to that sued on, for deposits by W. for the use of K., and the drawing bank had paid them in due course of business. Plaintiff knew that the drawer was W.'s banker, and the drawer telegraphed plaintiff that W. was coming with money to make good his trade with K. On the following morning, W. came to plaintiff with the certificate sued on, and other bank paper, which plaintiff accepted as cash, after asking if the drawing bank was solvent. There were rumors that W. was acting with officers of the drawing bank in grain speculations, but there was no evi-

against the receiver of the drawing bank that the money was to be used by the beneficiary named in the certificate and the depositor in a gambling transaction, and that plaintiff bank, who had placed the certificate to the credit of the beneficiary, knew this, as plaintiff was bound to honor the beneficiary's checks against it.[20] One receiving a certificate of deposit in payment for an automobile can not recover from the bank on its refusal to pay, if he retained control of the automobile until advised by the bank that the certificate was no good.[21] The acceptance of a certificate of deposit by the commissioners of a county, with knowledge of the embezzlement on account of which the certificate is transferred, does not place the county in pari delicto so as to vitiate the transfer and avoid recovery.[22]

Indorsed Specially.—In a suit against a bank on a certification of deposit, payable to the order of the depositor and specially indorsed by him to another and by the latter indorsed in blank, the bank set up a general denial and called the depositor as claiming the ownership of the certificate, who answered denying the plaintiff's, the holder's right thereto and that he had pledged the certificate specially and that the special indorsee could not dispose of it. It was error to exclude such evidence.[23]

Indorsed in Blank.—The holder of a letter or certificate of deposit indorsed in blank has implied authority to fill up the blank with an order for the payment of the deposit to himself.[24]

Not Indorsed.—A certificate of deposit, which is in effect a promissory note, may be passed by delivery without indorsement by the person to whose order it is made payable.[25] A depositor deposited in a bank a sum

dence that any officer of plaintiff had heard them. The certificate was in proper form to be controlled by W., and was signed by the proper officer of the drawing bank. Held, that the circumstances were not such as to put plaintiff on inquiry, and it would be protected as against a receiver of the drawing bank. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 33 L. Ed. 747, 10 S. Ct. 450.

20. Plaintiff, having accepted the certificate for its full amount, and given K. credit therefor, is entitled to recover that amount from the receiver of the drawing bank, regardless of what application was made of the amount, so that it was used for the benefit of K. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 33 L. Ed. 747, 10 S. Ct. 450.

21. American Trust, etc., Bank *v.* Moore, 161 Mich. 436, 126 N. W. 716.

22. Shanklin *v.* Madison, 21 O. St. 575.

23. Indorsed specially.—In a suit against a bank upon a certificate of deposit, payable to the order of T., and specially indorsed to the order of J., and by him indorsed in blank, the bank set up a general denial, and called T., the depositor in warranty as claiming the ownership of the certificate, who answered, denying the plaintiff's right thereto, and alleging that he had pledged the certificate to J., and that, having fulfilled his contract, J. could not dispose of it, and that, if he had done so, it was in fraud of his rights, and prayed to be declared the owner of the certificate. Held, that it was not error to dismiss the call in warranty. Barker *v.* Bank, 20 La. Ann. 567.

24. Indorsed in blank.—Weirick *v.* Mahoning County Bank, 16 O. St. 296.

25. Certificate not indorsed.—Cassidy *v.* First Nat. Bank, 30 Minn. 86, 14 N. W. 363; Pease, etc., Co. *v.* Rush, 2 Minn. 107 (Gil. 89); Shanklin *v.* Madison, 21 O. St. 575.

The transfer of a certificate of deposit without indorsement is a valid assignment, effectual to pass the property therein, if so intended; and its subsequent indorsement by the administrators of the assignor can not prejudice the rights of such assignee. Shanklin *v.* Madison, 21 O. St. 575.

of money the property of the plaintiff and received a certificate of deposit payable to the depositor or order of the return of the certificate properly indorsed. The plaintiff, upon presenting and offering to surrender the certificate and informing the bank that he was the lawful owner of the fund and holder of the certificate, is entitled to payment, although the certificate had not been indorsed by the depositor.[26]

Indorsed after Lapse of Time.—A reasonable time must have elapsed for the purpose of negotiation or presentment for payment, before a certificate of deposit is regarded as overdue.[27] Where a certificate is negotiated, two days after its date, to a party receiving it in good faith, for a valuable consideration, it is not regarded as overdue at the time.[28] A certificate of deposit is not dishonored until presented, and it has been held that the bank is liable thereon to bona fide holder to whom the certificate was transferred seven years after its issuance.[29] But it has also been held that a certificate transferred two years after its issuance is subject to set-off in favor of the bank against the original holder.[30]

Indorsed after Payment.—Indorsees of a bank's certificate of deposit, who received it more than six years after it had been paid and should have been surrendered, can not enforce its second payment after such delay.[31]

Certificate Not Negotiable.—Under a provision of the Alabama Code that all contracts other than bills of exchange, notes payable at a bank, and paper issued to circulate as money, are subject to all defenses prior to notice of transfer, a certificate of deposit payable on its return properly indorsed with the bank's name and address at its heading, contains no sufficient designation of the place of payment to render it commercial paper and hence it is

26. On the deposit in a bank by C. of a sum of money, the bank issued a certificate of deposit to C. for such sum, "payable to himself or order, in current funds, on the return of this certificate properly indorsed." The money deposited was the property of plaintiff, and immediately on receiving the certificate C. delivered it to plaintiff. Held, that plaintiff, upon presenting the certificate to the bank, and demanding payment thereof, informing the bank at the same time that she was the lawful owner and holder, and offering to surrender it on payment, was entitled to payment thereof, although it had not been indorsed by C.; such a certificate being, in effect, a negotiable promissory note, title to which may pass by delivery without indorsement of the person to whose order it is payable. Cassidy *v.* First Nat. Bank, 30 Minn. 86, 14 N. W. 363, following Pease, etc., Co. *v.* Rush, 2 Minn. 107 (Gil. 89).

27. Indorsed after lapse of time.—Howe *v.* Hartness, 11 O. St. 449, 78 Am. Dec. 312.

28. Howe *v.* Hartness, 11 O. St. 449, 78 Am. Dec. 312.

29. Where a bank issues a certificate of deposit, payable on its return properly indorsed, it is liable thereon to a bona fide holder to whom it was transferred seven years after its issue, notwithstanding a payment thereof to the original holder. Such certificate is not dishonored until presented. National Bank *v.* Washington County Nat. Bank (N. Y.), 5 Hun 605.

30. A certificate of deposit payable on the return thereof properly indorsed, is, in legal effect, a promissory note, payable on demand; and therefore, where such certificate was transferred nearly two years after its issue it was subject to set-off in favor of the bank against the original holder. Tripp *v.* Curtenius, 36 Mich. 494, 24 Am. Rep. 610.

31. Indorsed after payment.—Gregg *v.* Union County Nat. Bank, 87 Ind. 238.

subject to defenses.[32]

Certificate Payable on Condition.—Where a bank in a certificate of deposit stipulates that the money is received to the credit of a third person and subject to his check on certain conditions, the promise to pay such third person is not absolute, but depends on the contingencies expressed in the certificate.[33]

Certificate Given for Accommodation.—A bank is liable on a certificate of deposit given for the accommodation of the person named as depositor, if plaintiff advanced money to such person on the faith of the certificate, though he knew at the time that it was accommodation paper.[34]

As against Attaching Creditors of Depositor.—The indorsee can enforce payment of the certificate by the maker, and is not liable to an attaching creditor of the depositor.[35] But the holder of a certificate of deposit endorsed after the funds of the depositor were attached can not claim the deposit as against the attaching creditors under a certificate of deposit of funds subject to the order of the depositor and payable only on the return of the certificate.[36]

As against Person for Whom Deposit Made.—Where a party depositing money in one bank to the credit of another bank, but without the knowledge of the latter, took a letter from the former bank addressed to the latter, advising it of the deposit, and afterwards delivered the letter to a third person, with his own name indorsed in blank thereon, for presentation to the bank to whose credit the deposit was made, as between the depositor and the latter bank, in the absence of notice to the contrary, the bearer of the letter had authority to control the fund, and, for that purpose, to write a check or order over the blank signature.[37]

Where County Is Transferee.—The commissioners of a county of Ohio are clothed with power to accept the assignment of a certificate of deposit on account of the liability of a county treasurer incurred by his embezzlement of public funds in his custody, and the commissioners have power to maintain an action thereon against the maker.[38]

May Accept as Cash or for Collection.—Where a certificate of deposit, stating that a depositor had deposited in the drawing bank a certain amount of money, was issued in the name of the plaintiff bank to the use of

32. Renfro *v.* Merchants', etc., Bank, 83 Ala. 425, 3 So. 776.

33. Lamar, etc., Drug Co. *v.* First Nat. Bank, 127 Ga. 448, 56 S. E. 486.

34. Holland Trust Co. *v.* Waddell, 75 Hun 104, 26 N. Y. S. 980, 56 N. Y. St. Rep. 868.

35. As against attaching creditors of depositor.—Code, § 205; Howe *v.* Hartness, 11 O. St. 449, 78 Am. Dec. 312; Stone *v.* Elliott, 11 O. St. 252, approved and followed.

36. The certificate recited that "A has deposited in this bank $440, subject to his order, payable only on the return of this certificate." Lebanon Bank *v.* Mangan, 28 Pa. 452.

37. As against person for whom deposit made.—In such case, the fact that the bank held the note of the party making the deposit, then overdue, did not constitute a notice that the fund was to be applied on such note. Weirick *v.* Mahoning County Bank, 16 O. St. 296.

38. Shanklin *v.* Madison, 21 O. St. 575.

a certain person, it was optional with the plaintiff to accept it, as so much cash from such person, at once, or to await its collection.[39]

May Sue in His Own Name.—The mere indorsement of a certificate of deposit is not a legal assignment of it which enables the indorsee to sue thereon in his own name.[40]

§ 152 (8d) Effect of Transfer.—Where the certificate is payable on demand, a delivery of it to the donee, with an indorsement in blank, or a special indorsement to the donee, or without indorsement, transfers the whole title and interest of the donor in the fund represented by it.[41] The indorsement of a certificate of a bank deposit, payable at any time, to sureties, is equivalent to placing the bankers' promissory note due on demand in their hands, and is practically placing that much money with them.[42] The assignment of a certificate of deposit executed by a bank within the Confederate lines is a new contract, founded upon a new and valuable consideration, and if made within the federal lines, is entirely disconnected with the illegal act of its making, and is to be governed by the law of the place where made.[43]

As Transfer of Fund or Property Deposited.—A certificate of deposit is a subsisting chose in action and represents the fund it describes, as in cases of notes, bonds and other securities, so that a delivery of it, as a girt, constitutes an equitable assignment of the money for which it calls.[44]

As Will of Personalty.—The indorsement and delivery of a certificate of deposit, if void as a gift mortis causa, is not good as a will of personalty under the laws of Tennessee for a will of personalty in Tennessee does not take effect until probate.[45]

§ 152 (9) Redemption, Payment and Cancellation.—Right to Redeem.—A bank, after the expiration of the time limit, may call in a certificate of deposit or reduce the rate of interest by proper notice to the holder.[46]

Medium of Payment.—To give an instrument the character of a certificate of deposit, the deposit on which it is based must be one of money, and when this appears to be the case from the face of the paper, the word

39. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 33 L. Ed. 747, 10 S. Ct. 450.

40. Loudon Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. 498, 78 Am. Dec. 390.

41. **Effect of transfer.**—Basket *v.* Hassell, 107 U. S. 602, 27 L. Ed. 500, 2 S. Ct. 415.

42. Moore *v.* Hanscom (Tex. Civ. App.), 103 S. W. 665, reversed on other grounds in 101 Tex. 293, 106 S. W. 876.

43. Morrison *v.* Lovell, 4 W. Va. 346, citing Nichols *v.* Porter, 2 W. Va. 13, overruled on another point in Hughes *v.* Frum, 41 W. Va. 445, 23 S. E. 604.

44. **As transfer of fund or property deposited.**—Basket *v.* Hassell, 107 U. S. 602, 27 L. Ed. 500, 2 S. Ct. 415.

The assigning of certificates of deposit transfers to the assignee the whole sum deposited, as stated in the certificate. Springfield, etc., Fire Ins. Co. *v.* Peck, 102 Ill. 265.

45. Basket *v.* Hassell, 108 U. S. 267, 27 L. Ed. 719, 2 S. Ct. 634, decided under Stats. of Tenn. 1871, § 2169.

46. Bank *v.* Harrison, 11 N. Mex. 50, 66 Pac. 460.

payable becomes certain as to the mode or medium in which payment must be made; for the law implies under such a state of facts a promise to pay money for money deposited, and to pay a sum equal to the deposit.[47] A certificate of deposit issued by a bank payable in current bank notes is void as in violation of the Act of Georgia of 1837, making penal the issue of bank bills, payable in anything but gold and silver coin.[48]

Place of Payment.—A certificate of deposit, payable at a specified date on the return of the certificate, is payable at the bank.[49]

Demand for Payment.—A certificate of deposit, payable to the order of the depositor on return of the certificate properly indorsed, is not due until demand is made,[50] or until a sufficient time has elapsed to raise a presumption that the paper is past due, in view of the manner in which the business of the bank is ordinarily transacted.[51] A demand on a certificate of deposit in a bank, payable on the return of the certificate properly endorsed, need not be made within the period of the statute of limitations;[52] there can be

47. Medium of payment.—First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334.

48. Darden *v.* Banks, 21 Ga. 297.

49. Sanbourn *v.* Smith, 44 Iowa 152.

50. Demand for payment.—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008, followed by the same court in later cases; Auten *v.* Crahan, 81 Ill. App. 502; Brahm *v.* Adkins, 77 Ill. 263; Long *v.* Straus, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87; Elliott *v.* Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 1 L. R. A., N. S., 1130, 111 Am. St. Rep. 198; Dickinson *v.* Leominster Sav. Bank, 152 Mass. 49, 25 N. E. 12; Citizens' Bank *v.* Fromholz, 64 Neb. 284, 89 N. W. 775; Cottle *v.* Marine Bank, 166 N. Y. 53, 59 N. E. 736, and New York cases therein cited; Miller *v.* Western Nat. Bank, 172 Pa. 197, 33 Atl. 684; McGough *v.* Jamison, 107 Pa. 336; Girard Bank *v.* Bank, 39 Pa. 92, 80 Am. Dec. 507; Tobin *v.* McKinney, 15 S. Dak. 257, 88 N. W. 572, 91 Am. St. Rep. 694; Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377.

"If no actual demand be necessary to mature the debt created by a deposit, then depositors may sue at once upon leaving the bank, and a transaction intended to be for the mutual benefit of both may become one of oppression and wrong to the bank, and this the law should not tolerate." Elliott *v.* Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 1 L. R. A., N. S., 1130, 111 Am. St. Rep. 198.

A certificate of deposit is not due and payable until actual demand is made. Elliott *v.* Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 1 L. R. A., N. S., 1130, 111 Am. St. Rep. 198.

A certificate of deposit, payable to the order of the depositor on return of the certificate, does not mature until so returned. Judgment on rehearing 14 S. Dak. 52, 84 N. W. 228, 91 Am. St. Rep. 688, affirmed. Tobin *v.* McKinney, 15 S. Dak. 257, 88 N. W. 572, 91 Am. St. Rep. 694.

A bank certificate of deposit, payable to the order of the depositor, but indicating no time of payment other than can be inferred from the words, "interest at the rate of seven per cent on call, and ten per cent per annum," is payable on demand, and, therefore, due immediately; and bona fide holders are affected with the equities existing between parties prior to themselves. Meador *v.* Dollar Sav. Bank, 56 Ga. 605.

A certificate of deposit issued by a bank, and payable to the order of the depositor "on return of this certificate properly endorsed," is not due until payment thereof is actually demanded. Hillsinger *v.* Georgia R. Bank, 108 Ga. 357, 33 S. E. 985, 75 Am. St. Rep. 42.

Bank need not seek depositor.—"Unless the banker desires to return the deposit, he is under no obligation to seek his creditor for the purpose of making payment." Elliott *v.* Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 1 L. R. A., N. S., 1130, 111 Am. St. Rep. 198.

51. Auten *v.* Crahan, 81 Ill. App. 502.

52. Time of demand.—The parties may contract as they will. Elliott *v.*

no extension of the statute by either party, nor any laches on the part of either.[53]

To Whom Payable.—A certificate of deposit has the attributes of a negotiable note, and the depositary is liable to deliver the deposit to any holder of the certificate to whom it is properly indorsed.[54] A bank issuing a certificate of deposit is not bound, before paying the same to an indorsee, to ascertain whether the assignment is in good faith;[55] yet, if it is enjoined, it must not pay out the deposits until the parties claiming the same can have an opportunity to contest the good faith of the assignment.[56] The plaintiff, an illiterate person, in payment for a certificate of deposit took an amount, less the amount of a payment to an unauthorized person indorsed on the certificate, than the value of the certificate. He is not estopped from recovering the amount of the payment indorsed by a delay of fourteen months in discovering the fact of indorsement.[57]

Same—Agent.—Where a principal ratified his agent's unauthorized act in depositing money in a bank and receiving certificates therefor payable to the principal's order, but repudiated his unauthorized indorsement of the certificate in the principal's name, on which the bank wrongfully paid the money, the principal may recover from the bank the full amount deposited as evidenced by the certificates, without showing the amount actually received by the bank, although the money drawn by the agent on the first certificate might have been used by him to purchase the second.[58]

Same—Husband or Wife.—A certificate of deposit payable to the order of the depositor or his wife may be paid to the wife.[59] But where the depositor deposited money in a bank, and received a certificate of deposit payable to the order of himself, or his wife, on the return of the certificate, the

Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 1 L. R. A., N. S., 1130, 111 Am. St. Rep. 198.

53. "The depositor having the right to demand the amount due him at any time, and the bank having the right to pay at any time, there can be no extension of the statute of limitations by either party, nor any laches on the part of either." Elliott *v.* Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 1 L. R. A., N. S., 1130, 111 Am. St. Rep. 198.

54. To whom payable.—Hanna *v.* Manufacturers' Trust Co., 104 App. Div. 90, 93 N. Y. S. 304.

55. Springfield, etc., Fire Ins. Co. *v.* Peck, 102 Ill. 265.

56. Springfield, etc., Fire Ins. Co. *v.* Peck, 102 Ill. 265.

57. Estoppel to assert payment to wrong person.—Where plaintiff, an illiterate man, accepted a certificate of deposit of $200, and $100 in cash, in lieu of a certificate of $400 on which had been indorsed a payment of $100, he is not estopped from recovering the $100 payment indorsed on the original certificate, as having been made to an unauthorized person, by a delay of 14 months in discovering the fact of the indorsement. Devine *v.* Bank, 91 Wis. 68, 64 N. W. 589.

58. Payment to agent.—Honig *v.* Pacific Bank, 73 Cal. 464, 15 Pac. 58.

59. Payable to husband or wife.—A bank issued to a depositor a certificate of deposit payable to the order of himself or his wife. After notice of the death of the depositor the bank paid the money to the wife, and part of it was used by her in paying the funeral expenses of the husband, the executor obtaining credit in his administration account for the amount so used. On a bill by the bank to enjoin a suit at law to recover the money represented by the certificate, the court allowed the bank credit for the amount used by the wife in payment of the funeral expenses. Held no error. Second Nat. Bank *v.* Wrightson, 63 Md. 81.

bank is liable for paying to the wife after notice of the death of the depositor, and notice to the paying teller is notice to the bank.[60]

Same—Guardian.—A certificate of deposit payable to one as special guardian of another is payable to the former personally, those words being merely descriptio personæ.[61] On a certificate of deposit issued to certain children or their guardian the bank is not relieved of liability to the children by payment to a person not deriving his authority from the action of a competent court evidenced by a proper record.[62]

Production and Surrender of Certificate.—A certificate of deposit made payable to the depositor or his order being a negotiable instrument must be produced and delivered up upon demand for payment.[63]

Where Bank Reorganized.—The holder of a certificate of deposit of funds deposited with a private banking concern, the members of which organized a savings bank and proceeded to do business at the same place, knowing that the old banking concern was redeeming its certificates, presented his to the cashier of the savings bank who canceled it with the stamp of the old concern and issued a certificate of the bank for a like amount, charging the same to the account of the old bank on which there was a fictitious balance. The depositor, being ignorant of any fraud, can recover of

60. Second Nat. Bank *v.* Wrightson, 63 Md. 81.

61. **Guardian.**—Judgment 24 Misc. Rep. 498, 53 N. Y. S. 849, reversed in Walker *v.* State Trust Co., 40 App. Div. 55, 57 N. Y. S. 525.

62. **Payment to person acting as guardian without authority.**—A widowed mother, having insurance money, was asked by decedent's cousin to give it to her minor children, to which she assented, and went with the cousin to a bank, where he deposited the money, taking two certificates of deposit, payable one to each child, or guardian, on return of the certificates properly indorsed. The cousin retained the certificates, and both he and the bank accepted the money, not as the mother's, but as belonging to the children. The bank knew the children were minors, and dealt with the cousin as their guardian. The cousin subsequently surrendered the original certificates and obtained new ones, and the certificates were finally issued to the order of the minors, respectively, or to the cousin as the guardian. Held, that the original certificate determined the obligation of the bank, and the burden rested upon it to find out whether or not the cousin was in fact the guardian, deriving his authority from the action of a competent court, evidenced by a proper record, and where it paid the money to the cousin as guardian, who had never been appointed as such, was not discharged from liability to the minor. McMahon *v.* German-American Nat. Bank, 111 Minn. 313, 127 N. W. 7.

63. **Surrender of certificate.**—Cate *v.* Cate (Tenn.), 43 S. W. 365.

Upon its payment by the bank of issue the certificate of deposit should be surrendered. Gregg *v.* Union County Nat. Bank, 87 Ind. 238.

Where a negotiable certificate of deposit is in the hands of a third person, and there is no proof to show that it was not properly indorsed to him by the payee, he may have a legal right to demand payment; and the bank issuing the certificate has, therefore, a right to demand delivery of the same when called upon by the payee to pay the debt for its protection against the claim of the third party. Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603.

Where a depositor in a bank failed to produce or surrender his certificates of deposit, which had not been lost, on making demand for their payment, and failed to produce them on the trial of an action for the amount of the certificates, he can not recover, since the bank is not bound to pay the deposits, except on production and surrender of the certificates properly indorsed. Judgment 28 App. Div. 623, 51 N. Y. S. 1140, affirmed in Cottle *v.* Marine Bank, 166 N. Y. 53, 59 N. E. 736.

the bank on his certificate.[64] Where a certificate of deposit issued by a private banking concern was redeemed by a national bank which succeeded the private concern, the certificate of the national bank being issued to the depositor, the contention that the private certificate was not indorsed, and that therefore the bank did not get the legal title thereto, could not be sustained so as to relieve the national bank, since it at least got the equitable title, and the legal title being in the defendant in error, he would be estopped from asserting it against the bank; and hence in effect the bank held both the legal and equitable title.[65]

Cancellation.—A bank certificate of deposit in favor of the deceased was properly canceled where it was shown that it was paid by the bank, and that the deceased had promised to deliver up the certificate.[66]

§ 152 (10) Actions on Certificates.—The fact that a third person, who had possession of a certificate of deposit, has died, and there is a pending contest over his will, gives the payee no right to sue the bank, as he has a right of action against the temporary administrator to recover possession of the certificate, though such right may be in abeyance during the contest of the will.[67]

Pleading.—A certificate of deposit issued to a depositor was left with the cashier of the bank, who subsequently indorsed thereon the depositor's name, and credited thereon a specified sum as interest, and wrote on the face thereof that it had been paid. He did not make any memorandum of the transaction on the books of the bank whereby the depositor secured credit therefor. The depositor, by alleging in his complaint, in an action for the balance of his account, that the amount of the certificate and interest had been deposited to his credit, ratified the acts of the cashier, though the same when made were unauthorized.[68]

Damages for Detention.—A party is entitled to recover damages for detention of a certificate of deposit to an amount equal to legal interest on the value of the certificate from the date of the demand therefor and refusal, to the recovery, and this without evidence other than of his right to convert it into money and put it to use, and of defendant's illegal prevention of the exercise of such right.[69]

64. **Where bank reorganized.**—A. & Co., engaged in a private banking business, issued their certificate of deposit in the usual course of business to plaintiff, a depositor. Thereafter, a savings bank, with the members of the old firm as its trustees and officers, was organized, and proceeded to do business at the same place. Plaintiff, knowing that A. & Co. were redeeming their certificates, presented his to the cashier of the savings bank, who canceled it with the stamp of A. & Co., and issued a certificate of the bank for a like amount, charging the same to the account of A. & Co., on which there was a large, but fictitious, credit balance. Held, that plaintiff, being ignorant of any fraud, could recover of the bank on his certificate. Citizens' Sav. Bank *v.* Blakesley, 42 O. St. 645.

65. Logan County Nat. Bank *v.* Williamson, 2 O. C. C. 118, 1 O. C. D. 395.

66. Cate *v.* Cate (Tenn.), 43 S. W. 365.

67. Read *v.* Marine Bank, 136 N. Y. 454, 32 N. E. 1083, 32 Am. St. Rep. 758, affirming 59 Hun 578, 13 N. Y. S. 855, reversing 63 Hun 624, 17 N. Y. S. 326.

68. Boothe *v.* Farmers' Nat. Bank (Ore.), 98 Pac. 509.

69. Sleppy *v.* Bank, 17 Fed. 712.

§ 153. Special Deposits—§ 153 (1) In General.—A deposit is either general or special.[70] It is general, unless the depositor makes it special, or deposits it expressly in some particular capacity.[71] In the absence of proof to the contrary, every deposit is presumed to be general.[72]

Distinguished from General.—A special deposit is one in which the depositor is entitled to the return of the identical thing deposited,[73] and the title remains in the depositor.[74] A general deposit is one which is to be repaid on demand in money,[75] and the title to the money deposited passes to

70. Special deposits.—Shopert *v.* Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515; Bank *v.* Dean, 9 Okl. 626, 60 Pac. 226.

As to special deposits in national banks, see post, "Special Deposits," § 266.

71. Ward *v.* Johnson, 95 Ill. 215.

72. Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365.

73. Distinguished from general deposit.—Montagu *v.* Pacific Bank, 81 Fed. 602; First Nat. Bank *v.* Henry, 159 Ala. 367, 49 So. 97; Woodhouse *v.* Crandall, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385; Retan *v.* Union Trust Co., 134 Mich. 1, 95 N. W. 1006; In re Johnson, 103 Mich. 109, 61 N. W. 352; Dougherty *v.* Vanderpool, 35 Miss. 165; Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564.

"A special deposit is created where the money is left for safe-keeping and return of the identical thing to the depositor." Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365.

A special deposit of money in a bank is, where moneys (as bills in packages or specie in boxes, for example) or other articles of property are entrusted to the bank, not to be used but to be kept safely and specifically returned. Catlin *v.* Savings Bank, 7 Conn. 487.

A deposit in a bank is special only when the thing deposited is received by the bank, to be kept by itself, and returned in corpore on demand. In re Mutual Bldg., etc., Sav. Bank, Fed. Cas. No. 9,976, 2 Hughes 374.

A deposit with a bank is special when it is a deposit, like stocks, bonds, and other securities, and sometimes money, to be specially kept and returned to the owner, or money deposited for a fixed period of time or on unusual conditions, which is mingled in the general funds like a general deposit and repaid therefrom, or money which is to be applied by the bank at the depositor's request for specific purposes. First Nat. Bank *v.* Henry, 159 Ala. 367, 49 So. 97.

A special deposit is one where the bank merely assumes charge or custody of the property without authority to use it, the depositor being entitled to receive back the identical thing deposited in which case the title remains with the depositor, and, if the subject be money, the bank has no right to mingle it with other funds [citing Words & Phrases, vol. 7, p. 6574]. Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564.

Identical coin or currency to be returned.—If the agreement between a bank and its depositor is that the identical coin or currency shall be laid aside and returned, it is a special deposit, but if the money is to be returned, not in the specific coin or currency deposited, but in an equal sum, it is a general deposit. Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896.

74. Bank *v.* Dean, 9 Okl. 626, 60 Pac. 226. See post, "Title and Interest of Bank," § 153 (4).

75. General deposit.—Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896; Schofield Mfg. Co. *v.* Cochran, 119 Ga. 901, 47 S. E. 208; State *v.* Dickerson, 71 Kan. 769, 81 Pac. 497; Keene *v.* Collier (Ky.), 1 Metc. 415; Matthews *v.* His Creditors, 10 La. Ann. 342; Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564; Hodgin *v.* People's Nat. Bank, 125 N. C. 503, 34 S. E. 709; Bank *v.* Armstrong, 15 N. C. 519; Lennan *v.* Pollock State Bank, 21 S. Dak. 511, 512, 110 N. W. 834.

Deposit with savings bank.—Plaintiff delivered money to a banker, her representative stating to him that she wished to leave it with him until he could invest it. He made out a savings deposit ticket in her representative's presence, and gave her a pass book, containing rules and regulations, showing the opening of an account between herself and the bank; and the transaction was entered in his books as other savings accounts. Held, that the deposit was a general and not a specific one. Wetherell *v.* O'Brien, 140 Ill. 146, 29 N. E.

the bank.[76]

Change from General to Special Deposit.—In the absence of evidence showing a special agreement to that effect, a deposit can not be regarded as changed from a general to a special deposit. The fact that the directors of a corporation, the depositors, passed a resolution to the effect that they would keep enough money on deposit to protect their stock hypothecated by their stockholders to secure the payment of notes given by them to the bank, and the bank officials were notified of this action, is not sufficient evidence that the deposit was changed from a general to a special deposit.[77]

§ 153 (2) What Deposits Are Special—§ 153 (2a) Deposit Made under Special Agreement.—A deposit slip is a mere acknowledgment by the bank that the amount named has been received, and does not purport to embody the contract between the parties, and can not affect the rights of a person depositing money with the bank for another under an agreement between the depositor and the person for whose benefit the deposit was made that the deposit should be subject to a lien against property purchased by the depositor, where the bank has knowledge of the agreement and receives the deposit subject to the payment of the lien.[78]

Consideration for Contract.—Where a bank, in consideration of a depositor keeping a money deposit with such bank, receives an article for safekeeping, there is a sufficient consideration to make the special deposit an obligatory contract of bailment.[79] The custom of a bank to accept special

904, 33 Am. St. Rep. 221, reversing 41 Ill. App. 142.

Deposit for security.—Money deposited with a private banker to secure him from liability on a bond, though evidenced by a certificate of deposit stating the object for which it is made, is a general, and not a special, deposit. Mutual Acci. Ass'n *v.* Jacobs, 141 Ill. 261, 31 N. E. 414, 33 Am. St. Rep. 302, 16 L. R. A. 516, affirming 43 Ill. App. 340.

76. McBride *v.* American R., etc., Co. (Tex. Civ. App.), 127 S. W. 229.

77. Change from general to special deposit.—The complainant, a corporation, had a large deposit in the defendant bank, it being a sense the depository of the complainant. There was an understanding or agreement between the bank officials and the officers of the complainant that the latter would not draw out all of its money at once, but would do so only as it needed it in its current business. The president of the bank, believing that the complainant was not observing its agreement about not checking on its deposit except as it needed its money in its current business, saw the secretary of the complainant about it, and told him that a number of his stockholders were borrowers from his bank, that they had deposited their certificates of stock as collaterals to secure these notes, and that the complainant ought to have enough money on deposit to protect its stock thus deposited. The directors passed a resolution to the effect that they would keep enough money on deposit to protect their stock hypothecated by their stockholders to secure the payment of notes given by them to the bank, and the bank officials were notified of this action. "There is not the slightest evidence that the deposit was to be changed from a general to a special deposit, or that the bank was not to use it as it did its other funds in its current business." State Bldg., etc., Ass'n *v.* Mechanics' Sav., etc., Trust Co. (Tenn.), 36 S. W. 967.

78. What deposits are special.—Fort *v.* First Nat. Bank, 82 S. C. 427, 64 S. E. 405.

79. White *v.* Commonwealth Nat. Bank, Fed. Cas. No. 17,544, 4 Brewst. 234.

deposits does not absolutely demonstrate a general, still less a universal, receipt of consideration; and there is no reason why a bank should not be allowed to accommodate a customer, or any number of customers, in this way, without raising any equity to estop it from showing the fact of such accommodation.[80]

Construction of Contract.—A construction put upon a direction as to a special deposit by the bank and acquiesced in by the depositor for over two years should be followed.[81] A member of a firm made a deposit in its favor of his own money, receiving therefor a deposit slip reciting that the deposit was to be protected for his benefit by compress receipts and bills of lading sufficient to cover the amount, the receipts to be deposited with the bank in like manner as other similar accounts. On the same date he took from his firm a note for the amount of the deposit, payable through the bank. By its contract, the bank agreed in substance that it would protect the deposit for the benefit of the depositor by taking from his firm compress receipts and bills of lading sufficient to cover the amount thereof, or that it would have and hold at all times either that amount or compress receipts or bills of lading deposited by his firm sufficient to cover it, or so much thereof as the bank let them have, and it was bound thereby unless released.[82] The plaintiff agreed to sell a mine and the deed was placed in escrow in the defendant bank until payment of the balance of the purchase price. The purchaser sold the mine to foreign purchasers, and the contract of sale provided that a sum should be deposited with the defendant to pay the plaintiff the balance of the purchase price, and other charges against the mine. The amount and the copy of the contract were forwarded to the bank and the cashier's attention called thereto. The plaintiff, without knowledge of the contract, agreed to deliver the deeds on the receipt of a certain sum in cash out of the first payment by the foreign purchaser, and to accept his imme-

80. Merchants' Nat. Bank *v.* Giulmartin, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322.

81. **Construction of contract.**—A special deposit of $500 was sent to a bank, with a letter providing that it should be subject to call by the depositor association, but that it should not be checked against so long as it was employed in discounting paper for an agent of the depositor. Understanding these stipulations, which were ambiguous, to mean that the deposit was a guaranty of loans to the agent, the bank discounted the agent's note for $500. The depositor was informed of the bank's understanding of the stipulations, and of its wish that, if this construction thereof was not satisfactory, the association request its agent to take up this note, but the depositor kept silent for more than 2½ years. Held, that a finding that the depositor acquiesced in the bank's construction of the stipulation was justified. Fidelity Mut. Life Ass'n *v.* Germania Bank, 74 Minn. 154, 76 N. W. 968.

82. The note was simply the promise of the firm to repay the money which they were to get under the terms of the contract between the bank and the depositor, without effect on the transaction between the latter and the bank, and the effect of the whole transaction was a loan from him to the firm on their note, the money in the bank to be turned over to them when they deposited collateral for his benefit, so that he held the double obligation of the firm for the money, if the firm got it from the bank, and the obligation of the bank not to let the firm have it without the collaterals. First Nat. Bank *v.* Henry, 159 Ala. 367, 49 So. 97.

diate purchaser's note for the balance until the second payment. The defendant, without informing the plaintiff of the provisions of the contract, paid him the sum demanded for the delivery of the deed. The foreign purchasers never made any further payment. The plaintiff is not entitled to recover the balance of the purchase price from the defendant as money had and received.[83]

Entered on Passbook.—Where money not contained in a package is counted and extended on a passbook in the form of an open account, and credited as cash to the depositor, and the account does not show a deposit of bills or coin to be restored identically, the deposit is a general, and not a special, deposit.[84] Although a banker marks a credit in a customer's passbook as a special deposit, and gives him a form of check so marked by him, it may be shown that the deposit is a general one.[85]

Entered on Deposit Certificate.—A mark on a deposit ticket, if intended to require a particular deposit to be kept separate from all other deposits placed to the credit of the same depositor, must be in the shape of a plain direction, if such a duty is to be imposed on the bank.[86] Where the treasurer and tax collector of a county, without authority of law, deposit county moneys in a bank, and receive certificates of deposit marked special the title to the moneys does not pass, although there is no agreement that the identical bills shall be returned, and they are mixed with the bank's general funds, and the county is entitled to recover an equal amount from a receiver of the bank prior to the payment of the general depositors.[87]

83. Plaintiffs agreed to sell a mine to M., and the deeds were placed in escrow in the defendant bank until payment of $47,000 as a balance of the purchase price. M. sold the mine to Scottish purchasers, and the seventh paragraph of the contract provided that the £20,000 should be deposited with the defendant bank to pay plaintiffs the balance of the purchase price in full, and other charges against the mine, and that amount and a copy of the contract were forwarded to the bank, and the cashier's attention was called to the seventh paragraph. Plaintiffs, without knowledge of such contract, agreed to deliver the deeds on receipt of $22,000 in cash out of the first payment by the foreign purchasers, and to accept M.'s notes for the balance until the second payment. Defendant, without informing plaintiffs of the provisions of the contract between M. and the foreign purchasers, paid plaintiffs $22,000. The foreign purchasers never made any further payments. Held, that plaintiffs were not entitled to recover the balance of the purchase price from defendant as money had and received. Defendant's acceptance of the funds did not constitute an implied promise to the foreign purchasers for the benefit of plaintiffs that the defendant would pay the plaintiff the balance of the purchase price in full. McDonald *v.* American Nat. Bank, 25 Mont. 456, 65 Pac. 896.

84. Entered on passbook.—Matthews *v.* His Creditors, 10 La. Ann. 342.

Where a roll of bills, not inclosed in any manner, was deposited at a private bank, and the depositor given an ordinary passbook, and no request was made that the money be kept apart, nor agreement as to the character of the deposit, and ordinary deposit slips were prepared at the time, from which the books of the bank were written up, a general, and not a special, deposit is shown. State *v.* Dickerson, 71 Kan. 769, 81 Pac. 497.

85. Carr *v.* State, 104 Ala. 43, 16 So. 155.

86. Entered on deposit certificate.—State Nat. Bank *v.* Dodge, 124 U. S. 333, 31 L. Ed. 458, 8 S. Ct. 521.

87. San Diego County *v.* California Nat. Bank, 52 Fed. 59.

Payment to Be Made on Condition.—The fact that payment by the bank at the start was subject to condition does not conclusively establish the fact that a deposit is special.[88]

Deposit without Agreement.—Where money or its equivalent is deposited in a bank without any special agreement, the law implies that it is to be mingled with other funds of the bank, and the relation of debtor and creditor is created, and the deposit is general; the bank becoming the owner of the fund.[89] But, where there is an accompanying agreement that the identical thing deposited shall be returned or paid out for a specific purpose, the transaction constitutes a special deposit, and the bank is liable only as bailee.[90]

88. Payment to be made on condition.—A petition alleged that defendant's predecessor was a banking corporation, doing a general banking business; that it bought certain bonds issued by a county in aid of a railroad then building, as a branch of plaintiff's predecessor's line, and by agreement among the vendors the bank and plaintiff's predecessor agreed to hold, and did hold, certain of the proceeds for the benefit of plaintiff's predecessor, payable to its order, when certain conditions as to track laying should be complied with, and thereupon entered a credit upon its books in favor of plaintiff's predecessor; that on part compliance with the conditions it paid one-half the sum and held the remainder; that thereafter, on full compliance, it paid part of the balance to plaintiff's creditor on its order; and that thereafter it and its successors had held the balance subject to the order of its owner. Held, that the fact that payment by the bank at the start was subject to condition would not conclusively establish the nonexistence of the relation of banker and depositor; the condition being subsequently performed. Missouri Pac. R. Co. *v.* Continental Nat. Bank, 212 Mo. 505, 111 S. W. 574.

89. Deposit without agreement.—State *v.* Dickerson, 71 Kan. 769, 81 Pac. 497; Keene *v.* Collier (Ky.), 1 Metc. 415; McBride *v.* American R., etc., Co. (Tex. Civ. App.), 127 S. W. 229.

Where money is placed in the keeping of a third party without a special understanding that the same shall be kept separate and apart from the personal funds of the custodian, a special deposit is not created. Troike *v.* Cook County Sav. Bank, 127 Ill. App. 413. But see San Diego County *v.* California Nat. Bank, 52 Fed. 59.

Although object known to bank.—One desiring to purchase goods which had been pledged was directed by the pledgee to deposit the principal to his account in the named bank and to save him harmless. The purchaser deposited a draft to the credit of the pledgee in the bank named, drawn on a bank in another city. The officers of the first-named bank knew the object of the deposit, but no actual instructions were given them as to the fund so deposited. The draft was duly paid, but before the money was returned to the bank in which the draft had been deposited that bank failed. The purchaser, in accordance with his agreement, paid the amount of the draft to the pledgee and sued the depository bank. The deposit to the account of the pledgee was a general deposit, and did not entitle the purchaser, who was subrogated to the rights of the pledgee, to priority over other general depositors. Schofield Mfg. Co. *v.* Cochran, 119 Ga. 901, 47 S. E. 208.

90. McBride *v.* American R., etc., Co. (Tex. Civ. App.), 127 S. W. 229.

There must be a plain agreement between the bank and the depositor. State Nat. Bank *v.* Dodge, 124 U. S. 333, 31 L. Ed. 458, 8 S. Ct. 521.

Holders of bonds issued to secure funds for the construction of a railroad deposited money with a trust company from time to time as construction funds were needed, and the trust company paid out of the deposit exchange drawn on it by a bank in payment of drafts given by the construction company in payment for labor and material; the bank agreeing that the fund should be used for no other purpose, and there being no other business transactions between the bank and the trust company. Held, that the deposit was a special one, the bank holding as trustee, and, on its becoming insolvent, its power as trustee was destroyed, and it was entitled only to be reimbursed out of the fund for the amount of construction claims actually

§ 153 (2b) Deposit for Particular Purpose.—A special deposit exists when money or property is given to a bank for some specific and particular purpose, as a note for collection, money to pay, a particular note, or property for some specific purpose.[91] A fund which comes into the possession of a bank, with respect to which the bank has but a single duty to perform, which is to deliver it to the person entitled thereto, is a trust fund incapable of being commingled with general assets of the bank subsequently transferred to a receiver.[92]

To Pay Check.—Where a certified check is received by a bank for the specific purpose of taking up another check drawn on the bank, and is so marked and identified, and on collection a certificate of deposit is made out, and marked and identified, to the same effect, the deposit is special and does not pass to the receiver of the bank as assets.[93] Drawing checks on a bank at the time of making a deposit therein, some of which checks are certified, does not make the deposit a special fund to meet such checks, in the absence of a special agreement to that effect.[94]

To Pay Purchase Price.—A deposit of the purchase price of property to be paid to the vendor upon the compliance with certain conditions is special.[95]

paid. McBride *v.* American R., etc., Co. (Tex. Civ. App.), 127 S. W. 229.

91. Deposit for particular purpose.—Brahm *v.* Adkins, 77 Ill. 263; Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365; Peak *v.* Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; People *v.* City Bank, 96 N. Y. 32; German Nat. Bank *v.* Foreman, 138 Pa. 474, 21 Atl. 20, 21 Am. St. Rep. 908.

If the deposit is for a specified purpose, the bank becomes not a creditor but a bailee. Continental, etc., Sav. Bank *v.* Chicago Title, etc., Co., 117 C. C. A. 639, 199 Fed. 99.

92. Deposit for particular purpose.—Capital Nat. Bank *v.* Coldwater Nat. Bank, 49 Neb. 786, 69 N. W. 115, 59 Am. St. Rep. 572.

93. To pay check.—Star Cutter Co. *v.* Smith, 37 Ill. App. 212.

94. People *v.* St. Nicholas Bank, 77 Hun 159, 28 N. Y. S. 407, 58 N. Y. St. Rep. 712; S. C., 77 Hun 611, 28 N. Y. S. 421, 59 N. Y. St. Rep. 881; S. C., 28 N. Y. S. 422; In re Kerr, 77 Hun 611, 28 N. Y. S. 423, 59 N. Y. St. Rep. 881.

95. Deposit to pay purchase price.—Money placed in a bank, to be paid over to a third person when he should present a warranty deed to the depositor, was a trust fund, and did not pass to a receiver on insolvency of the bank; and the fact that on its receipt the bank mingled the money with its own, without the knowledge of the depositor, did not change its character. Kimmel *v.* Dickson, 5 S. Dak. 221, 58 N. W. 561, 25 L. R. A. 309, 49 Am. St. Rep. 869.

A depositor deposited money in a bank under an agreement that the bank should pay it to a third person, provided a machine he had sold to the depositor complied with the warranty after 10 days' trial. At the time the deposit was made the depositor drew out his balance on deposit, and placed it with the special fund, receiving a certificate of deposit expressing the terms of deposit. Held, that the deposit was a special deposit, though the depositor testified that he did not understand that he was to receive back the identical money on breach of the warranty. Shopert *v.* Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515.

Where the uncontradicted evidence was that, after the execution of a contract of sale of certain land, the purchaser wrote one F., who was the cashier of a bank, stating that he inclosed a draft for a certain amount, which, with other amounts on deposit, made up the purchase price of the land; that this was to be paid over on the receipt of warranty deed from the vendor to one A. and a special warranty cross-deed from H. to the vendor; that the title for the first time had been declared acceptable; and that, if the deeds were not at the bank from H., then for the cashier to get them before paying over any money, so the deeds could be recorded together—it was er-

To Redeem Pledged Property.—A deposit to redeem pledged goods made without any special instructions is general.[96]

For Security.—A deposit of funds with a bank as security is special.[97] Collaterals deposited with a bank for one debt, or class of debts, can not be appropriated to another debt, or class of debts.[98] Where a tenant makes a bank deposit on the express condition that it is to be held by the bank as security to his landlord for the faithful performance of his lease, taking a receipt reciting that the bank is to pay the landlord out of the fund deposited whatever damages he may sustain by reason of the tenant's default, and that after the expiration of a certain time, and on the conditions named in the lease, the bank is to hold the whole sum to the credit of the landlord,

ror to find that there was an agreement that the purchase price should be paid into the bank as a special deposit, there to remain until title to the land was perfected, when it was to be turned over to the vendor. Lennan *v.* Pollock State Bank, 21 S. Dak. 511, 110 N. W. 834.

Where the plaintiff agreed to deposit $10,000 in a certain bank to be paid to defendants as a forfeit if he failed to comply with his part of the contract, and as a part of the purchase price if he did so comply, it was held that such fund was a special and not a general deposit, and was of such character that in case of the bank becoming insolvent the money would be held as a trust fund to be paid to the account of the contract in preference to general creditors. Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103, affirmed in 95 Tex. 680, no op.

Plaintiff agreed to deposit $10,000 in a certain bank to be paid to defendants as a forfeiture if he failed to comply with his part of the contract, and as a part of the purchase price if he did so comply. The president of the bank, who was solvent and had that much money on deposit in the bank, agreed to lend it to plaintiff's associate and agent, and notified defendants that the deposit was made, but no entry in respect to the matter was made on the books of the bank. Held, that this was a sufficient compliance on plaintiff's part, as the fund was thus made a special deposit, held in trust by the bank for accounts of the contract. Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103, affirmed in 95 Tex. 680, no op.

96. Schofield Mfg. Co. *v.* Cochran, 119 Ga. 901, 47 S. E. 208.

97. **Deposited for security.**—Anderson *v.* Pacific Bank, 112 Cal. 598, 44 Pac. 1063, 32 L. R. A. 479, 53 Am. St. Rep. 228.

But where a corporation, being a depositor in the defendant bank, agreed to keep on deposit a sum sufficient to protect certain shares of its stock deposited as collateral to secure loans made to its stockholders, such deposit was not a trust, for the repayment of which the corporation was entitled to a preference over other creditors of the bank. State Bldg., etc., Ass'n *v.* Mechanics' Sav., etc., Trust Co. (Tenn.), 36 S. W. 967.

A person deposited money with a bank, taking from it a deposit slip in the form used for general deposits. Upon such slip were the words, "Security for signing bond to be held by bank." Subsequently the depositor, in order to change the security so that $700 would be available for one purpose and $800 for another, drew an ordinary check, which was marked "Paid," and a certificate of deposit for $800 made out, to be held by the surety, and $700 to secure other bondsmen. The first named certificate was afterwards paid by the bank. The depositor testified that the deposit was a special one. Held, a general deposit, and not a trust fund in the hands of a receiver. Dearborn *v.* Washington Sav. Bank, 13 Wash. 345, 42 Pac. 1107.

98. Where a firm having deposited with a bank as collateral for its note to the bank, another note of the firm endorsed by third party, stipulating as follows: "If we should come under any other liability, or enter into any other engagement, with said bank, while it holds this obligation," etc. Held, construing the word or as and, the stipulation refers to any other liability or engagement of the same kind with the first mentioned note, and not to a draft drawn on, and accepted by, said firm, and discounted for the drawer and placed to his credit. Loyd *v.* Lynchburg Nat. Bank, 86 Va. 690, 11 S. E. 104.

to be paid to him in certain installments, the deposit is a special one, creating a trust fund, and the bank is bound to keep it intact for the purposes specified.[99] But where money is left with a bank as indemnity to it as surety on an appeal bond given by the depositor, and the money is paid to the bank by a check which is cashed, and, with the knowledge of the depositor, the money is mingled with the bank's other funds, and there is an implied understanding with the depositor that he shall receive interest on the deposit, the deposit is general and not special.[1]

As Forfeiture.—A deposit as a forfeiture if the depositor should fail to comply with his part of a contract is a special deposit.[2]

§ 153 (2c) Deposit by Particular Person.—Agent.—Where an agent intrusted with funds for the payment of specific obligations of his principal deposits them in a bank in his own name, without specifying that they were to be used for any particular purpose, the deposit is a general one.[3]

Public Officer.—The addition to the name of the depositor of an account with a bank of the words "clerk"[4] or "judge of probate, license money,"[5] is not alone sufficient to make deposits on such account special. Where a register in chancery deposits money in a bank without a formal order by the court to make such deposit, but makes regular statements to the presiding judge, practically complying with the requirements of the statutes, showing the amount deposited and in what bank, accompanied by certificates of the cashier, and such statements are approved by the judge, the deposits are not special deposits, entitled to priority over others on the insolvency of the bank.[6]

Receiver.—Where, by the orders appointing them, receivers were authorized and directed to carry on and operate railways, and the property thereof, and such carrying on and operating contemplated and required the handling, receiving, and paying out of moneys, the payment and collection of bills, and the transaction of such financial business as would require the medium and accommodation of banks, in the transaction of this business, such moneys so deposited in such banks were not deposited as special funds, to be drawn out on order of the court, but were deposited generally, to the credit of the receivers, and to be handled and used by the bank, like deposits of its other patrons in a banking, loan, and deposit business.[7]

99. Judgment, 99 Ill. App. 552, affirmed in Woodhouse *v.* Crandall, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385.

1. Mutual Acci. Ass'n *v.* Jacobs, 43 Ill. App. 340.

2. Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103, affirmed in 95 Tex. 680, no op.

3. Keene *v.* Collier (Ky.), 1 Metc. 415.

4. **By person in official character.**—The addition of the word "clerk" to the name of a general depositor does not make a deposit by the clerk of a county court a special one, nor does it change the liability of the bank. McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911.

5. Alston *v.* State, 92 Ala. 124, 9 So. 732, 13 L. R. A. 659.

6. Retan *v.* Union Trust Co., 134 Mich. 1, 95 N. W. 1006.

7. **Deposits by receivers.**—Southern Development Co. *v.* Houston, etc., R. Co., 27 Fed. 344.

Executor or Administrator.—Where an executor deposits funds belonging to the estate with a bank, and draws checks against the funds, which are honored, there being no agreement to return the identical money deposited, or that the funds should be used for any specified purpose, the deposit is merely a general one.[8] But where the bank, receiving a deposit from an executor, knows that it is a deposit of estate funds, it is a special deposit, as an executor can not lawfully make a general deposit of such funds.[9]

Person Acting under Order of Court.—A deposit in a bank under

8. **Deposit by executor without notice to bank.**—Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365.

"The deposit made in this case was not a special one. The bank did not receive it upon a promise to keep the identical money and to return it to the executor. It was not specific, for the bank had the right to mix the funds with other money received by it, and obligated itself simply to honor and pay the executor's checks. It did not agree to hold the same for the parties entitled thereto, but it was at all times authorized to pay the same out on checks signed by the executor, and was not bound to see that the money received thereon went to those who were entitled to receive it. Many attempts have been made to secure priority in such cases on the theory that the deposit is specific, but they have uniformly failed. See Fletcher *v.* Sharpe, 108 Ind. 276, 9 N. E. 142; McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911; Alston *v.* State, 92 Ala. 124, 9 So. 732, 13 L. R. A. 659; Henry *v.* Martin, 88 Wis. 367, 60 N. W. 263." Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365.

"In virtue of the power conferred upon him by law, the executor deposited the money in the bank, and thus became the bank's creditor for the amount of the deposit. The money was properly mingled with other funds of the bank, and lost its distinctive character as trust funds. The bank became obligated to return a like amount to the executor, or to honor his checks issued against the deposit. In other words, it became the debtor of the trustee. And, as said in Bradley *v.* Chesebrough, 111 Iowa 126, 82 N. W. 472, referring to Cavin *v.* Gleason, 105 N. Y. 256, 11 N. E. 504, 'that plaintiff was a trust creditor does not of itself entitle him to preference over other creditors.' The executor had the right to make the deposit, and the bank had an equal right to use it in its business in the ordinary way. The fund stood on the same footing as any other general deposit. McAfee *v.* Bland, 11 Ky. L. Rep. 1, 11 S. W. 439." Officer *v.* Officer, 120 Iowa, 389, 94 N. W. 947, 98 Am. St. Rep. 365.

In Fletcher *v.* Sharpe, 108 Ind. 276, 9 N. E. 142, it is said: "There is no question that the fund was properly deposited. * * * When deposits are received, unless they are special, they belong to the bank as a part of its general funds, and the relation of debtor and creditor arises between the bank and the depositor. This is equally so whether the deposit is of trust money or of funds which are impressed with no trust, provided the act of the depositor is no misappropriation of the funds. If, in receiving a trust fund, a bank acted with knowledge that it was taking the fund in violation of the duty of the trustee, the rights of a cestui que trust might be different. * * * In this case, where no impropriety is imputed to the bank in receiving the money, it becomes the debtor of the petitioner, and its debt to them was of the same character as its debt to any other depositor, and must be paid in the same proportion. The rights of other creditors stand on a level with those of the petitioners, and are to be guarded and protected by the court with the same vigilance." This is manifestly sound doctrine, and does not in any maner controvert the rule that a cestui que trust may follow trust property which has been misapplied or misdirected by a trustee into the hands of any who is not an innocent purchaser for value. Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365.

The case is easily distinguishable from those cases where a bank, with notice of the trust character of a deposit, attempts to apply it on a debt due it by the trustee. In such cases, the cestui que trust may recover the amount so misapplied from the bank. Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365.

9. Officer *v.* Officer (Iowa), 90 N. W. 826.

order of court, the money not being kept separate from other deposits, is not a special deposit.[10]

§ 153 (2d) Deposit to Be Paid to Particular Person.—Money deposited in a bank with direction to pay to a particular person is a special deposit.[11]

§ 153 (2e) Deposit Credited to Account.—Where a depositor gives a bank a draft to collect with directions to credit the proceeds to the plaintiff, and the collection was credited to the plaintiff's general account in the usual course of business between the parties, this was a general and not a special deposit.[12] The plaintiff left with a bank certain mortgages, with instructions that the money received thereon was not to be credited to his account, but that the bank should immediately notify him, so that he could withdraw the same. Checks were given in payment, and the money, when received, was credited to a fictitious account. The bank received the money as the plaintiff's agent, and not in such a way as to create the relation of debtor and creditor between them.[13] But where the bank discounts the note of the depositor and credits the amount to his general account, the deposit is general.[14]

10. Person acting under order of court.—Where moneys deposited in a commercial savings bank were not kept separate from the general funds of the bank, or distinguished therefrom, and the entries of the same upon the bank books, and upon the deposit book of the officer making the deposit, were the same as with all other depositors, except that no interest was to be paid thereon, it was held, that the deposit, though made under a general order of the court, was not a special one, or a mere bailment, and that the money so deposited became that of the bank, which was liable for its repayment the same as to any other depositor or creditor. Otis *v.* Gross, 96 Ill. 612, 36 Am. Rep. 157.

11. To be paid to particular person.—Capital Nat. Bank *v.* Coldwater Nat. Bank, 49 Neb. 786, 69 N. W. 115, 59 Am. St. Rep. 572.

Money deposited in one bank to the account of another, with directions to the latter to pay the amount thereof by telegram to a third bank, is a specific deposit. Montagu *v.* Pacific Bank, 81 Fed. 602.

A deposit of money in a New York bank to pay a creditor in Montana, together with a telegraphic order from the New York bank to the Montana bank to pay the same, held to constitute a special deposit, where the creditor insisted on having the cash, and only consented to take a draft on the New York bank with the understanding that it should be a payment only in case it was honored. Moreland *v.* Brown, 30 C. C. A. 23, 86 Fed. 257.

12. Credited to general account.—Plaintiffs, at a time when their account with defendants' intestate, a private banker, was overdrawn, offered him their draft on a distant house for discount and deposit. The accommodation being refused, it was agreed that intestate should collect the draft, and credit plaintiffs with the proceeds when received. The collection was credited to plaintiffs' general account, which was the usual course of business between the parties, the day before intestate's death, and in the meantime plaintiffs had drawn their checks against the draft, advising the payees when the account would be good for their payment. Held, that the draft was delivered and received for collection and credit to plaintiff's general account, and not on special deposit. Bennett *v.* Knapp, 56 Hun 643, 9 N. Y. S. 766, 31 N. Y. St. Rep. 24.

13. In re Johnson, 103 Mich. 109, 61 N. W. 352.

14. Deposit of proceeds of note discounted.—The directors of a stock fire insurance company, desiring a license to do business, being required to raise $50,000 paid-up capital by Kirby's Dig., § 4335, before a license could be obtained, executed a note to the company

§ 153 (2f) Deposit Subject to Check.—A certificate by a branch of the Bank of Arkansas of the deposit in that branch of a certain sum in the bills of that branch, subject to the order of the depositor on return of the certificate, is a general, and not a special, deposit, and the depositor may recover the amount in specie.[15] But a deposit not subject, deposited under an agreement by which the bank is bailee, is special.[16]

§ 153 (2g) Deposit Mingled with Other Funds.—Money deposited with a bank for a particular purpose but, with the depositor's consent, commingled with other funds is a general deposit.[17] But where commingled without his consent is special.[18] That a deposit in a bank, to hold pending negotiation by the depositor for the purchase of land, and to be returned to him in case the title to the land was found not to be good, was commingled with the general assets of the bank, did not make it any the less a trust fund, as affecting the jurisdiction of a chancery court of a suit by the depositor to recover the money, though as between the bank and its general deposi-

for $50,000, each director signing the note individually. This note was presented to the Auditor, who refused to issue a license thereon, but suggested that they borrow the money on the note. The secretary thereupon borrowed $50,000 of defendant bank on the note, and, this money having been transferred on the bank's books to the credit of the insurance company, the deposit slip was exhibited to the Auditor, and a license was issued. The next day the note was taken up by the insurance company's check for $50,000 on the account, and the note was held by the insurance company until the next annual license was obtained on a showing to the Auditor that the company had received a conveyance of land worth $50,000. The Auditor had knowledge that the note had been taken up in this manner. Held, that the proceeds of the note while on deposit in the bank did not constitute a trust fund for creditors of the insurance company, and that, the loan by the bank having been actually made on sufficient collateral, it was not responsible for the way in which the deposit was expended by the insurance company's officers, and was therefore not liable to the insurance company's receiver for the amount thereof. Dodge *v.* State Nat. Bank, 96 Ark. 65, 131 S. W. 65.

15. Deposit subject to check.—Wallace *v.* State Bank, 7 Ark. 61.

16. Where money is placed in a bank for safe-keeping, and is not to be checked out by the depositor, or under an agreement with the bank to act as bailee or agent and deliver the money to some other person under certain conditions, or apply it to special purposes, it is a special deposit; and the bank is an agent or bailee with no right to use it or mingle it with its own funds. Covey *v.* Cannon (Ark.), 149 S. W. 514.

17. Mingled with other funds.—Mutual Acci. Ass'n *v.* Jacobs, 43 Ill. App. 340; Otis *v.* Gross, 96 Ill. 612, 36 Am. Rep. 157.

When a deposit has been mixed with other assets of the bank so as to be incapable of identification, it can not be recovered as a special deposit. Lanterman *v.* Travous, 73 Ill. App. 670, affirmed in 174 Ill. 459, 51 N. E. 805.

18. Without consent of depositor.—San Diego County *v.* California Nat. Bank, 52 Fed. 59; Kimmel *v.* Dickson, 5 S. Dak. 221, 58 N. W. 561, 25 L. R. A. 309, 49 Am. St. Rep. 869.

Plaintiff, under an agreement with a bank, deposited with it $2,000, to secure the bank, and the sureties it might procure, from liability as bail, and the sureties it might procure, from liability as bail, and received a receipt reciting the deposit, and that it was payable on return of the certificate and release from liability on bail bond. The money, without the consent of plaintiff, went into the bank vaults through the regular channels. Held, that the deposit was special, and therefore, on the insolvency of the bank, plaintiff did not stand merely in the same position as the general creditors of the bank. Anderson *v.* Pacific Bank, 112 Cal. 598, 44 Pac. 1063, 32 L. R. A. 479, 53 Am. St. Rep. 228.

tors there exists only the ordinary relation of debtor and creditor.[19]

§ 153 (2h) Evidence to Prove Deposit Special.—To prove that money found in the banker's safe, the ownership of which does not appear on the books, is the special deposit of the plaintiff, it is not necessary to particularize and identify the coins.[20] Evidence that the plaintiff's messenger, in making a deposit, remarked to the teller that it was to cover checks that would be in that day, and the teller made no reply, neither the ticket which accompanied the deposit nor the entry in the depositor's book showing that the deposit was other than an ordinary one, is insufficient to impress on such deposit a trust for the payment of any particular check.[21]

§ 153 (3) What May Be Specially Deposited.—The term "special deposits" is not confined to securities held as collateral to loans, but includes money, and other valuables delivered to banks to be specifically kept and redelivered.[22] The ordinary relation of banker and depositor on a general deposit is that of debtor and creditor; but, without actual delivery to the depositor and a redeposit for a special purpose, a general deposit may by agreement be converted into a special deposit.[23]

§ 153 (4) Title and Interest of Bank.—The title to the thing deposited specially is not in the bank but remains in the depositor.[24] Where a deposit is made generally the relation between the bank and the depositor is that of debtor and creditor,[25] but where the deposit is made specially, the relation between the bank and the depositor is that of bailor and bailee.[26]

19. Mitchell *v.* Bank, 98 Miss. 658, 54 So. 87.

20. Evidence to prove deposit special.—Dougherty *v.* Vanderpool, 35 Miss. 165.

21. Myers *v.* Twelfth Ward Bank, 28 Misc. Rep. 188, 58 N. Y. S. 1065.

22. What may be specially deposited.—Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582.

23. State *v.* Grills (R. I.), 85 Atl. 281.

24. Title to thing deposited.—San Diego County *v.* California Nat. Bank, 52 Fed. 59; Thompson *v.* Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704; Marine Bank *v.* Fulton County Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785; Bank *v.* Wister, 2 Pet. 318, 7 L. Ed. 437; Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483; State Nat. Bank *v.* Dodge, 124 U. S. 333, 31 L. Ed. 458, 8 S. Ct. 521; Phœnix Bank *v.* Risley, 111 U. S. 125, 28 L. Ed. 374, 4 S. Ct. 322; Hodgin *v.* People's Nat. Bank, 125 N. C. 503, 34 S. E. 709; Bank *v.* Dean, 9 Okl. 626, 60 Pac. 226; Zinn *v.* Mendel, 9 W. Va. 580. See, also, Dickeschied *v.* Exchange Bank, 28 W. Va. 340.

Where a special deposit is made, the bank is merely a trustee, the property right remaining in the depositor. Shopert *v.* Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515.

The owner of city bonds does not lose title thereto by leaving them as special deposit in a bank which is the agent of the city for paying the interest, and likewise its agent for payment of the principal to a certain amount, when the amount was deposited by the city for that purpose, though the bank collects the coupons and sends the proceeds to her. Gibson *v.* Erie, 196 Pa. 7, 46 Atl. 102.

25. Deposit as bailment.—Upon a general deposit the relation between depositor and banker is that of debtor and creditor. Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669.

A general deposit loses its character of bailment and becomes a loan and the bank is liable for the money absolutely, however it may have been lost. The case, however, is different with a special deposit in a bank; there the thing deposited is expected to be kept and redelivered. Duncan *v.* Magette, 25 Tex. 245.

26. Preston *v.* Prather, 137 U. S. 604, 34 L. Ed. 788, 11 S. Ct. 162; Thompson

While bonds on special deposit with a bank ordinarily constitute a gratuitous bailment, such deposit may, by becoming a security for loans, become a bailment for the mutual benefit of both parties.[27] The bank and not an officer of the bank is the bailee.[28]

Lien on Deposit.—A bank does not have a lien on special deposits, or on money deposited for a specific purpose, as collateral security, or for the payment of a particular debt.[29]

Deposit as Set-Off.—A special deposit due to another bank as trustee for the use of a third person can not be offset against such bank's private debt to the depository bank.[30]

§ 153 (5) Power of Bank to Accept.—The receiving of bank notes in a bank on special deposit is as much a bank transaction as the receiving of them on general deposit.[31] Where the charter of a bank granted the power to regulate the manner of making and receiving deposits, and to pass all necessary by-laws, a by-law providing for the reception of special deposits, in the nature of loans bearing interest, is within the powers of the bank.[32] The power to receive special deposits is conferred by the national banking act upon banks organized under that act.[33]

§ 153 (6) Duty and Liability of Bank—§ 153 (6a) In General.—Upon a special deposit a bank is merely a bailee, and is bound according to the terms of the special deposit.[34] When a bank receives a special de-

v. Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704; Marine Bank *v.* Fulton County Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785; State Nat. Bank *v.* Dodge, 124 U. S. 333, 31 L. Ed. 458, 8 S. Ct. 521; Schofield Mfg. Co. *v.* Cochran, 119 Ga. 901, 47 S. E. 208; McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911; Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669; McBride *v.* American R., etc., Co. (Tex. Civ. App.), 127 S. W. 229; Duncan *v.* Magette, 25 Tex. 245.

The relation between a bank and a special depositor of property for safe keeping is a relation of bailee and bailor. Bank *v.* Zent, 39 O. St. 105; Griffith *v.* Zipperwick, 28 O. St. 388.

27. As bailment for mutual benefit.—Where the owners of bonds on special deposit, subsequently to their deposit, had repeatedly asked for a discount of their notes by the defendants, offering the latter the bonds deposited with them as collateral, and such discounts were made, and when the notes thus secured were paid, and the bank called upon the owners to know what they should do with the bonds, they were informed that they were to hold them for the plaintiffs' use as previously, the plaintiff having already written to the defendants that they desired to keep the bonds for an emergency, and also that they wished at times to overdraw their account, and that they would consider the bonds as security for such overdrafts; from these facts the court was of opinion that the bonds were held by the defendants as collateral to meet any sums which the plaintiffs might overdraw; and it became a bailment for mutual benefit. Preston *v.* Prather, 137 U. S. 604, 34 L. Ed. 788, 11 S. Ct. 162.

28. Where special deposits are made in a bank, the corporation is the bailee, and not its officers. Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

29. Wagner *v.* Citizens' Bank, etc., Co., 122 Tenn. 164, 122 S. W. 245.

30. American Exch. Nat. Bank *v.* Loretta Gold, etc., Min. Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233.

31. Power of bank to accept.—Coffin *v.* Anderson (Ind.), 4 Blackf. 395.

32. Heironimus *v.* Sweeney, 83 Md. 146, 34 Atl. 823, 33 L. R. A. 99, 55 Am. St. Rep. 333; Edwards *v.* Sweeney, 83 Md. 146, 34 Atl. 823.

33. Bank *v.* Zent, 39 O. St. 105.

34. Duty of bank.—McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911.

Where a bank, solely in considera-

posit for a designated purpose it is charged with the duty of applying the money to that purpose. This duty it is under obligation to perform in strict accordance with its instructions, and it can not use or dedicate such deposit to any other purpose.[35] Where the holder of a promissory note delivers it to a bank with directions to appropriate the proceeds to a specific object, the bank may realize the proceeds, either by discounting it or by collecting it of the maker at its maturity if the holder does not make an election.[36] Where a special deposit consists of stocks and bonds, written authority indorsed on the certificate of deposit, to pay out the dividends and coupons, is no authority for surrendering the stocks and bonds themselves.[37]

To Hold Fund Intact.—The bank is bound to keep intact a fund deposited special.[38] A special deposit creates a trust fund and the bank is bound to keep it intact for the purposes specified.[39] A bank having become the special depository of a fund is bound to retain it until it is drawn out for the use designated, or if the purpose of the deposit has become incapable of execution, to hold the fund to the use of the original depositor.[40]

Liability in Absence of Negligence.—A special deposit remains the property of the depositor and if it is lost or stolen without the negligence of the bank, the loss falls on the depositor.[41] But this is not so in case

tion of a depositor keeping a money deposit with such bank, receives an article from the depositor for safe-keeping, the depositor is entitled to such security only as the course of business between him and the bank shows to have been mutually intended and expected between them. White *v.* Commonwealth Nat. Bank, Fed. Cas. No. 17,544, 4 Brewst. 234.

35. Bank *v.* Cooper, 137 U. S. 473, 34 L. Ed. 759, 11 S. Ct. 160; Commercial Nat. Bank *v.* Hamilton Nat. Bank, 42 Fed. 880; American Exch. Nat. Bank *v.* Loretta Gold, etc., Min. Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233; Armstrong *v.* National Bank, 90 Ky. 431, 12 Ky. L. Rep. 393, 14 S. W. 411, 9 L. R. A. 553; Judy *v.* Farmers', etc., Bank, 81 Mo. 404; Cutler *v.* American Exch. Nat. Bank, 113 N. Y. 593, 21 N. E. 710, 4 L. R. A. 328; Bank *v.* Macalester, 9 Pa. 475.

36. Drown *v.* Pawtucket Bank (Mass.), 15 Pick. 88.

37. Chattahoochee Nat. Bank *v.* Schley, 58 Ga. 369.

38. To hold fund in tact.—Woodhouse *v.* Crandall, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385.

The bank has no right to mingle money deposited specially with other funds. Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564.

39. Woodhouse *v.* Crandall, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385.

40. American Exch. Nat. Bank *v.* Loretta Gold, etc., Min. Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233; Drovers' Nat. Bank *v.* O'Hare, 119 Ill. 646, 10 N. E. 360; Cutler *v.* American Exch. Nat. Bank, 113 N. Y. 593, 21 N. E. 710, 4 L. R. A. 328.

41. Liability in absence of negligence.—Hodgin *v.* People's Nat. Bank, 125 N. C. 503, 34 S. E. 709.

"While the bonds remained in the defendant's safe, subject to the sole control of Francis P. Sherwood, they were in the possession of the plaintiff's agent and of the plaintiff. When, on April 21, 1903, the bonds were taken from the safe by Oliver T. Sherwood, with the intent to appropriate them to his own use, they were taken from the possession of the plaintiff, and the act was not the act of the bank or of an agent of the bank, but was a theft by Oliver T. Sherwood. The defendant is not liable to the plaintiff for this theft by a third party. If in fact the failure of the directors to discover that their cashier had become a dishonest man, liable to steal property within his reach, and their failure to remove him from his office were due to a negligent performance of their duties as directors, that negligence would not make the defendant liable to the plaintiff as

of a general deposit, or in case of a general deposit of a special fund, or of a fund for a special purpose, where the facts are known to the bank.[42]

Liability under By-Law.—The contract of bailment between a bank and one of its depositors, who deposits with the bank an article for safe-keeping, can not be affected by a by-law of which the depositor has no knowledge, though providing that articles so deposited shall be at the depositor's risk.[43] A bank is not liable for the act of its cashier in taking from the vault of the bank bonds belonging to the plaintiff city, with intent to appropriate them to his own use, the plaintiff's agent, who was an employee of the bank, having placed the bonds in the vault for his own accommodation, knowing that the bank according to its rules would not act as custodian for such securities; and it would not be otherwise though the directors' failure to discover the dishonesty of the cashier amounted to negligence on their part.[44]

Liability Where Funds Attached by Creditors.—A bank received money to sell, and sold it with other money, receiving for the whole amount a check which was attached as the property of the bank by its creditors. The bank was liable to the depositor, as it would not be permitted to force him to pursue his remedy against the attaching creditor.[45]

§ 153 (6b) Degree of Care Required.—The bank should exercise such degree of care as is reasonable, with reference to the particular circumstances of the deposit and the nature of the thing deposited.[46] If the deposit is for hire, then ordinary care only is required;[47] if no hire or compensation is paid, only slight care is required, and the bank is only liable for gross negligence.[48] It is also stated that the degree of care

bailee of the plaintiff's bonds." Fairfield *v.* Southport Nat. Bank, 80 Conn. 92, 67 Atl. 471.

42. Hodgin *v.* People's Nat. Bank, 125 N. C. 503, 34 S. E. 709; Bank *v.* Armstrong, 15 N. C. 519.

43. Under by-law.—White *v.* Commonwealth Nat. Bank, Fed. Cas. No. 17,544, 4 Brewst. 234.

One depositing in a bank without notice of its by-law that special deposits for safe-keeping shall be at the risk of the depositor is not bound thereby. White *v.* Commonwealth Nat. Bank, Fed. Cas. No. 17,544, 4 Brewst. 234.

44. The defendant did not become the bailee of the plaintiff's bonds. The plaintiff's agent, placed the bonds in the defendant's safe for his own personal accommodation, with knowledge of a standing rule in the bank that the bank would not act as a custodian for the safe-keeping of negotiable securities and that any such securities left in the bank's safe was at the risk of the owner. Fairfield *v.* Southport Nat. Bank, 80 Conn. 92, 67 Atl. 471.

The cashier having placed the proceeds of the bonds in another bank to the credit of his bank, and such money having passed to the receiver of the cashier's bank, such bank was liable to plaintiff for the proceeds, though the deposit by the cashier was a payment by him to conceal his prior misappropriations. Fairfield *v.* Southport Nat. Bank, 80 Conn. 92, 67 Atl. 471.

45. Spears, etc., Co. *v.* Ohio Life Ins. etc., Co., 3 O. Dec. 338.

46. Degree of care required.—Griffith *v.* Zipperwick, 28 O. St. 388.

47. State *v.* Copeland, 96 Tenn. 296, 34 S. W. 427, 31 L. R. A. 844, 54 Am. St. Rep. 840.

48. Gross negligence.—Preston *v.* Prather, 137 U. S. 604, 34 L. Ed. 788, 11 S. Ct. 162. See First Nat. Bank *v.* Graham, 100 U. S. 699, 25 L. Ed. 750; Wylie *v.* Northampton Nat. Bank, 119 U. S. 361, 370, 30 L. Ed. 455, 7 S. Ct. 268; Manhattan Bank *v.* Walker, 130 U. S. 267, 32 L. Ed. 959, 9 S. Ct. 519; First Nat. Bank *v.* First Nat. Bank, 116 Ala. 520, 22 So. 976; Hale *v.* Rawal-

which is required of a bank acting as a depositary without special contract

lie, 8 Kan. 136; Ray *v.* Bank (Ky.), 10 Bush 344; State *v.* Copeland, 96 Tenn. 296, 34 S. W. 427, 31 L. R. A. 844, 54 Am. St. Rep. 840.

A national bank is liable to the depositor for securities which, as a gratuitous bailee, it has received for safe-keeping, and lost through its gross negligence. Pattison *v.* Syracuse Nat. Bank, 17 Hun 419, affirmed in 80 N. Y. 82, 36 Am. Rep. 582.

A gratuitous deposit in a bank does not imply an undertaking by the bailee to use more than ordinary care in preserving the property, and it is responsible only for fraud or gross negligence. Ray *v.* Bank (Ky.), 10 Bush 344.

Where a bailment is for the sole benefit of the bailor, as in case of a special deposit in a bank for safe-keeping without compensation, the bailee is answerable only for gross neglect. First Nat. Bank *v.* Graham, 79 Pa. 106, 21 Am. Rep. 49.

Where a bank gratuitously accepts property on special deposit for safe-keeping, the bank will be liable only for losses occurring through its gross negligence. Griffith *v.* Zipperwick, 28 O. St. 388.

A bank receiving money as a safe deposit without compensation is not responsible for its loss, unless caused by its gross negligence. Hale *v.* Rawallie, 8 Kan. 136.

A bank acting as a depositary without special contract or reward is liable for the loss of the deposit only in case of gross negligence. Scott & Bro. *v.* National Bank, 72 Pa. 471, 13 Am. Rep. 711.

In the case of bankers and banking institutions, having special arrangements, by vaults and other guards, to protect property in their custody, persons depositing valuable articles with them except that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, and that whenever ground for suspicion arises an examination will be made by them to see that it has not been abstracted or tampered with; an omission of such measures would in most cases be deemed culpable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor. Preston *v.* Prather, 137 U. S. 604, 34 L. Ed. 788, 11 S. Ct. 162. See First Nat. Bank *v.* Graham, 100 U. S. 699, 25 L. Ed. 750; Wylie *v.* Northampton Nat. Bank, 119 U. S. 361, 30 L. Ed. 455, 7 S. Ct. 268.

A bank received bonds "for safe-keeping as a special deposit," without solicitation or reward. Held, that the measure of responsibility therefor was that of a naked bailee without reward, and that the bank was not liable for a loss of the bond by robbery, there being neither fraud nor gross negligence. Whitney *v.* First Nat. Bank, 55 Vt. 154, 45 Am. Rep. 598.

What constitutes gross negligence.—What will constitute gross negligence, on the part of the bank in such a case, must be determined as a question of fact, in each particular case, by the jury, under proper instructions from the court. Griffith *v.* Zipperwick, 28 O. St. 388.

Negligence equivalent to fraud.—A mere depositary without any special undertaking and without reward is not answerable for the loss of the goods deposited, except in case of gross negligence, which is equivalent to fraud in its effect upon contracts. Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

Negligently exposing to public.—In an action to recover from a bank for the loss of a special deposit, there was evidence that such deposit was stolen while the bank was open; that the deposit, consisting of bonds, was in a safe so situated as to be accessible to a person entering from the street; that the employees in the bank did not at all times have the safe in view; and that sometimes the door of the safe was left open. Held to justify a finding of gross negligence against the bank. Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582, affirming 17 Hun 419.

Received for accommodation of customer.—Where a bank receives a box for safe-keeping, without any special compensation therefor, but merely because the depositor keeps an account with it, it is liable for gross negligence only. White *v.* Commonwealth Nat. Bank, Fed. Cas. No. 17,544, 4 Brewst. 234.

Deposit unauthorized by charter of bank.—"It is now well settled that if a bank be accustomed to take such deposits as the one here in question, and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter." First Nat. Bank *v.* Graham, 100 U. S. 699, 25

or reward is that which it bestows on its own goods.[49]

§ 153 (6c) Liability of Bank as Gratuitous Bailee.—A special deposit in a bank is gratuitous where it is accepted for the accommodation of the depositor, and without any undertaking by him, express or implied, to pay or do anything as compensation or reward for keeping the deposit.[50] The bank is not an insurer,[51] and the mere fact of loss does not make the bank liable.[52] In such case the bank is liable only for fraud[53] or gross negligence,[54] which is not increased by the showing the depositor the facilities for safekeeping.[55] A bank is liable as a gratuitous bailee of a special de-

L. Ed. 750; Manhattan Bank *v.* Walker, 130 U. S. 267, 32 L. Ed. 959, 9 S. Ct. 519.

Deposit for collection.—Where a note and mortgage were deposited with a bank for safe-keeping and for the collection of interest, the bank was liable for the exercise of ordinary care, though the bailment was gratuitous. Sherwood *v.* Home Sav. Bank, 131 Iowa 528, 109 N. W. 9.

49. Care bestowed on own business.—Scott & Bro. *v.* National Bank, 72 Pa. 471, 13 Am. Rep. 711.

Good faith generally requires that a bailee should keep the goods intrusted to him with as much care as he ordinarily keeps his own, of the same kind. Griffith *v.* Zipperwick, 28 O. St. 388.

A bank receiving a gratuitous deposit of a box containing valuables is bound to use the same diligence in preserving it that it uses in preserving its own property. Levy *v.* Pike Bro. & Co., 25 La. Ann. 630.

Where bonds are deposited with bankers for safe-keeping, they are liable for a loss occurring through a failure to use such care as persons of common prudence, in their situation and business, usually bestow in the custody and keeping of similar property belonging to themselves. Maury *v.* Coyle, 34 Md. 235.

Where a national bank has been accustomed to receive United States bonds, as special deposits, gratuitously, it is liable for any loss thereof occurring through the want of that degree of care which good business men would exercise in keeping property of such value. Bank *v.* Zent, 39 O. St. 105.

Under Georgia Code.—Code, § 2064, provides that, "in all cases of bailments after proof of loss, the burden of proof is on the bailee to show proper diligence." Held, that such diligence is not established by showing merely that the officers of a bank, which was a gratuitous bailee of bonds, treated the bonds in the same manner in which they treated the property of the bank. Merchants' Nat. Bank *v.* Guilmartin, 93 Ga. 503, 21 S. E. 55, 44 Am. St. Rep. 182.

In an action against a bank to recover the value of a special deposit embezzled by the cashier, diligence in the keeping of the deposit was not shown by evidence that under similar circumstances defendant intrusted its cashier with like property of its own. Merchants' Nat. Bank *v.* Carhart, 95 Ga. 394, 22 S. E. 628, 32 L. R. A. 775, 51 Am. St. Rep. 95.

Liability for act of officer.—Rule that a depositary without reward is only responsible for the degree of care which he bestows on his own goods applied in a case of larceny of a special money deposit in a bank by one of its own officers. Scott & Bro. *v.* National Bank, 72 Pa. 471, 13 Am. Rep. 711.

50. Liability as gratuitous bailee.—In an action to hold the bank liable for its loss, it is error to instruct the jury that if the bank habitually accepts such class of deposits, a person going to make a deposit with it is not obliged to be able to show satisfactorily to himself what benefit will result to the bank, but can assume that it will be benefited. Merchants' Nat. Bank *v.* Guilmartin, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322.

51. Lloyd *v.* West Branch Bank, 15 Pa. 172, 53 Am. Dec. 581.

52. To recover against a bank for bonds left with the bank as a gratis bailment, something more is needed than the mere fact that they were stolen from the bank. Wylie *v.* Northampton Nat. Bank, 15 Fed. 428, 64 How. Prac. 456.

53. Ray *v.* Bank (Ky.), 10 Bush 344; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

54. See ante, "Degree of Care Required," § 153 (6b).

55. The mere showing the depositor the bank's facilities for security does not increase its obligation. Hale *v.* Rawallie, 8 Kan. 136.

posit converted by it or by its officers,[56] acting within the scope of their authority.[57] The officers are also individually liable.[58]

§ 153 (6d) Liability of Bank as Bailee for Mutual Benefit or Hire.—Where the deposit is made for mutual benefit[59] or for hire, the bank is required to exercise ordinary care in regard thereto.[60] A bank receiving certain transfers of land certificates with instructions to deliver them to a certain person upon payment of a certain sum, is not a gratuitous bailee thereof, and must use ordinary care in keeping them.[61]

§ 153 (6e) Liability for Acts of Officers.—A bank receiving a special deposit, which was appropriated by an officer, is not liable unless it par-

56. Where the speculations in stocks and bonds on margins of a bank cashier of which the president had knowledge were such that such president must have known of the cashier's dishonesty, the bank is liable for bonds deposited with it as a gratuitous bailee, which the cashier converted to his own use. Merchants' Nat. Bank *v.* Guilmartin, 93 Ga. 503, 21 S. E. 55, 44 Am. St. Rep. 182.

57. White *v.* Commonwealth Nat. Bank, Fed. Cas. No. 17,544, 4 Brewst. 234.

58. If a deposit of notes in a bank be special, there is no change of property, and the deposit is nothing but a bailment; so that the conversion of such a deposit by the cashier is a tort for which he is individually liable in trover. Coffin *v.* Anderson (Ind.), 4 Blackf. 395.

59. Bailment for mutual benefit.—Where the deposit becomes a bailment for mutual benefit, a higher degree of care is required and there is a liability for ordinary negligence not amounting to gross negligence. Preston *v.* Prather, 137 U. S. 604, 612, 34 L. Ed. 788, 11 S. Ct. 162; Wylie *v.* Northampton Nat. Bank, 119 U. S. 361, 30 L. Ed. 455, 7 S. Ct. 268; First Nat. Bank *v.* Graham, 100 U. S. 699, 704, 25 L. Ed. 750.

Where a deposit, by its change from a gratuitous bailment to a security for loans, became a bailment for the mutual benefit of both parties, that is to say, both were interested in the transactions, the bank was therefor required, for the protection of the bonds, to give such care as a prudent owner would extend to his own property of a similar kind, being in that respect under an obligation of a more stringent character than that of a gratuitous bailee, but differing from him in that he thereby became liable for the loss of the property if caused by his neglect, though not amounting to gross negligence. Preston *v.* Prather, 137 U. S. 604, 34 L. Ed. 788, 11 S. Ct. 162.

Deposit for security.—Where bonds are left with a bank as security for a loan, and after payment are allowed to remain for safe-keeping, for collection of coupons, and as security for any future loan, the bank becomes a mandatory, rather than a depositary, as it would derive benefit from the collection of the interest, which is within its business scope, as well as from the anticipated profits of a future loan on the same security, and is liable for failure to exercise reasonable diligence in protecting the bonds. Ouderkirk *v.* Central Nat. Bank, 52 Hun 1, 4 N. Y. S. 734, 22 N. Y. St. Rep. 127, judgment affirmed 119 N. Y. 263, 23 N. E. 875; Hollister *v.* Central Nat. Bank, 52 Hun 610, 4 N. Y. S. 737, judgment affirmed 119 N. Y. 634, 23 N. E. 878.

In an action for the conversion of bonds so deposited, an instruction that the defendant bank is liable for "any neglect" on its part, when explained by the court in another part of the charge by the remark that defendant had undertaken to show that it did all it reasonably could to protect the securities, is correct; the latter clause correcting any erroneous inference that might be drawn from the words "any neglect." Ouderkirk *v.* Central Nat. Bank, 52 Hun 1, 4 N. Y. S. 734, 22 N. Y. St. Rep. 127, judgment affirmed 119 N. Y. 263, 23 N. E. 875; Hollister *v.* Central Nat. Bank, 52 Hun 610, 4 N. Y. S. 737, judgment affirmed 119 N. Y. 634, 23 N. E. 878.

60. State *v.* Copeland, 96 Tenn. 296, 34 S. W. 427, 31 L. R. A. 844, 54 Am. St. Rep. 840.

61. First Nat. Bank *v.* First Nat. Bank, 116 Ala. 520, 22 So. 976.

ticipated in the act, or was guilty of gross negligence.[62] Where the bank exercises proper care in the selection of an officer, it is not liable for the

62. Liability for acts of officers.—Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28; Coffin *v.* Anderson (Ind.), 4 Blackf. 395; Scott & Bro. *v.* National Bank, 72 Pa. 471, 13 Am. Rep. 711; El Paso Nat. Bank *v.* Fuchs (Tex. Civ. App.), 34 S. W. 203, reversed in 89 Tex. 197, 34 S. W. 206, on another point.

Where a cask containing a quantity of gold coin was deposited in a bank for safe-keeping, and the gold was fraudulently taken out by the cashier of the bank, the bank was not liable to the depositor for the value of the gold so taken. Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec 168.

The directors of a bank are responsible for abstraction and sale, by a subordinate officer, of a special deposit. United Soc. *v.* Underwood (Ky.), 9 Bush 609, 15 Am. Rep. 731.

A cashier of a bank, acting as special agent for a third party, purchased bonds for him, and as agent for the bank received them as a special deposit, and afterwards, without the knowledge of the depositor, transferred the bonds from the special deposit, and entered them as part of the assets of the bank. Held, that the bank was not liable for his conversion. First Nat. Bank *v.* Dunbar, 118 Ill. 625, 9 N. E. 186.

For a special deposit, received by a bank through its cashier for gratuitous safe-keeping and return to the depositor on demand, the bank is not liable where the cashier, without its knowledge or consent, steals it, or fraudulently appropriates it to his own use; the bank having exercised due diligence in selecting the cashier, and not having kept him in office after it knew, or ought to have known, that he was or had become untrustworthy. Merchants' Nat. Bank *v.* Guilmartin, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322.

An action against a bank for the conversion or the loss by gross negligence of bonds deposited with it as a bailee without hire can not be sustained on evidence from which the inference that the articles were stolen by servants of the bank, selected and continued in its employment without negligence, who, in the proper course of business had access to them, is equally deducible with any other inference. Smith *v.* First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59.

Negligently left in safe.—Where government bonds which have been specially deposited with a banker for safe-keeping are tied together in an open package, and placed loosely in a safe to which three persons have access, the bank is liable for the loss of the bonds occurring through the theft of its assistant cashier. Gray *v.* Merriam, 46 Ill. App. 337.

For failure to examine accounts of officer.—A bank received bonds on special deposit for safety from one of its customers, and at his risk, and placed them in a safe, with similar deposits from others and its own securities. The bonds were stolen by the teller. The teller absconded, and it was then discovered that his accounts were false, and that he had robbed the bank during two years. Held, that the bank was not negligent in not examining the teller's accounts during that time, so as to make it liable to the gratuitous bailee. Scott & Bro. *v.* National Bank, 72 Pa. 471, 13 Am. Rep. 711.

Sufficient evidence of negligence.—A special deposit of bonds was left by a customer with the cashier of a national bank for safe-keeping, with the knowledge of its directors, and the cashier gave a receipt therefor. The bonds were subsequently stolen, and the bank offered no satisfactory explanation of the manner of the theft. Held, that there was sufficient evidence of gross negligence to be submitted to the jury, and a recovery could be had against the bank if the bonds were stolen through the gross negligence of its officers. First Nat. Bank *v.* Graham, 85 Pa. 91, 27 Am. Rep. 628.

Representation of officer within scope of authority.—The plaintiff deposited government bonds with the defendant bank for safe-keeping, and afterwards, at the request of the president of the bank, consented to their use by the bank, on the assurance that they should shortly be replaced. The cashier, who was directed to replace the bonds borrowed, converted them to his own use, without returning them. The president and other officers of the bank assured the plaintiff that his bonds had been appropriated by the cashier after being returned, and the plaintiff, relying on this statement, and supposing the bank not to be legally liable, executed on certain terms a release to the bank of all liability for his loss. The officers of the bank had no other authority for their assurance that

loss of a special deposit, through an act of the officer not within the scope of his employment.[63] But where the bank, after notice that its cashier, a person of small means, was speculating in stock, permitted such person to continue in office, the bank is liable for a special deposit appropriated by such officer.[64] Where notes, left with the cashier of a bank as a special deposit, without compensation, and unknown to, and without authority of, the directors, are lost, the bank is not liable.[65]

the bonds had been returned than the false statement of the cashier. Held, in an action for the value of the bonds, where the release was set up and put in evidence, that it was error to nonsuit the plaintiff. A bank, in such a case, can not escape the consequences of the false representation by proving that its officers were told the falsehood by some other officer or agent of the bank. The statements of the cashier, moreover, being in reference to the business of the bank, bound the latter. Gould *v.* Cayuga County Nat. Bank (N. Y.), 56 How. Prac. 505, affirmed in 21 Hun 293, 86 N. Y. 75.

Same degree of care as to own goods.—A bank acting as a depositary without special contract or reward, and exercising the same care which it bestows on its own goods, is not liable for the larceny of the deposit, even by its own officers. Scott & Bro. *v.* National Bank, 72 Pa. 471, 13 Am. Rep. 711.

Negligence of watchman.—A bank which, without reward, was a voluntary bailee of certain bonds, held not to be liable for their loss through the neglect of the watchman to obey the cashier's instructions to admit no person at a certain time. De Haven *v.* Kensington Nat. Bank, 81 Pa. 95.

63. A bank which received a special deposit for safe-keeping, though responsible therefor if it is delivered to a wrong person, or is lost or mislaid by the carelessness of an officer or employee thereof, in the course of business, is not responsible, proper care having been observed in the selection of officers and employees, if it is lost through any act of theirs not within the scope of their employment. White *v.* Commonwealth Nat. Bank, Fed. Cas. No. 17,544, 4 Brewst. 234.

64. In an action against private bankers to recover the value of bonds placed with them as a special deposit, and stolen by an absconding cashier, it appeared that, about a year before his flight, the managing partner became aware that he had been speculating on the board of trade, and, on charging him therewith, was told that he had speculated, but was not doing so then, and would not thereafter; that no efforts were made to verify his statements, or ascertain whether he had used property not his own; that about eight months later it was learned that he had been speculating again, but he stated that these were deals for friends, and were closed; that an examination of the books and securities, though not of the special deposits, was then made, but the cashier was retained in his position. Held, that this was gross negligence, and defendants were liable whether regarded as gratuitous bailees or bailees for hire. Preston *v.* Prather, 137 U. S. 604, 34 L. Ed. 788, 11 S. Ct. 162.

United States bonds deposited by plaintiff with defendant bankers as a special deposit were stolen by defendants' cashier, who had access to them for the purpose of cutting off interest coupons as they fell due. The year before the theft, defendants had notice that the cashier was speculating, but did not forbid his doing so. Held, that defendants were guilty of such gross negligence as to make them liable. Gray *v.* Merriam, 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. Rep. 172.

United States bonds deposited by plaintiff with the defendants, as a special deposit were stolen by defendants' cashier, who had access to them for the purpose of cutting off the interest coupons as they fell due. A year before the theft, defendants had notice that the cashier was speculating in grain, and they did not forbid his doing so. Held, that the defendants were guilty of such gross negligence as to make them liable, although they were mere gratuitous bailees. Gray *v.* Merriam, 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. Rep. 172, affirming 46 Ill. App. 337; following Preston *v.* Prather, 137 U. S. 604, 34 L. Ed. 788, 11 S. Ct. 162.

65. Lloyd *v.* West Branch Bank, 15 Pa. 172, 53 Am. Dec. 581.

§ 153 (6f) Liability of Bank for Loss by Theft.—For a bank to be liable for a special deposit which was stolen or embezzled, there must be proof of fraud or negligence.[66] Although certain bonds are deposited in a bank as a special deposit, yet if afterwards the bonds are held by the bank as collateral security for advances made and to be made to the owner, the liability of the bank for their loss through embezzlement by its cashier will not be that of a gratuitous bailee, but that of a pledgee.[67] Where a bank was broken into by burglars, and property belonging to it and to others was taken, it is competent for the bank to take measures for the recovery of its own; and if deemed best it might lawfully undertake to act for others jointly concerned; and want of proper skill and care in the performance of such an undertaking would be ground of liability in damages for failure.[68]

§ 153 (6g) Liability of Bank for Delivering Deposit to Wrong Person.—A bank is liable for the delivery of a special deposit to a wrong person.[69] This liability is not relieved by an order of court of a foreign

66. **Liability for loss by theft.**—Wylie *v.* Northampton Nat. Bank, 119 U. S. 361, 30 L. Ed. 455, 7 S. Ct. 268.

A bank is not liable in trover for the value of bonds which had been deposited therein, but which had been stolen therefrom. Dearbourn *v.* Union Nat. Bank, 58 Me. 273.

67. **Where special deposit changed to pledge.**—Prather *v.* Kean (U. S.), 29 Fed. 498.

68. **For failure to recover.**—Where the offer of bank officials, to a meeting of depositors, to appoint a joint committee to recover certain deposits lost by a bank robbery, is rejected by the depositors, and the bank proceeds to undertake the recovery on its own account, there is no evidence to sustain the allegation of a petition, brought against the bank by depositors, that the depositors were induced to abandon individual efforts at recovery by the bank's undertaking to act as the depositors' agent in the recovery. Wylie *v.* Northampton Nat. Bank, 119 U. S. 361, 30 L. Ed. 455, 7 S. Ct. 268.

69. **Delivery by officer in course of business.**—Where a bank has received from a depositor an article for safekeeping, it is responsible if the article is delivered to a wrong person by the fault of any officer of the bank in the course of the officer's business. White *v.* Commonwealth Nat. Bank, Fed. Cas. No. 17,544, 4 Brewst. 234.

Delivery to person holding receipt.—The widow and son of one F. sued defendant bank for the contents of a bank box, wrongfully delivered by the bank to R. and W. The contents of said box, amounting to $100,000, R. and W. were charged with having appropriated. Held that the bank, having delivered the box to the bearer (in whose name it had been deposited) of the ticket or card which called for the delivery of the box to "bearer," had legally complied with its contract, and was exonerated from all responsibility in the premises. Fisk *v.* Germania Nat. Bank, 40 La. Ann. 820, 5 So. 532.

Delivery without production of receipt.—A married woman left securities with a bank for safe-keeping, taking a receipt, which stated that they would be delivered on its surrender. Held, that the bank could not escape liability, as against the wife's administrator, by delivering the securities to the woman's husband at his request, without a production of the receipt, or of an order from the woman, she having left issue, though the husband was entitled to a distributive share in the proceeds of the securities, and though, after he received the securities from the bank, he invested their proceeds in property which passed to the wife's issue, of greater value than the proceeds. Ganley *v.* Troy City Nat. Bank, 98 N. Y. 487.

Delivery to person entitled to dividends.—Where a special deposit consists of stocks and bonds, a written authority, indorsed on the certificate of deposit, to pay to holder the dividends and coupons, is no authority for surrendering to him the stocks and bonds themselves. Chattahoochee Nat. Bank *v.* Schley, 58 Ga. 369.

Delivery to grantor instead of purchaser.—Plaintiff deposited the purchase price of land with a bank un-

country which had not seized nor brought the deposit into court and the

der an agreement with the grantor that the deposit was to be subject to the payment of a mechanic's lien claim against the property, if such claim was established in a suit then pending. The bank was informed of the agreement, but subsequently paid out all of the deposit on the order of the grantor. Held, that the agreement made the deposit special to the extent of the lien claim, and the bank was liable to the purchaser for the amount of the judgment in the lien suit, paid by the grantor. Fort *v.* First Nat. Bank, 82 S. C. 427, 64 S. E. 405.

Delivery to person having secret authority.—The bank is not liable for a special deposit which has been withdrawn by a person having authority from the depositor to withdraw and use the same, although, in suffering the withdrawal, the corporation, or its officers, acted without any knowledge that the authority had been conferred. Chattahoochee Nat. Bank *v.* Schley, 58 Ga. 369.

Delivery contrary to agreement unknown to bank.—Plaintiff agreed to loan M. $2,000 to pay the balance of the price of certain land, M. agreeing to deposit the amount in defendant bank as a special deposit, and to use the same only to pay for the land, and to give plaintiff a lien thereon as soon as the title was transferred. The money was deposited by M. in defendant bank to the credit of an account styled "Henry I. Moore, special," but the bank had no knowledge of the agreement between plaintiff and M., M. having overdrawn his general account, the amount of the special deposit, under agreement between M. and the bank, was transferred to his general account, and checked out, and not applied to the purchase price of the land. Held, that the style of the deposit was insufficient to put the bank on inquiry, and that its acts as to such deposit were not a conversion thereof as against plaintiff. Prosser *v.* First Nat. Bank (Tex. Civ. App.), 134 S. W. 781.

Delivery to agent of depositor.—The assistant cashier of a bank gave, at the request of an agent who kept on special deposit with the bank certain securities purchased with the agency funds, over which he exercised a plenary control, a receipt, showing that special deposit and the beneficial owner thereof, for the express purpose of sending same to such beneficial owner, as was done. It was held that the execution of the receipt or certificate in question, and its transmission by mail directly by the bank to the plaintiff, created the relation of bailor and bailee between her and the bank and made it an act of gross negligence for the bank to deliver, or dispose of, or appropriate the securities in question, on the sole request of the agent, and without the direct authority of the beneficial owner. Manhattan Bank *v.* Walker, 130 U. S. 267, 277, 32 L. Ed. 959, 9 S. Ct. 519.

Under the circumstances of the case, the receipt having been made out by the assistant cashier, and sent by him to the plaintiff, on the request of the agent made on her behalf, the statement in the receipt that the agent for the plaintiff had placed the securities with the defendant on special deposit, must be regarded as virtually a statement that the plaintiff, by her agent, had placed the securities with it on special deposit. Manhattan Bank *v.* Walker, 130 U. S. 267, 32 L. Ed. 959, 9 S. Ct. 519.

J., as agent, but without disclosing his principal, placed certain securities with defendant on special deposit. Afterwards he asked defendant for a receipt, showing the special deposit, to send to plaintiff. Defendant executed the receipt in the name of J., as agent for plaintiff, and sent it to plaintiff by mail. Defendant afterwards applied the proceeds of part of the securities to a debt of W. to it, for which J. was surety, and delivered the balance of the securities to J. with the knowledge that he intended using them to raise money for W. The power of J. as agent was limited to investing plaintiff's money for her exclusive use and benefit. Held, that defendant was liable for the loss of such securities. Manhattan Bank *v.* Walker, 130 U. S. 267, 32 L. Ed. 959, 9 S. Ct. 519.

Degree of care exercised.—In an action for the loss of bonds which had been deposited in a bank for safekeeping, and subsequently delivered by the bank to another, who represented himself to be the owner, it is irrelevant for the teller to testify that in this instance he exercised the same care and diligence as he did in the general transaction of the business of the bank. Lancaster County Nat. Bank *v.* Smith, 62 Pa. 47.

Negligence question for jury.—A

bank was not a party to the proceeding.[70]

§ 153 (6h) Liability for Transfer to Branch Bank.—Where the president of a bank transfers a special deposit to a branch bank without authority of the depositor, there is no implied promise by such president to pay the depositor the value of it in case it is lost by failure of such branch bank.[71]

§ 153 (6i) Action against Bank.—Where, in an action for the value of a note and mortgage, alleged to have been deposited with defendant bank for safe-keeping, defendant, in response to the allegation that it had received the securities and refused to deliver them, pleaded that its cashier had appropriated the papers and that they had been lost, without negligence on defendant's part, the action was for breach of contract, and not in tort, and hence it was not incumbent on plaintiff to affirmatively allege negligence; the burden of proof being on the defendant to establish that the loss occurred notwithstanding the exercise of ordinary care on its part.[72]

Evidence.—In an action against a bank for the value of notes left with it for safe-keeping, where plaintiff showed the deposit of the notes, and the failure of the bank, its cashier, or representatives to return them, a prima facie case was made out, and defendants were liable in the absence of a further showing of loss without negligence of the bailees, regardless of the degree of care required from them.[73]

Instruction.—Where, in an action against a bank for the loss of certain securities, the court required a finding that it was the custom of the defendant to receive special deposits, in order to entitle plaintiff to recover, it was not material that knowledge of the local custom of banks so to do was not proven.[74]

stranger, unknown to the officers of a bank, left bonds in care of the bank, retaining a list of minute description. The bonds were inclosed in an envelope, indorsed with his name and residence, and put into a vault with valuable securities of the bank and others. Sometime afterwards, a stranger, representing himself to be the person who deposited them, demanded the bonds from the teller, describing them, giving the name and address of the depositor accurately, but producing no other evidence of his identity. The teller delivered the bonds to him. Held, that the question whether the teller was guilty of negligence was a question for the jury. Lancaster County Nat. Bank *v.* Smith, 62 Pa. 47.

70. **Under direction of court.**—A purchaser in a contract for a purchase of real estate situated in a foreign country, deposited in a bank of such country a part of the price for delivery by the bank to the vendor on specified conditions, which were not performed. The vendor obtained a judgment in the foreign country against the purchaser to compel payment of the price, but the money deposited with the bank was not seized nor brought into court, and the bank was not a party to the action. Subsequent to the judgment the bank paid the money to the vendor pursuant to direction of the foreign court. Held, that the bank was liable for converting the deposit, and the purchaser could sue for the damages sustained. Banco Minero *v.* Ross (Tex. Civ. App.), 138 S. W. 224.

71. El Paso Nat. Bank *v.* Fuchs, 89 Tex. 197, 34 S. W. 206.

72. **Action against bank.**—Sherwood *v.* Home Sav. Bank, 131 Iowa 528, 109 N. W. 9.

73. Barnett *v.* First Nat. Bank, 148 Iowa 667, 127 N. W. 1012.

74. Sherwood *v.* Home Sav. Bank, 131 Iowa 528, 109 N. W. 9.

Question for Jury.—The failure of the bank to exercise ordinary care is a question for the jury.[75]

§ 153 (7) Preference of Depositor on Insolvency of Bank.—On the insolvency of the bank a special depositor may claim the amount of his deposit in preference of other creditors of the bank.[76]

§ 153 (8) Repayment and Revocation of Deposit.—In the case of a special deposit, the depositor has a right to the return of the particular money or thing deposited.[77]

Deposit Not Subject to Check.—A special deposit can not be checked upon, because it does not belong to the bank.[78]

75. **Question for jury.**—Where the directors of a bank, with knowledge that its cashier was speculating on a board of trade, that he had been, incurring expenses out of proportion to his salary, and that drafts on the bank's Chicago correspondent had been returned protested a year before prior to the cashier's discharge, whether the bank had exercised ordinary care in guarding securities deposited with it by plaintiff for safe-keeping, which were appropriated by the cashier, was for the jury. Sherwood *v.* Home Sav. Bank, 131 Iowa 528, 109 N. W. 9.

In an action against a bank for failure to deliver securities deposited for safe-keeping, evidence held to require submission to the jury of the question whether plaintiff deposited the securities with the bank or with the cashier personally. Sherwood *v.* Home Sav. Bank, 131 Iowa 528, 109 N. W. 9.

76. **Preference on insolvency of bank.**—San Diego County *v.* California Nat. Bank, 52 Fed. 59; Anderson *v.* Pacific Bank, 112 Cal. 598, 44 Pac. 1063, 32 L. R. A. 479, 53 Am. St. Rep. 228; First Nat. Bank *v.* Strang, 28 Ill. App. 325; Star Cutter Co. *v.* Smith, 37 Ill. App. 212; Schofield Mfg. Co. *v.* Cochran, 119 Ga. 901, 47 S. E. 208; Retan *v.* Union Trust Co., 134 Mich. 1, 95 N. W. 1006; State Bldg., etc., Ass'n *v.* Mechanics' Sav., etc., Trust Co. (Tenn.), 36 S. W. 967; McBride *v.* American R., etc., Co. (Tex. Civ. App.), 127 S. W. 229; Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103, affirmed in 95 Tex. 680, no op.; Dearborn *v.* Washington Sav. Bank, 13 Wash. 345, 42 Pac. 1107.

Money deposited in one bank to the account of another, with directions to the latter to pay the amount thereof by telegram to a third bank, is a specific deposit, which may be recovered in full, as against general creditors, where the bank to whose credit the money is deposited receives the same, but suspends before making payment as directed. Montagu *v.* Pacific Bank, 81 Fed. 602.

A deposit in a bank, under order of court, the money not being kept by the bank separate from other deposits, is not a special deposit; and the fact of the bank failing, and its assets coming to the hands of a receiver of the court, gives the clerk no right to claim the amount of such deposit in preference to the rights of other creditors of the bank. Otis *v.* Gross, 96 Ill. 612, 36 Am. Rep. 157.

Where the complaint sets forth facts sufficient to make a special deposit, a demurrer will not be sustained because it does not appear that there was continuously in the bank, from the time of the special deposit to the day the bank failed, a sum of money equal to the amount of the deposit. Moreland *v.* Brown, 30 C. C. A. 23, 86 Fed. 257.

77. **Repayment and revocation.**—Thompson *v.* Riggs (U. S.), 5 Wall. 663, 678, 18 L. Ed. 704; Marine Bank *v.* Fulton County Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785; Bank *v.* Wister, 2 Pet. 318, 7 L. Ed. 437; Scammon *v.* Kimball, 92 U. S. 362, 23 L. Ed. 483; State Nat. Bank *v.* Dodge, 124 U. S. 333, 346, 31 L. Ed. 458, 8 S. Ct. 521; First Nat. Bank *v.* Henry, 159 Ala. 367, 49 So. 97; McGregor *v.* Battle, 128 Ga. 577, 58 S. E. 28; Schofield Mfg. Co. *v.* Cochran, 119 Ga. 901, 47 S. E. 208; Shopert *v.* Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515; Ruffin *v.* Orange, 69 N. C. 498; Lilly *v.* Cumberland, 69 N. C. 300; Hodgin *v.* People's Nat. Bank, 125 N. C. 503, 34 S. E. 709; Bank *v.* Armstrong, 15 N. C. 519; Duncan *v.* Magette, 25 Tex. 245.

78. **Deposit not subject to check.**—Hodgin *v.* People's Nat. Bank, 125 N. C. 503, 34 S. E. 709; Bank *v.* Armstrong, 15 N. C. 519.

Demand for Repayment.—If a bank treats a special deposit as a part of its general funds, transferring it and putting it among them, the owner may sue in trover without a demand.[79] A demand for bonds specially deposited with a national bank is sufficient to sustain an action of trover therefor, though made after the examiner has taken possession of its assets after its suspension, where all special deposits have been left in charge of its officers, to be delivered to their owners when called for.[80]

By Whom Withdrawn.—The bank is not bound to restore or answer for a special deposit which has been withdrawn by a person having authority from the depositor to withdraw and use the same, though in suffering the withdrawal the corporation, or its officer, acted without any knowledge that the authority existed, or had been conferred.[81]

Time of Repayment.—If money is deposited with a bank for safekeeping only, there to remain intact until called for, the defendant has the right to call for the same at any time, and have delivered to him the parcel containing his money, without reference to the financial condition of the bank at the time that the demand for the special deposit is made upon it.[82]

Action for Recovery—Burden of Proof.—The burden is upon a depositor, suing to recover money deposited in a bank, to allege and prove a demand for repayment.[83]

Contingency Never Happened.—Where a sum of money is placed in a bank as a special deposit to meet a contingency of the bank which never happens, the repayment of the same by the receiver is valid.[84]

Direction Not Complied with.—Where money is deposited with the cashier of a bank under an agreement that it shall be invested by the bank in bonds and stocks, the bank is liable for the return of the money, no investment having been made.[85]

Repayment by Payment of Checks.—Where, under a previous agreement, a depositor sent a bank a special deposit in gold, the subsequent payment of checks and the striking of balances, which on each occasion were larger than the special deposit, does not necessarily extinguish the special deposit, if from the facts and circumstances the parties had a different intention, and such intention is a subject of inquiry for the jury.[86]

Right to Revoke—Deposit on Condition Not Performed.—One who made a special deposit, to be paid to certain parties on their joint check, is entitled to the deposit on demand, where the conditions of withdrawing it were not complied with by the parties named within sixteen months.[87]

79. First Nat. Bank *v.* Dunbar, 19 Ill. App. 558.

80. First Nat. Bank *v.* Strang, 28 Ill. App. 325.

81. Chattahoochee Nat. Bank *v.* Schley, 58 Ga. 369.

82. McGregor *v.* Battle, 128 Ga. 577, 580, 58 S. E. 28.

83. Newburger *v.* State Bank, 70 Misc. Rep. 46, 127 N. Y. S. 956.

84. Kinsela *v.* Cataract City Bank, 18 N. J. Eq. 158.

85. L'Herbette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354.

86. Chesapeake Bank *v.* Swain, 29 Md. 483.

87. Bank *v.* Harding, 1 Kan. App. 389, 41 Pac. 680.

Power to Revoke.—A deposit made in a bank by one person for the expressed purpose of meeting a check drawn on the bank by another, to the former's order, is special and revocable if not assented to or acted upon by the beneficiary.[88]

Sufficiency of Repayment.—Where a special deposit of gold coin was made before the passage of the legal tender acts, the depositor was entitled to the value of the gold, and, if paid in paper currency at a discount, to have the amount of the premium at which gold was sold over currency allowed to him.[89]

§ 153 (9) Proceedings to Recover Deposit.—Limitation of Actions.—In an action against a bank for breach of contract to deliver a special deposit on demand, the statute begins to run from the time of demand.[90] In an action for conversion, the statute begins to run from the time of the discovery of the fraud.[91]

Relief in Equity.—The deposit of money in a bank, to be held pending negotiations for the purchase of land, and to be returned to the depositor if the title to the land should be found not to be good, raises a trust relation, giving the chancery court jurisdiction of an action by the depositor to recover the money on its wrongful distribution by the bank to a third person after the conclusion of the negotiations for the purchase of the land.[92]

Pleadings.—A complaint in an action against a national bank, claiming that securities which belonged to plaintiff were stolen from the bank with other property belonging to the bank, and that the bank negotiated for the return of its own property, but allowed the thieves to retain the property of plaintiff, states a valid cause of action.[93] A complaint alleging that plaintiff made a special deposit with defendant bank, to be loaned on real estate, but that the bank loaned without any security, and knowing that the borrower was insolvent, is sufficient to support a recovery for fraud on the part of the bank in procuring the borrower, who was indebted to it, to execute a new note to plaintiff, and thereupon transferring the amount of the loan from the plaintiff's account to that of the bank.[94]

Burden of Proof.—A bank which received a special deposit for safe-

88. Star Cutter Co. *v.* Smith, 37 Ill. App. 212.

89. Kupfer *v.* Bank, 34 Ill. 328, 85 Am. Dec. 309.

90. **Limitation of actions.**—Where a bank receives securities for safe-keeping, to be surrendered on demand, the statute begins to run against the right of action for a breach of the contract to return them only from the time of a demand. Ganley *v.* Troy City Nat. Bank, 98 N. Y. 487.

91. Bonds were deposited with the assistant cashier of a bank for safe-keeping. Afterwards, as cashier, he pledged them for the bank's debts, and they were sold in payment thereof. The depositor was put off from time to time with promises to return the bonds, the interest being paid in the meantime. Held, that the statute of limitations did not begin to run against the depositor until he discovered the fraud. Hughes *v.* First Nat. Bank, 110 Pa. 428, 1 Atl. 417.

92. Mitchell *v.* Bank, 98 Miss. 658, 54 So. 87.

93. **Pleadings.**—Wylie *v.* Northampton Nat. Bank, 15 Fed. 428, 64 How. Prac. 456.

94. Larsen *v.* Utah Loan, etc., Co., 23 Utah 449, 65 Pac. 208.

keeping has the burden of showing that the loss thereof is not due to its fault.[95] But it has been held that the burden is on the plaintiff to prove gross negligence of the bank.[96]

Evidence.—Evidence of the cashier's representations at the time of the deposit as to safe-keeping of the deposit is inadmissible to vary a receipt stating the deposit was received at the risk of the depositor.[97] Evidence of a banking custom is admissible as bearing on the bank's power to accept a special deposit as well as the cashier's authority to act for the bank.[98] A demand on a bank for government bonds received by it as a special deposit, according to custom, and a refusal to deliver, with no other explanation than that it had no such bonds, is sufficient proof of loss by negligence to render the bank liable.[99] The fact that a bank lost, through a burglary, certain funds intrusted to it, is not, by itself, sufficient to prove negligence on the part of the bank.[1] Nor is the fact that property of the bank was

95. Burden of proof.—White *v.* Commonwealth Nat. Bank, Fed. Cas. No. 17,544, 4 Brewst. 234.

In an action against a bank for the value of a special deposit, where plaintiff introduced in evidence the receipt for the deposit, signed by defendant's cashier, proved the cashier's authority to receive special deposits, and a failure to deliver the same to plaintiff on his demand, the burden was cast on defendant to show that it exercised at least slight diligence in the care and keeping of the property. Merchants' Nat. Bank *v.* Carhart, 95 Ga. 394, 22 S. E. 628, 32 L. R. A. 775, 51 Am. St. Rep. 95.

In an action against a bank to recover the value of a special deposit embezzled by the cashier, the burden on defendant of showing that it was not guilty of gross negligence in retaining the cashier after it knew, or should have known, by the exercise of slight diligence, that he was unworthy of trust, was not sustained by proving that up to within three or more years previous to the embezzlement the cashier's reputation was good, and that he stood high in the community. Merchants' Nat. Bank *v.* Carhart, 95 Ga. 394, 22 S. E. 628, 32 L. R. A. 775, 51 Am. St. Rep. 95.

96. In an action by a depositor against a bank receiving a special deposit for safe-keeping without reward, to recover its loss, the burden is on plaintiff to prove gross negligence. First Nat. Bank *v.* Rex, 89 Pa. 308, 33 Am. Rep. 767.

97. Admissibility of evidence.—A., at the solicitation of the cashier of a bank, deposited with it, for safe-keeping, certain bonds, taking a receipt therefor, stating that they were received "for deposit in the vault of this bank at the risk of the depositor." Held that, in the absence of any evidence that the bank was accustomed to receive bonds for safe-keeping except at owner's risk, or that the directors had knowledge that bonds were left at the instance, request, or solicitation of the cashier, evidence of the latter's representations, at the time of the deposit, as to the safe-keeping of the bonds, was not sufficient to change the effect of the receipt so as to affect the bank. Comp *v.* Carlisle Deposit Bank, 94 Pa. 409.

98. Evidence of custom of bank.—Where, in an action against a bank for loss of securities intrusted to it for safe-keeping, the bank pleaded that the securities had been misappropriated by its cashier, without fault on its part, and that it was beyond the bank's powers so to receive the securities, evidence that it was the local custom of banks to receive valuable papers for customers was admissible as bearing on the bank's powers as well as on the cashier's authority so to act for the bank. Sherwood *v.* Home Sav. Bank, 131 Iowa 528, 109 N. W. 9.

99. Weight and sufficiency of evidence.—First Nat. Bank *v.* Zent, 39 O. St. 105, 4 Ky. L. Rep. 1013.

1. Evidence of loss alone.—Wylie *v.* Northampton Nat. Bank, 119 U. S. 361, 30 L. Ed. 455, 7 S. Ct. 268.

On the trial of an action brought to recover the value of certain government bonds, deposited by the plaintiff with defendants as gratuitous bailees, and which were stolen from the vault of their banking house by burglars, the

taken at the same time sufficient to show absence of gross negligence.[2]

§ 154. Actions by Depositors or Others for Deposits—§ 154 (1) In General.—Right of Action.—A suit for the balance of a deposit as per passbook will be maintained where there is no plea of warrant of amicable demand accompanied by a tender of the balance.[3] Where a bank receives certain securities, and gives credit for that amount as money received by it, and enters the same on the passbook, a defense that no money was received and that the securities were void can not stand where no offer is made to return the securities and they are in no way accounted for.[4]

Wrongful Payment to Third Party.—If a third party wrongfully obtains possession of money deposited with a national bank he is indebted to the bank for the same amount, and the bank is liable to the depositor.[5] And if the depositor owes such third party a portion of that sum it is proper for him to consent to an adjustment of accounts between the three parties, or, perhaps, for the jury to make such adjustment without his consent, and their doing so in no way invalidates the residue of the depositor's demand against the bank. Passing these mutual claims constitutes no ratification of the wrongful act of such third party in obtaining the money of the bank.[6]

Effect of Proving Claim before Receiver.—A party who brings an action to recover his deposit against a bank, that is afterwards restrained, by injunction, from further proceeding in its business, and whose property and effects are put into the hands of receivers, does not, by proving his claim before the receivers, but without receiving a certificate thereof, or

evidence tended to show that the plaintiff's bonds, when deposited, were inclosed in a tin box, fastened with a padlock, of which the plaintiff retained the key; that defendants had a small burglar-proof safe in their vault, in which they kept similar bonds of their own and other depositors, which were all inclosed in paper envelopes, but that plaintiff's box, and similar bonds of another depositor, also inclosed in a box, were kept in the vault, outside of the burglar-proof safe, such other depositor consenting that his box should be thus kept. It was held that these facts, if proved, would not be conclusive evidence of gross negligence, or a want of good faith. Griffith *v.* Zipperwick, 28 O. St. 388.

2. In an action to recover of a bank for the loss of a special deposit, the fact that property of the bank was stolen from the same place at the same time is not conclusive against the charge of gross negligence. Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582.

3. **No plea of warrant of amicable demand.**—McKnight *v.* Bank, 114 La. 289, 38 So. 172.

4. **Defense—Securities void.**—Where a bank accepts city warrants, for which it gives the city credit, it can not, after the expiration of two years, defeat an action by the city to recover the amount of the deposit by pleading illegality of the warrants, without having made an offer to return the same, or to account therefor. Tacoma *v.* German-American, etc., Sav. Bank, 15 Wash. 294, 46 Pac. 256.

5. **Third party wrongfully obtaining possession of deposit.**—International Bank *v.* Ferris, 18 Ill. App. 143.

6. **Adjustment of claims.**—International Bank *v.* Ferris, 18 Ill. App. 143.

Where money was wrongfully paid out by a bank to B., and F. to whom the money belonged sued the bank for it, and B. had paid out for F. or on his order certain sums, the application by the jury in reduction of F.'s demand of the moneys paid out by B. on F.'s account did not amount to an affirmance or ratification of the unauthorized act of B. in drawing F.'s money from the bank. International Bank *v.* Ferris, 18 Ill. App. 143.

taking a dividend, bar his right to proceed in the action.[7]

Application of Doctrine of Election of Remedies.—A depositor, who has sued the fraudulent receiptor of money paid on checks with forged indorsements, is not thereby precluded by the doctrine of election of remedies from bringing an action against the bank for the money thus paid out.[8]

Form of Action.—When bank notes are received in bank on general deposit, they become the property of the bank, and their amount is a debt payable on demand by the bank to the person entitled to it. If payment in such case be afterwards refused, the creditor's only remedy is an action of debt or assumpsit against the bank.[9] The value of money deposited with a bank may be recovered in an action for money had and received.[10] Confederate treasury notes,[11] Mississippi cotton notes and Mississippi military treasury notes between 1861 and 1862, were "money" so as to authorize the action.[12]

Remedy in Equity.—An ordinary action of debt will lie on behalf of the depositor as well as a suit on the common money counts. If the bank plead payment or discharge, the legal remedy is full and adequate. But there may exist fiduciary relation calling equity jurisdiction into play.[13] A corporation's remedy to recover from a bank money deposited therein in the name of the corporation's treasurer and alleged to have been wrongfully transferred by him to the bank by means of his checks as treasurer and converted by the bank is in equity and not at law; title to the deposit being in the treasurer and not in the corporation.[14] A bill in equity for an accounting will not lie, although the items on general deposit constitute a running account.[15] Where the complainant has not a plain, adequate, and complete remedy at law, equity has jurisdiction to afford relief.[16] Where an agent

7. **Effect of proving claim before receiver.**—Watson *v.* Phœnix Bank (Mass.), 8 Metc. 217, 41 Am. Dec. 500.

8. **Application of doctrine of election of remedies.**—August *v.* Fourth Nat. Bank, 48 Hun 620, 1 N. Y. S. 139, 15 N. Y. St. Rep. 956.

9. **Action of debt or assumpsit.**—Coffin *v.* Anderson (Ind.), 4 Blackf. 395.

10. **Form of action.**—Green *v.* Sizer, 40 Miss. 530.

11. **Confederate treasury notes.**—Confederate treasury notes, deposited with a banker in 1861 and 1862, were "money" at that time, and the value of the notes so deposited may be recovered in an action for money had and received. Green *v.* Sizer, 40 Miss. 530.

12. **Mississippi cotton notes—Mississippi military treasury notes.**—Mississippi cotton notes and Mississippi military treasury notes, deposited with a banker in 1861 and 1862, were "money" at that time, so as to authorize an action for money had and received to recover the value thereof. Green *v.* Sizer, 40 Miss. 530.

13. **Remedy plain, full and adequate.**—Foley *v.* Hill, 2 House of Lord Cas. 28.

14. **Fiduciary relation.**—State Bank *v.* Hawkeye Gold Dredging Co., 100 C. C. A. 626, 177 Fed. 164, reversing 157 Fed. 253.

15. **Bill for accounting.**—Foley *v.* Hill, 2 House of Lord Cas. 28. The remedy at law is perfect.

16. **Absence of legal remedy.**—Freeholders *v.* Newark City Nat. Bank, 48 N. J. Eq. 51, 21 Atl. 185.

A county collector deposited county funds in a bank to his credit as collector. After the expiration of his office, and his refusal to transfer the account to his successor, and the refusal of the bank to pay except on the order of the depositor, the board of chosen freeholders of the county brought a bill to have the deposit declared the

deposited money in bank for his principal, taking a certificate payable to himself, or order, which he delivered to the principal, but refused to indorse, the principal may sue the bank on the certificate, and hence can not maintain a bill in equity to compel the bank to pay, after the court has ordered the agent to indorse the certificate.[17]

Joint Action.—The rule is that where joint borrowers of money pledge separate property as security for the money, after the loan is satisfied, each becomes entitled to his own property; hence, where two persons make a joint deposit as security to cover losses in buying and selling stock and in addition each has a separate deposit which they agree shall also be liable as security, if these latter deposits are claimed by the banker to cover losses, the depositors can not bring a joint action to recover them.[18]

Stay of Proceedings Pending Another Suit.—Where a bank which is sued for a deposit, pleads an attachment of the deposit as the property of plaintiff's husband, and that the attachment suit is pending, no collusion or delay being shown, the suit for the deposit should be stayed until the disposition of the attachment suit.[19]

Duty of Bank to Defend Action by Third Person for Deposit.—A bank sued by an adverse claimant of money deposited with it is under no obligation, after having given the depositor timely notice of the proceedings and of the facts on which they are based, to make a strenuous and persistent defense, or to resort to any measures to prevent the cause being brought to trial according to the regular course of the court; the implied obligation of a bank to its depositor to protect the interests of the latter does not go beyond the requirement of good faith in refusing to surrender the moneys confided to its custody, except upon a lawful demand lawfully established.[20] Where the depositor and her attorney had ample notice of the suit against the bank to recover the deposit, and her agent was present at the trial, failure by the bank to notify such depositor's attorney at the time of the trial, such notice not having been requested, is no breach of duty or evidence of negligence on the part of the bank.[21] An omission to apply for a continuance, until such time as the depositor can appear and take part in the trial, is, under the circumstances set out above, not negligence on the part of the bank.[22] Nor is it the duty of the bank to move for a new trial, upon facts

property of the county, and for an order directing the bank to pay the same to complainants. The depositor demurred on the ground that complainants had a complete remedy at law. Held, that the implied contract arising from the deposit was that the bank would pay out the money at the depositor's order, and that, therefore, the bank owed no legal duty to complainants. Freeholders *v.* Newark City Nat. Bank, 48 N. J. Eq. 51, 21 Atl. 185.

17. **Remedy in equity.**—Fultz *v.* Walters, 2 Mont. 165.

18. **Joint action for separate deposits.**—Henelly *v.* Rittenhouse, 7 D. C. 76.

19. **Stay pending another suit.**—Ferguson *v.* Kansas City Bank, 25 Kan. 333.

20. **Duty of bank to defend action by third person for deposit.**—Detroit Sav. Bank *v.* Burrows, 34 Mich. 153.

21. **Failure to notify depositor's attorney at time of trial.**—Detroit Sav. Bank *v.* Burrows, 34 Mich. 153.

22. **Omission to apply for continuance.**—Detroit Sav. Bank *v.* Burrows, 34 Mich. 153.

communicated to it after the verdict, the burden of the defense being upon the depositor.[23]

§ 154 (2) Time to Sue and Limitations—§ 154 (2a) In General.—In some states there is no limitation to an action against a bank to recover money deposited therein,[24] while in others the statute of limitations applies to deposits as well as to other contracts and claims.[25] Under a law which provides that after the cause of action shall have accrued, "an action upon any agreement, contract or promise in writing" must be brought "within five years," and "an action upon a contract not in writing within three years,"[26] a passbook given by a bank to a depositor is not a written contract, but is a mere receipt for the amount deposited; and an action thereon is barred by the three-years limitation.[27] In some cases it is held that entries in a passbook constitute "evidences of indebtedness in writing," within the meaning of a statute of limitations.[28] And it makes no differ-

23. Failure to move for new trial.—Where a bank gives a depositor notice of a suit by a third person to recover the deposit, the failure of the bank to move for a new trial, upon facts communicated, after the verdict, to the bank officers and attorney, by the depositor's agent, who was present at the trial, is not negligence; since the burden of the defense rested on the depositor, and not on the bank; and, if a new trial was to be moved for, the duty of taking the necessary steps was upon such agent, instead of awaiting the action of a mere custodian having no interest in the dispute. Detroit Sav. Bank *v.* Burrows, 34 Mich. 153.

24. No limitation in some states.—Green *v.* Odd Fellows' Sav., etc., Bank, 65 Cal. 71, 2 Pac. 887; Mitchell *v.* Beckman, 10 Pac. C. L. J. 742; Code Civ. Proc., § 348 (Cal.).

25. Statute applies to deposits.—Where, in a suit against a bank on deposit and a promise to pay, it appears that the deposit and promise were made more than six years before suit brought, and that no new promise was ever made, the action is barred by the statute of limitations. Locke *v.* First Nat. Bank, 65 N. H. 670, 23 Atl. 529.

A depositor of an insolvent bank is barred by the statute of limitations where more than six years elapsed between the time when the bank stated and delivered his account showing an overdraft and the time when he presented his claim to the auditor appointed to distribute its funds. In re Penn Bank, 152 Pa. 65, 25 Atl. 310.

26. Section 18, Civ. Code of Kansas.

27. Passbook mere receipt.—Talcott *v.* First Nat. Bank, 53 Kan. 480, 36 Pac. 1066, 24 L. R. A. 737.

"In Davis *v.* Lenawee County Sav. Bank, 53 Mich. 163, 18 N. W. 629, the court observed that 'the bank book is no contract, and is only one of the means of indicating the state of the funds.' The reasons why a passbook given to the depositor, and its entries therein, do not constitute a contract in writing, are fully stated in the authorities cited. See, also, Bank *v.* Smith, 19 Johns. 116; Asher *v.* National Park Bank, 7 Alb. L. J. 43; Anderson *v.* Leverich, 70 Iowa 741, 30 N. W. 39. The case of Jassoy & Co. *v.* Horn, 64 Ill. 379, is not applicable, because in Illinois the statute provides that actions brought upon 'evidence of indebtedness in writing,' have the same limitation as actions upon contracts in writing. A passbook is 'evidence of indebtedness in writing,' but not a contract in writing. As against the ruling of the trial court, the case of Long *v.* Straus, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87, is cited. The action in that case was upon a written instrument in the nature of a certificate of deposit, properly signed by the party executing the same. It was more than a mere receipt, for it embodied an agreement." Talcott *v.* First Nat. Bank, 53 Kan. 480, 36 Pac. 1066, 24 L. R. A. 737.

28. As evidence of indebtedness in writing.—Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399.

"In Jassoy & Co. *v.* Horn, 64 Ill. 379, the action was assumpsit, and the evidence of indebtedness produced by the plaintiff, was a depositor's bank book, kept in the usual form. The bar of five years was pleaded, but it was held

ence that the action is against a stockholder instead of the bank itself.[29] Where the liability of the stockholder is primary, it being regarded as the liability of unincorporated partners, the stockholder occupies the same relation to the creditor as the bank, so far as the statute of limitations is concerned.[30] The written evidence of indebtedness is as binding upon the stockholder as upon the bank,[31] and the stockholder's liability ends at the same time that liability of the bank ends, and no sooner.[32] A statute which provides that the statute of limitations shall not apply to actions to recover money or other property deposited with a bank, applies to an action to recover a special deposit which the bank is authorized to loan on real-estate security as the agent of the depositor.[33]

Deposit Wrongfully Paid Third Person—Laches.—Where a bank wrongfully paid the depositor's money to a third party, the depositor having acquiesced for a large number of years in the action of the bank, could not afterwards sue for the amount of the deposits.[34]

that the account evidenced by the bank book was not barred until the lapse of 16 years after the cause of action accrued. In that case we said: 'The entries in the book were made by the bankers, and they charged themselves with the money deposited. They constituted "evidences of indebtedness in writing," within the meaning of the statute.'" Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399.

29. Same rule where action against stockholder.—An action by a depositor in a bank against a stockholder for the balance of his account, as evidenced by entries in his passbook, written by officers of the bank, is an action upon "evidences of indebtedness in writing," within the meaning of the statute of limitations. Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399.

"This court has frequently held that an action at law by a single creditor will lie against any stockholder of an insolvent corporation to enforce an individual liability created by its charter. Culver *v.* Third Nat. Bank, 64 Ill. 528; Corwith *v.* Culver, 69 Ill. 502; Tibballs *v.* Libby, 87 Ill. 142; Fuller *v.* Ledden, 87 Ill. 310; Arenz *v.* Weir, 89 Ill. 25; McCarthy *v.* Lavasche, 89 Ill. 270, 31 Am. Rep. 83; Buchanan *v.* Meisser, 105 Ill. 638; Thompson *v.* Meisser, 108 Ill. 359. In the last two cases the section of the charter of the People's Bank, of Bellville, under which suits were brought by creditors against the Meisser as a stockholder, was exactly the same as § 9 of the German Savings Bank of Chicago, as above quoted. The stockholders, with respect to their personal liability under such a provision as § 9, are in effect partners, and are liable as such, to the creditors of the corporation, to an amount equal to the amount of stock held by them respectively. The stockholders in the German Savings Bank assumed a primary liability to the creditors to pay the indebtedness of the bank to the amounts stated in § 9. When a debt was contracted by the bank the liability of those who were then stockholders, attached, and from that moment they became bound in the same manner and with like effect as if they had been doing business as partners unincorporated, except that the liability of each stockholder was limited to an amount equal to the amount of stock held by him. Fuller *v.* Ledden, supra; Thompson *v.* Meisser, supra." Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399.

30. Relation of stockholder to creditor.—Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399.

31. Evidence of indebtedness binding upon stockholder.—Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399, citing Conklin *v.* Furman, 8 Abb. Prac., N. S., 161, 57 Barb. 484.

32. When liability ends.—Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399.

33. Statute construed—Application to special deposit.—Larsen *v.* Utah Loan, etc., Co., 23 Utah 449, 65 Pac. 208.

34. Deposit wrongfully paid to third party—Laches.—During the War, a New Orleans bank paid the deposit of a country depositor to an officer of the

Time—Statutory Period.—The period of limitation depends altogether on the statute of the particular state and the decisions of the courts as to the nature of the deposits and the construction of the statutes with reference thereto.[35]

§ 154 (2b) Accrual of Cause of Actions.—If a deposit is general and not evidenced by any regular certificate of deposit, or other writing fixing the time of payment, the statute of limitations does not commence to run in favor of the bank until demand and refusal,[36] unless such demand be

United States army, under an order from the general commanding the department. Held, that the depositor, having acquiesced for nine years in the action of the bank, could not afterwards sue for the amount of his deposit. Bennett *v.* Mechanics', etc., Bank, 34 La. Ann. 150.

35. Time to sue—Statutory period.—In some states an action for money deposited in a bank is barred after the lapse of two years from demand and refusal. Thus, it is held in Texas that an action for money deposited in a bank is not barred by limitations, where less than two years have elapsed since demand for the money was made of the bank, or its receiver. Arnold *v.* Penn, 11 Tex. Civ. App. 325, 32 S. W. 353.

Again it is held that a passbook is a mere receipt and an action thereon is barred within three years. Talcott *v.* First Nat. Bank, 53 Kan. 480, 36 Pac. 1066, 24 L. R. A. 737.

36. Accrual of cause of action.—Munnerlyn *v.* Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159; Arnold *v.* Penn, 11 Tex. Civ. App. 325, 32 S. W. 353; Bank *v.* Merchants' Nat. Bank, 91 N. Y. 106.

And upon the ordinary deposit of money with the bank no action will lie until a demand has been made, by cheque or otherwise, certified or not, and hence the statute of limitations will not begin to run until after a refusal to pay on such demand. United States *v.* Wardwell, 172 U. S. 48, 53, 43 L. Ed. 360, 19 S. Ct. 86; Leather Mfg'rs Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 34, 32 L. Ed. 342, 9 S. Ct. 3.

And the rule thus announced in respect to ordinary deposits was held to apply in case of a certified cheque: "It is not meant to be asserted that the authorities are unanimous on this question; on the contrary, there is a diversity of opinion. It is sufficient for the purposes of this case to notice that the rule finds support in the decisions of many courts of the highest standing. It is not inconsistent with the proposition laid down by this court in Marine Bank *v.* Fulton County Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785, and often reaffirmed, Phœnix Bank *v.* Risley, 111 U. S. 125, 28 L. Ed. 374, 4 S. Ct. 322, and cases cited in opinion, to the effect that the relation between a bank and its depositor is that of debtor and creditor and nothing more, for that proposition throws no light upon the question when the debt of the debtor becomes due, and when the statute of limitations begins to run." United States *v.* Wardwell, 172 U. S. 48, 54, 43 L. Ed. 360, 19 S. Ct. 86.

No cause of action arises for the recovery of a demand bank deposit until demand for and refusal of payment has been made. Clark *v.* Farmers' Nat. Bank, 124 Ky. 563, 30 Ky. L. Rep. 738, 99 S. W. 674.

The right of action against a bank upon a general deposit does not accrue, nor does the statute of limitations begin to run against it, until a demand of payment, unless demand be waived or otherwise dispensed with. Branch *v.* Dawson, 33 Minn. 399, 23 N. W. 552.

The statute, as against a depositor in a bank, begins to run, not from the date of the deposit, but from the time of his making a demand for payment on the bank. Girard Bank *v.* Bank, 39 Pa. 92, 80 Am. Dec. 507.

The statute of limitations does not begin to run upon a general deposit until demand for repayment. Armstrong *v.* Warner, 21 Wkly. L. Bull. 136, 10 O. Dec. 434, affirmed in 49 O. St. 376, 31 N. E. 877. See also, Armstrong *v.* Law, 27 Wkly. L. Bull. 100, 11 O. Dec. 461.

There is no liability upon a bank to pay money upon deposit until there has been a demand therefor by the depositor; hence the statute of limitations does not begin to run in favor of the bank until there has been such demand and payment refused by the

deemed waived or otherwise dispensed with.[37] Demand can not be delayed until the right to the repayment of the deposit has become stale.[38] Whenever the bank refuses to pay the money on deposit to the depositor,[39] or order, the statute begins to run in the bank's favor.

Denial or Repudiation of Liability.—When the bank sets up in its own defense, not the want of demand or notice, but the fact of demand or notice, and the expiration of the period of limitation before suit brought, it is necessary for the bank to show something in the nature of a denial or repudiation of liability on its part.[40] A depositor may demand payment of his deposit and thereafter waive it or not press it, and unless the bank in some manner denies or repudiates its liability, the statute ought not to bar his right of action.[41] This is analogous to a trust, in which case the limitation does not run until the trustee has repudiated the trust and a knowledge thereof has come to the cestui que trust.[42]

Dispensing with Demand.—See post, "Dispensing with or Waiver of Demand," § 154.

Sufficiency of Demand.—See post, "What Constitutes Demand," § 154.

Fraud or Mistake.—The general rule is that actions for relief on the grounds of fraud or mistake shall not be deemed to have accrued until such fraud or mistake is discovered by the party,[43] and this is especially true where the cause of action is fraudulently concealed by the defendant,[44] or, as some say, until such fraud or mistake might have been discovered by

bank. Patterson *v.* Blanchard, 98 Ga. 518, 25 S. E. 572.

The statute does not begin to run against the recovery of funds deposited in a bank subject to call at any time until a demand is made for them. Starr *v.* Stiles, 2 Ariz. 436, 19 Pac. 225.

Where a demand is essential to entitle a depositor to be paid the amount of his deposit, the statute of limitations does not begin to run against him until the demand is made. Brown *v.* Pike, 34 La. Ann. 576.

37. Waived or otherwise dispensed with.—Branch *v.* Dawson, 33 Minn. 399, 23 N. W. 552.

38. Demand delayed—Stale demand.—Munnerlyn *v.* Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159.

39. The lapse of six years is not a bar to an action to recover a deposit. The statute of limitations only begins to run from the time payment is refused. Thomson *v.* Bank, 82 N. Y. 1.

40. Denial or repudiation of liability.—Dickinson *v.* Leominster Sav. Bank, 152 Mass. 49, 25 N. E. 12.

41. Dickinson *v.* Leominster Sav. Bank, 152 Mass. 49, 25 N. E. 12.

42. Analogous to case of trust.—Dickinson *v.* Leominster Sav. Bank, 152 Mass. 49, 25 N. E. 12, citing Davis *v.* Coburn, 128 Mass. 377; Merriam *v.* Hassam (Mass.), 14 Allen 516; Childs *v.* Jordan, 106 Mass. 321; Jones *v.* McDermott, 114 Mass. 400; French *v.* Merrill, 132 Mass. 525.

43. Fraud or mistake as ground of suit.—Cole *v.* Charles City Nat. Bank, 114 Iowa 632, 87 N. W. 671.

Allegation of fraud and mistake.—A petition stating that plaintiff executed a promissory note to defendant bank, and was given credit therefor in his bank book, but that this entry was not made in the proper place, but on a page where the account had been balanced, and that subsequently a party indebted to plaintiff deposited a sum equal to the face of the note to plaintiff's credit, and that plaintiff did not know of this payment, and was told by the president of defendant that no such payment had been made, and in his final settlement received no credit for one of the sums so deposited, charges both mistake and fraud. Cole *v.* Charles City Nat. Bank, 114 Iowa 632, 87 N. W. 671.

44. See Cook *v.* Chicago, etc., R. Co., 81 Iowa 551, 46 N. W. 1080.

the exercise of diligence,[45] which is a question for the jury.[46] Mistake alone is sufficient to save plaintiff's rights.[47]

§ 154 (2c) Accrual of Cause of Action on Certificate of Deposit.—Some of the cases hold that the difference between a certificate of deposit payable on demand and a promissory note being merely formal, the statute of limitations begins to run against such certificate from the date of the certificate.[48] Other cases, however, hold that upon a certificate of deposit, where the certificate expressly states that the amount deposited is payable on return of the certificate, or uses some similar expression, the object of deposit being the accumulation of interest, the statute of limitations can not be held to run until demand is actually made, and this is probably the better rule.[49] The statute of limitations is not set in motion against a certificate of deposit by the appointment of a receiver for the bank which issued it.[50]

§ 154 (2d) Action to Recover Interest.—Where money is deposited in a bank under an agreement that it shall bear interest, to be credited to the depositor semiannually, the statute of limitations will not begin to run against the depositor's right to recover such interest until he has notice that it is no longer credited to him.[51]

§ 154 (2e) Suspension of Operation.—When a bank refuses to honor its depositor's check, and thereupon a cause of action arises upon which the statute of limitations begins to run, the operation of the statute is not suspended by the payment thereafter of a check for another amount, which is not denied to be due.[52] The payment of interest on deposits by a banking firm after the withdrawal of a partner, and notice thereof to the depositor, does not affect the running of the statute of limitations as against the depositor's cause of action against such partner for deposits made before his withdrawal.[53]

New Promise.—A publication of unclaimed deposits remaining in a bank in New York, made in pursuance of the statute, is an acknowledgment of indebtedness, from which a new promise will be implied, to save the statute of limitations.[54]

45. See Humphreys *v.* Mattoon, 43 Iowa 556.

46. **Question for jury.**—Cole *v.* Charles City Nat. Bank, 114 Iowa 632, 87 N. W. 671.

47. **Mistake alone.**—Cole *v.* Charles City Nat. Bank, 114 Iowa 632, 87 N. W. 671; Baird *v.* Omaha, etc., Bridge Co., 111 Iowa 627, 82 N. W. 1020.

48. See post, "Certificate of Deposit," § 154 (3b).

49. See post, "Certificate of Deposit," § 154 (3b).

50. **Appointment of receiver.**—Riddle *v.* First Nat. Bank, 27 Fed. 503. See, also, post, "Certificate of Deposit," § 154 (3b).

51. **Action to recover interest.**—Marion Nat. Bank *v.* Fidelity, etc., Vault Co., 12 Ky. L. Rep. 492, 14 S. W. 371.

52. **Suspension of operation.**—Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743.

53. **Payment of interest — Action against withdrawing partner.**—Robinson *v.* Floyd, 159 Pa. 165, 28 Atl. 258.

54. **New promise.**—Adams *v.* Orange County Bank (N. Y.), 17 Wend. 514.

§ 154 (3) Conditions Precedent—§ 154 (3a) Deposit in General.—Necessity for Drawing Check.—Where a bank, on demand, refuses to credit a depositor with the amount of a check that he deposited with the bank, he need not draw a check on the bank before suing it for the amount of the deposited check.[55]

Return of Note.—Where a bank, without authority so to do, paid the note of a depositor and charged the same to his account, and the note was returned to the depositor with canceled checks, it was not necessary for the depositor to return the note to the bank before bringing an action for the amount paid.[56]

Demand as Condition Precedent.—In a case of a general deposit of money with a banker, a previous demand by the depositor, or some other person by his order, is indispensable to the maintenance of an action for the deposit, unless circumstances are shown which amount to a legal excuse.[57] Where moneys are deposited in a bank, the bankers reserving the right to demand sixty days' notice as a condition of payment, a suit brought without giving such notice is not prematurely brought, unless the bank demands the notice.[58] Where a bank accepts a deposit, and agrees to repay it at a certain future date, such contract being illegal, the depositor may bring an action to recover the amount without making any previous demand.[59]

Dispensing with or Waiver of Demand.—As this demand is for the

55. Refusing to credit amount of check.—Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. (6 Vr.) 588. See post, this section, catchline, "What Constitutes Demand."

56. Return of note.—Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

"The note was voluntarily put into his possession, with canceled checks, as a paper which had ceased to be of value. The delivery was not made in the execution of a contract in reference to the note, or as a part of any transaction to which the plaintiff was a party and with which the note was connected. It was not necessary for the plaintiff to rescind the contract, or to do anything to change the existing legal relations between the parties, before demanding his money and suing to recover it. If the defendant had demanded the note of the plaintiff, and he had refused to deliver it before bringing his suit, a different question would have been presented." Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

"In the nature of the transactions and the relations of the parties, the case differs materially from Northampton Nat. Bank *v.* Smith, 169 Mass. 281, 47 N. E. 1009, 61 Am. St. Rep. 283." Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

57. Demand as condition precedent.—Brahm *v.* Adkins, 77 Ill. 263; Tobias *v.* Morris, 126 Ala. 535, 28 So. 517; Johnson *v.* Farmers' Bank (Del.), 1 Har. 117; Adams *v.* Orange County Bank (N. Y.), 17 Wend. 514; Bank *v.* Merchants' Nat. Bank, 91 N. Y. 106; Catlin *v.* Savings Bank, 7 Conn. 487.

An express demand is necessary to entitle the depositor to recover 20 per cent per annum from the Bank of Missouri, as authorized by its charter, for failing to pay a deposit. Bank *v.* Benoist, 10 Mo. 520.

Where a bank receives money on deposit from a customer, and a balance is struck in his book in his favor, suit can not be brought for the balance without a demand first made on the bank. Downes *v.* Bank (N. Y.), 6 Hill 297.

A noninterest drawing deposit does not become due until demand, in the absence of circumstances rendering demand unnecessary. Sickles *v.* Herold, 149 N. Y. 332, 43 N. E. 852.

58. Reservation of right to demand notice.—Arnold *v.* Seifert, 76 Ill. App. 666.

59. Demand not necessary.—White *v.* Franklin Bank (Mass.), 22 Pick. 181.

protection of the bank, the bank may waive it, or it may be otherwise dispensed with.[60] The rule requiring demand on banks before suit for deposits does not extend to cases where the bank has disclaimed liability or the demand would be manifestly futile.[61] A usage, established by proof, that current deposits made in a bank, and the proceeds of notes and drafts placed for collection, are to be paid to the depositor, on demand, at the counter of the bank, would prevent the running of the statute of limitations against such depositor until payment of his claim had been refused, or some act done, with his knowledge, dispensing with the necessity of such demand.[62] A notification by a bank to a depositor that his claim, which is payable on demand, will not be paid on demand at the counter, dispenses with the necessity of a demand as preliminary to a right to sue.[63] A demand is not necessary to entitle a party to recover money deposited with the bank, after the bank had rendered an account claiming it as its own.[64] And where a bank, by words or conduct, denies the right of the depositor, as by paying the deposit to, or by placing the deposit to the credit of, a third person, the banker becomes presently liable to action, without formal demand.[65] Where a bank positively and repeatedly denies one's right to make any claim upon it in respect of currency and checks mailed by him to it for deposit, the depositor need not make demand before bringing suit on account of such deposit.[66] But, passing plaintiff's deposit book back to him after writing up his account, the attention of the parties not being directed to an overcharge therein, does not constitute a refusal of payment amounting to a waiver of demand on defendant's part.[67]

Where Forged Check Paid.—Where a depositor had drawn a check which was paid to some one other than the payee on the forgery of the latter's indorsement, a demand for payment of the canceled check is not a

60. Waiver.—Dickinson *v.* Leominster Sav. Bank, 152 Mass. 49, 25 N. E. 12; Townsend *v.* Webster, etc., Sav. Bank, 143 Mass. 147, 9 N. E. 521.

61. Disclaimer of liability.—Pratt *v.* Union Nat. Bank, 79 N. J. L. (50 Vr.) 117, 75 Atl. 313.

62. Usage—Knowledge of act dispensing with demand.—Planters' Bank *v.* Farmers', etc., Bank (Md.), 8 Gill & J. 449.

63. Notification of refusal to pay.—Farmers', etc., Bank *v.* Planters' Bank (Md.), 10 Gill & J. 422.

64. Account rendered—Claim set up by bank.—Bank *v.* Benoist, 10 Mo. 520.

65. Denial of right by word or conduct.—Where the avails of a certain draft were deposited with a banker, and no demand was made for the payment thereof by the assignor before or by the assignee after the assignment of the claim, but the banker denied the right of the depositor, as by placing the deposit to the credit of a third person, it was held that he thereby became presently liable to an action for the amount, without a formal demand. Carroll *v.* Cone (N. Y.), 40 Barb. 220.

Where a bank upon an adverse claim having been made to certain money deposited by one of its customers in his own account, pays the claimant the amount of his claim out of the funds standing to the credit of its customer, and charges against the customer the amount thus paid, the customer has an action against the bank for the amount thus appropriated, without previous demand. Jaselli *v.* Riggs Nat. Bank, 36 App. D. C. 159.

66. Denial of right of claim.—Miller *v.* Western Nat. Bank, 172 Pa. 197, 33 Atl. 684.

67. Return of deposit book—Failure to call attention to overcharge.—Goodell *v.* Brandon Nat. Bank, 63 Vt. 303, 21 Atl. 956, 25 Am. St. Rep. 766.

condition precedent to the depositor's suit for his deposit.[68]

Suspension, Discontinuance or Insolvency.—When a banker suspends business, and closes his doors against depositors and creditors, and discontinues banking operations, he waives the necessity for a demand on him on the part of his creditors or depositors before suing for their money.[69] The insolvency of the bank or a stoppage of payment dispenses with the necessity of demand, and all deposits become due and payable forthwith.[70] A demand need not be shown in an action by a depositor against a bank which has failed, where it affirmatively appears that it would have been fruitless had it been made.[71] The insolvency of a banking corporation will not be inferred from the appointment of a temporary receiver pending an action for its dissolution, instituted by the superintendent of banking without the consent of the bank officers, so as to excuse demand on the part of the depositors before suing for their deposits.[72]

What Constitutes Demand.—It seems that to constitute in law a demand for payment of a deposit, it must be such as to cause payment of the deposit or a denial or repudiation of liability, so understood by the parties.[73] In an action to recover the balance of a deposit, where defendant claimed payment, the depositor's production of his bank book as a prerequisite to a valid demand, essential to a right of action would have been a useless thing, the doing of which the law never requires.[74] In an action to

68. **Where forged check paid.**—Pratt *v.* Union Nat. Bank, 79 N. J. L. (50 Vr.) 117, 75 Atl. 313.

69. **Suspension or discontinuance of business.**—White *v.* Meadowcroft, 91 Ill. App. 293.

A discontinuance of banking operations, dispenses with the necessity of a demand for a deposit if such fact is known to the depositor. Planters' Bank *v.* Farmers', etc., Bank (Md.), 8 Gill & J. 449.

Suspension of specie payment and discontinuance.—Planters' Bank *v.* Farmers', etc., Bank (Md.), 8 Gill & J. 449.

The statute of limitations begins to run against a depositor in a bank, which has suspended specie payments and discontinued banking operations, from the time when he obtains knowledge of such facts. Planters' Bank *v.* Farmers', etc., Bank (Md.), 8 Gill & J. 449; Union Bank *v.* Planters' Bank (Md.), 9 Gill & J. 439, 31 Am. Dec. 113.

Where a bank suspends payment, and closes its doors against its creditors, a party who has deposited money therein may maintain an action to recover the amount of his deposit without first making a demand of payment. Watson *v.* Phœnix Bank (Mass.), 8 Metc. 217, 41 Am. Dec. 500.

70. **Insolvency or stoppage of payment.**—Armstrong *v.* Warner, 21 Wkly. L. Bull. 136, 10 O. Dec. 434; Armstrong *v.* Law, 27 Wkly. L. Bull. 100, 11 O. Dec. 461.

71. **Failure of bank.**—Wheeler *v.* Commercial Bank, 5 Idaho 15, 46 Pac. 830.

72. **Insolvency not inferred.**—Sickles *v.* Herold, 149 N. Y. 332, 43 N. E. 852.

73. **What constitutes a demand.**—In an action for money deposited with a bank there was evidence that the deposit book of plaintiff had been surrendered to the bank, and that one who had formerly been treasurer of defendant came to the bank one day with the guardian of plaintiff, called for the deposit book, and explained to the guardian the payments made thereon; but it did not appear that the liability of the bank was discussed. Held, that it could not be said as a matter of law that such a demand had been made upon the bank for the payment of such deposits, or that the bank had so repudiated its liability therefor, as to set the statute of limitations in operation. Dickinson *v.* Leominster Sav. Bank, 152 Mass. 49, 25 N. E. 12.

74. **Production of bank book not essential when payment alleged.**—Donijanovic *v.* Hartman (Mo. App.), 152 S. W. 424.

recover money deposited in defendant bank to plaintiff's credit, and which he had not received because of mistake in settlement, the tender of a receipt or check is not a necessary part of the demand required as a condition precedent to a cause of action.[75] Where a receiver of a depositor on his appointment writes the bank, asking that the amount of the deposit be sent to him, and receives in answer a letter from the bank's attorneys that the bank is itself a creditor of the depositor in an amount exceeding the deposit, there is sufficient demand and refusal to entitle the receiver to sue for the deposit.[76] Where a depositor has on deposit a certain sum to his credit, a check for a greater amount is insufficient as a demand to support an action for the money on deposit.[77] A depositor's demand upon his bank for a sum in excess of that actually on deposit to his credit does not, in a subsequent action by him for the full amount demanded, in which it appears that most of it had already been paid to him, warrant a verdict in his favor for the actual balance.[78] Where a trustee has deposited trust funds in bank as "agent," the bank knowing that they are trust funds, a check in favor of a third person, signed by the trustee as agent, and presented by the payee, is a sufficient demand for the repayment of the deposit to justify a suit by the trustee to recover the deposit.[79]

Drawing and Presentation of Check as Demand.—The mere drawing of a check does not constitute a demand sufficient to put the statute of limitations in operation.[80] And the certification of such check by the drawee bank does not alter the rule.[81] However, the giving of a check to

75. Tender of receipt or check.—Cole *v.* Charles City Nat. Bank, 114 Iowa 632, 87 N. W. 671, citing McEwen *v.* Davis, 39 Ind. 109, as not supporting defendant's contention. See ante, "Deposit in General," § 154 (3a).

76. Demand by receiver of depositor.—Delahunty *v.* Central Nat. Bank, 37 App. Div. 434, 56 N. Y. S. 39.

77. Check for amount greater than deposit.—Aurora Nat. Bank *v.* Dils, 18 Ind. App. 319, 48 N. E. 19.

78. Where action for full amount demanded.—Hales *v.* Seamen's Bank, 28 App. Div. 407, 51 N. Y. S. 140.

79. Where trustee deposits funds as agent.—Munnerlyn *v.* Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159.

80. Drawing check as demand.—In an action to recover the balance of a deposit, it was shown that plaintiff had, more than seven years before, drawn a check therefor in favor of a third person, and that the check had been paid by defendant on a forged indorsement. When the forgery was discovered, seven years later, plaintiff made demand for the amount, and, upon refusal, brought this action. Defendant set up the statute of limitations. Held, that the mere drawing of the check did not amount to a demand, and that, as plaintiff's right of action did not accrue until demand, the action was not barred. Bank *v.* Merchants' Nat. Bank, 91 N. Y. 106.

81. Effect of certification.—The A. bank had a deposit account with the B. Bank, and in 1870 drew a check payable to the order of H. The teller of the B. Bank certified the check, and on the following day the B. Bank paid it upon a forged indorsement of H.'s name. The amount was charged to the A. Bank, to which bank the check was delivered up as a voucher, and the passbook was balanced. The A. Bank discovered the forgery in January, 1877, and in the following June tendered the check to the B. Bank, and demanded payment, and during the same year brought suit. Held, that the suit was not barred by the statute of limitations, that the statute began to run from the time of the demand, in June, 1877, and that the certification did not alter the case. Bank *v.* Merchants' Nat. Bank, 91 N. Y. 106; S. C., 48 N. Y. Super. Ct. 1.

the payee, although it does not operate as an assignment, or give him the right to maintain an action against the drawee because of want of privity, yet it authorizes him, or some person taking the check, to make a demand of payment,[82] and the refusal to pay on presentation of the check, which presentation is equivalent to a demand of payment, gives to the drawer a right of action, in case he has funds in the bank to meet the check, and the refusal to pay is without authority.[83] It is to be presumed, at least so far as plaintiff is concerned, that the person presenting the checks has the right so to do, and nothing is shown to the contrary. Such being the case, the bank becomes liable, when presentation is made, and payment of the same refused for the amount of each check.[84] A demand for the whole balance on deposit is not requisite in order to enable the depositor to maintain suit against the bank. The implied contract between a bank and its depositor is that it will pay the deposits when and in such sums as are demanded. Whenever a demand is made, by presentation of a genuine check in the hands of a person entitled to receive its amount, for a portion of the amount on deposit, and payment is refused, a cause of action immediately arises.[85] For the balance, no suit can be brought until demand is made.[86] In other words, the depositor has the election to make the whole claim payable at one time by demanding the whole; or in installments, by demanding portions thereof; and it would be a novel doctrine that, when the claim has thus been made payable in installments, no action can be brought for an installment which has become due and payable, because there is a residue of the claim not due.[87] Where plaintiff closed his account with defendant bank, and drew his check for the balance then standing to his credit, such check is a demand only for the amount named therein, and not for an amount with which he had theretofore been charged by mistake, and the

82. Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743, citing Bank *v.* Merchants' Nat. Bank, 91 N. Y. 106; Van Alen *v.* American Nat. Bank, 52 N. Y. 1, citing Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897.

83. Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743.

Upon refusal of a bank to honor its depositor's check, a cause of action in his favor arises, without demand, for so much of the deposit, and the statute of limitations begins to run thereon immediately. Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743; followed in Citizens' Nat. Bank *v.* Importers', etc., Bank, 119 N. Y. 195, 23 N. E. 540.

84. Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743.

85. Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743.

86. Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743.

87. Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743.

"The payment of the two checks referred to did not authorize the conclusion that the defendant intended to recognize the fact that the other checks were still a subsisting indebtedness, against which the statute had not commenced to run; but such payments were entirely separate and independent transactions, having no reference whatever to the checks in suit. Under the facts there is no ground for claiming that the payment of the checks of December 2, 1872, and March 27, 1873, was a recognition of any indebtedness beyond them, and operated as a revival of the debt, and prevented the statute from running." Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743.

statute does not begin to run from such time as to such latter amount.[88]

Proof of Demand.—The plaintiff's testimony that he had demanded payment of his deposit is sufficient proof of a demand, where such testimony is uncontradicted.[89] In a suit against a bank to recover the amount of money deposited therein, the allowance of the plaintiff's claim by the receivers of the bank, appointed after the suit was commenced, furnishes sufficient proof of the plaintiff's demand.[90]

§ 154 (3b) Certificate of Deposit.—The decisions upon the question whether upon a certificate of deposit made payable "on return of this certificate" or "on presentation of this certificate," etc., demand of payment must be made before an action can be brought, seem to be in conflict. In some of the cases it is held that the difference between a certificate of deposit payable on demand and a promissory note payable on demand, being merely formal, the statute of limitations begins to run against such certificate from the date of the certificate.[91] The cases which hold that a demand is not a condition precedent to a recovery base the decision on the principle that the bank, like the maker of the note, is obliged to find out the payee and pay the certificate.[92] On the other hand it is held that, where the

88. **Demand for amount charged by mistake.**—Goodell *v.* Brandon Nat. Bank, 63 Vt. 303, 21 Atl. 956, 25 Am. St. Rep. 766.

89. **Plaintiff's uncontradicted testimony.**—Cole *v.* Charles City Nat. Bank, 114 Iowa 632, 87 N. W. 671.

90. **Proof of demand.**—Watson *v.* Phœnix Bank (Mass.), 8 Metc. 217, 41 Am. Dec. 500.

91. Brummagim *v.* Tallant, 29 Cal. 503, 89 Am. Dec. 61; Ruff *v.* Bull (Md.), 7 Har. & J. 14, 16 Am. Dec. 290; Fells Point Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603.

A certificate of deposit in the ordinary form issued by a bank is, in substance and legal effect, a promissory note. It is due immediately, and no actual demand is necessary in order to set the statute of limitations running. Mitchell *v.* Easton, 37 Minn. 335, 33 N. W. 910.

In Tripp *v.* Curtenius, 36 Mich. 494, 24 Am. Rep. 610, it is said to hold such instruments to be in legal effect promissory notes payable on demand, and yet not apply the principle applicable to demand promissory notes, either because of the peculiar form of the instruments, or because issued by a firm engaged in banking, would be to create a distinction unsound in principle, and one not warranted by any reason or necessity. This case cites Brummagim *v.* Tallant, 29 Cal. 503, 89 Am. Dec. 61.

"It has been held invariably that the statute commences to run against a promissory note payable on demand from the date of the note, and that no special demand is necessary to put it in motion; which follows, from the rule, that no demand before suit is required in order to give a right of action upon a demand note. (Angell on Lim., Chap. XI.)" Brummagim *v.* Tallant, 29 Cal. 503, 89 Am. Dec. 61.

"This latter rule is illogical and undoubtedly obnoxious to the criticism of Mr. Chief Justice Bronson in Downes *v.* Phœnix Bank, 6 Hill 297, where he said: 'We are reminded that when the promise is to pay on demand, the bringing of the action is a sufficient demand. If that were a new question, I think the courts would not again fall into the absurdity of admitting that there must be a demand, and still holding that a suit may be commenced without any prior request. They would either say that no demand was necessary, or else that it was a condition precedent to the right of action. It is an anomaly in the law that the breach of the defendant's contract should be made out by the very fact of suing him upon it.' But such is the rule, and the power to change it has long since passed from the courts." Brummagim *v.* Tallant, 29 Cal. 503, 89 Am. Dec. 61.

92. Hunt *v.* Divine, 37 Ill. 137; Cate *v.* Patterson, 25 Mich. 191.

certificate is payable "on the presentation of the certificate properly endorsed," or where it uses some other similar expression no action can be maintained thereon until special demand has been made.[93] It is also held that, on a certificate of deposit "payable with interest on demand on return of the same," the statute of limitations begins to run only from the time of demand actually made.[94] And it is well settled in New York that the statute of limitations begins to run only where there is an actual demand for payment in due form, and that such demand must precede suit.[95] Certificates of deposit are designed to subserve with convenience the purpose of temporary investments of money, and whether the expression used in them as to payability be "on return of this certificate" or "on presentation of this certificate" or "return or surrender of this certificate properly indorsed," the meaning is substantially the same; that is to say, that the certificate is payable when payment is demanded by the party entitled to receive the money and who avouches the fact by producing the instrument with evidence of title.[96] Though a certificate of deposit recites that it is payable "on its return properly indorsed," action thereon by the payee is not premature, notwithstanding it is not indorsed; the certificate having been presented and payment demanded by the attorney of the payee for and on his behalf, and defendant having refused payment on the ground that he was not a member

93. A certificate of deposit issued by a bank, and payable to the order of the depositor "on return of this certificate properly indorsed," is not due until payment thereof is actually demanded. Hillsinger *v.* Georgia R. Bank, 108 Ga. 357, 33 S. E. 985, 75 Am. St. Rep. 42.

A certificate of deposit was issued by a bank for a certain sum, subject to the order of the depositor, at a certain date, payable on return of the certificate. Held, in an action on said certificate against the bank, brought by an assignee, that there could be no recovery without proof of an actual demand and refusal of payment. Brown *v.* McElroy, 52 Ind. 404.

No action can be maintained on a certificate of deposit "Payable on demand and on presentation of the certificate," without showing such demand and presentation. Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377.

94. Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603.

95. Pardee *v.* Fish, 60 N. Y. 265, 19 Am. Rep. 176; Munger *v.* Albany City Nat. Bank, 85 N. Y. 580; Payne *v.* Gardiner, 29 N. Y. 146. This is laid down by Daniel in his work on Negotiable Instruments, vol. 2, § 1707a, as being the better opinion.

Though certificates of deposit in a bank are payable on demand when properly indorsed, the bringing of an action against the bank for the amount of such certificates is not a sufficient demand to entitle the depositor to recover, since the demand must be by presentation of the certificates properly indorsed. Judgment, 28 App. Div. 623, 51 N. Y. S. 1140, affirmed in Cottle *v.* Marine Bank, 166 N. Y. 53, 59 N. E. 736.

No right of action arises on a certificate of deposit in the ordinary form, issued by a bank, until demand of payment has been made. Howell *v.* Adams, 68 N. Y. 314; Munger *v.* Albany City Nat. Bank, 85 N. Y. 580.

No action can be maintained against a bank on a certificate of deposit until after payment has been demanded and refused, and hence the statute of limitations does not begin to run against it until after demand. Howell *v.* Adams, 68 N. Y. 314.

96. Meaning of terms as to payment. —Cornwall *v.* McKinney, 12 S. Dak. 118, 80 N. W. 171.

The statute does not begin to run on a certificate of deposit payable to the order of the depositor on the return of the certificate until demand made. McGough *v.* Jamison, 107 Pa. 336.

of the banking firm when it was issued.[97]

Sufficiency of Demand.—Where a bank offered to pay, in its own bills, a certificate of deposit when presented for payment, it put its own construction on the sufficiency of the demand and can not afterwards say that the depositor should have accompanied his demand with a check.[98]

§ 154 (4) Parties—Who May Sue.—Where a trustee deposits trust moneys in a bank to his credit as agent, he has a right to demand payment of such deposit, and this being true he can recover such deposit from the bank by suit, the bank having refused payment upon proper demand.[99] Where a fund is deposited by a general agent, or for him or for his use, in his name as agent and subject to his order, the bank by accepting such a deposit assumed the obligations incident thereto, and it follows that such agent has a sufficient interest therein to maintain a suit therefor in his own name, as the real party in interest.[1] The words of agency, might, for convenience, be rejected as mere description of the depositor.[2] The rule may be stated in this language: "If an agent acts for me and on my behalf, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless you can also show that he is prohibited from carrying on that action by the person on whose behalf the contract was made." The action

97. **Payable "on its return properly indorsed."**—Cornwall *v.* McKinney, 12 S. Dak. 118, 80 N. W. 171.

"But a reasonable interpretation of this contract is that no indorsement was necessary, except upon a transfer by Charles Thatcher. It was only necessary that it should be properly indorsed, or that his order in writing to pay the money should accompany the certificate when demand was made by some other person than Charles Thatcher himself—some person to whom he had assigned or sold the certificate—that the bank might know upon presentation that such holder had a right to demand the fund. Emerson *v.* Thatcher, 6 Kan. App. 325, 51 Pac. 50." Cornwall *v.* McKinney, 12 S. Dak. 118, 80 N. W. 171.

98. **Necessity of drawing check.**—A bank of issue received its own notes as a deposit, and issued a certificate therefor, the notes passing at that time at about 50 cents on the dollar. The depositor afterwards requested payment in specie, which was refused, the bank at the same time offering to pay in its own notes. Held, that after offering to pay, the bank could not afterwards object that there should have been a check presented with the certificate. Bank *v.* Wister, 2 Pet. 318, 7 L. Ed. 437.

99. **Right of trustee to sue.**—Munnerlyn *v.* Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159.

1. **Agent—Deposit for his use.**—Code Civ. Proc., § 74, provides "that every action must be prosecuted in the name of the real party in interest," except as otherwise provided in § 76, which provides that a trustee of an express trust "may sue without joining with him the person for whose benefit the action is prosecuted; and the trustee of an express trust, within the meaning of this section, shall be construed to mean a person with whom or in whose name a contract is made for the benefit of another." Held, that a general agent of a mining company, who deposited money with a bank in his own name as "agent," subject to his check, and whose drafts and checks so drawn were honored by the bank, could sue the bank in his own name for a balance alleged to be due on account. McLaughlin *v.* First Nat. Bank, 6 Dak. 406, 43 N. W. 715.

2. **Words of agency rejected.**—McLaughlin *v.* First Nat. Bank, 6 Dak. 406, 43 N. W. 715; Considerant *v.* Brisbane, 22 N. Y. 389.

might be maintained by the agent when the promise was to him.[3]

Assignee.—One having a sufficient interest in funds deposited in a bank to maintain an action against the bank therefor may transfer his interest so as to enable his assignee to maintain such action.[3a]

Party Having Beneficial Interest.—Where money is deposited in a bank in which another has a beneficial interest, it is doubtful whether he can maintain an action at law for the money, and it is certain he can not do so unless he shows clearly that the money belongs to him and that he is entitled to receive it.[4] When an officer charged with the collection and custody of public money unlawfully deposits the same in a bank for safe-keeping, and the same is subject to the check or demand of such officer, the state, county, or other municipal body for whom such officer acted may maintain an action in its own name to recover such deposit.[5]

3. McLaughlin *v.* First Nat. Bank, 6 Dak. 406, 43 N. W. 715, citing Sargent *v.* Morris, 3 Barn. & Ald. 277.

3a. Assignee.—McLaughlin *v.* First Nat. Bank, 6 Dak. 406, 43 N. W. 715.

4. Party having beneficial interest.—Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

"In the case of Sims *v.* Bond, 5 Barn. & Adol. 97, decided in 1833—a suit against a banker by one who claimed to be the real owner of money deposited by another—the court said the rule that when the agent of an undisclosed principal makes a contract not under seal an action may be maintained thereon either in the name of the principal or the agent, was generally acted upon in sales made by factors, agents, or partners, and added: 'But we do not say that when a person lends money nominally on his own account, but really on account of and as the loan of another, the real lender may not sue for the money. But where the money is lent by another in his own name, the plaintiff who alleges that he was really the lender must prove that fact distinctly and clearly. He must show that the loan, though nominally that of another, was really intended to be his own.'" Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

"In Tassell *v.* Cooper, 9 C. B. 509 (decided in 1850), the court held that a bailiff who had deposited his principal's money in bank, and was indebted to the principal, could recover from the bank notwithstanding that the principal had notified the bank that the fund was his, and not to pay it to the bailiff. The reason assigned was that, when a deposit is made by a person to his own credit with a bank, it is not competent for a third party to interpose, and say that the bank really contracted with him." Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

"In Jackson *v.* Bank, 10 Pa. 61, the court held that a bank which received money on deposit in the name of a person who was an agent, and paid the agent's checks after a garnishee was served on the bank at the instance of a creditor of the agent, could not defend itself by showing that the money deposited was received by the depositor from his principal for a particular purpose, and that the checks paid were drawn for the accomplishment of that purpose. One of the reasons given was that the bank, having received the money from the depositor as his money, could not resist his demand by showing that the money did not belong to him, and, as the garnishing creditor was entitled to stand in the depositor's shoes, could not resist his demand." Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804.

5. Money deposited by state officer—Right of state to sue.—Farmers', etc., Banking *v.* Red Cloud, 62 Neb. 442, 87 N. W. 175, overruling State *v.* Klein, 8 Neb. 63.

"Mr. Mechem, in a note to § 922 of his valuable work on Public Officers, after a careful review of the authorities, intimates that State *v.* Keim stands alone in denying to the state the right to recover upon the facts reported, and adds that it 'is not consistent with reason or authority if it was intended to hold that the state could not recover the money at all.' And in Wolffe *v.* State, 79 Ala. 201, 58 Am. Rep. 590, Chief Justice Stone, in criticising that case, declares that it ignores 'the prin-

Suit for Breach of Contract.—But no one can sue at law for a breach of the contract between the depositor and the bank, except the parties thereto, even though depositor be a mere trustee of the funds.[6]

Proper and Necessary Parties.—In actions for deposits, by depositors or others, the general rule as to interest governs as to who are proper and necessary parties. It seems that anyone who has an interest in the controversy adverse to the plaintiff or who is necessary to a complete determination of the case, may be made a party.[7] Where money is deposited by order of the circuit court of the United States, in a bank, it can only be withdrawn upon order of one of the judges of that court and no proper inquiry can be

ciple that an outsider, by aiding in the misapplication of trust funds knowing them to be such, constitutes himself a trustee, and must account as a trustee.'" Farmers', etc., Banking Co. *v.* Red Cloud, 62 Neb. 442, 87 N. W. 175.

"San Diego County *v.* California Nat. Bank, 52 Fed. 59, arose out of a state of facts quite similar to Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693. There one D. made a deposit of money to his account as county treasurer, there being no agreement that the identical money should be returned, and it was in fact mingled with the funds of the bank. It was held, in an elaborate opinion by Judge Ross, that the county could recover on the ground that the bank was a mere trustee, and was liable as such; and the principle there stated was distinctly recognized by this court in the recent case of Cady *v.* South Omaha Nat. Bank, 46 Neb. 756, 65 N. W. 906, holding that trust funds do not lose their character as such by being deposited in bank to the trustee's own account, but may be followed through any number of transformations, and reclaimed by the owner, so long as they can be distinguished in the hands of the trustee or his assignees." Farmers', etc., Banking Co. *v.* Red Cloud, 62 Neb. 442, 87 N. W. 175.

See the case of Chautauqua *v.* Gifford (N. Y.), 8 Hun 152, in which it was held that where a town collector deposited moneys collected by him for taxes with a firm of bankers, and subsequently the supervisor agreed with the bankers that they could retain the moneys until wanted, payment of which was afterwards, on demand by him, refused, an action to recover the same must be brought in the name of the supervisor, not by the town.

6. Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Union Stock Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 34 L. Ed. 724, 11 S. Ct. 118.

7. The banking law provides that every shareholder shall be liable individually for any debt or engagement of such association, to an amount over and above his stock equal to the amount of his shares of such stock. 2 Rev. St., p. 31, § 18, provides that any person may be made a defendant who has an interest in the controversy, adverse to plaintiff, or who is necessary to a complete determination of the case. Held, that in an action against a bank to recover the amount of a deposit the joinder of the stockholders was not improper. Wright *v.* Field, 7 Ind. 376.

Where a bank, in which, by agreement between the borrower and lender, money borrowed is deposited to be applied on a prior mortgage on the borrower's land when it becomes due, places the money to the credit of a third person, who converts it, and, upon such mortgage becoming due, the lender, whose loan is secured by a second mortgage, buys in the first mortgage, and also obtains further security from the one who converted the money, he and the lender are both necessary parties to a suit by the borrower against the bank to recover the amount so deposited and converted. Judy *v.* Farmers', etc., Bank, 70 Mo. 407.

Money fraudulently obtained was deposited in a bank, and the legal owner notified the bank of his claim, and requested the bank to hold the deposit; but it was afterwards paid out to one who had notice of such owner's claim. Held, in an action by the owner to recover the money, that the bank and the party to whom the money was paid were properly joined as defendants. Adams Co. *v.* National Shoe, etc., Bank, 44 Hun 629, 9 N. Y. S. 75, 23 Abb. N. C. 172.

made as to the ownership of that fund without making such judges parties to the suit.[8] In an action against a bank to recover money belonging to plaintiff, which was deposited by a third person in his own name, the depositor is not a necessary party defendant.[9] A purchaser suing a bank for damages for the conversion of money, deposited with it by him for the payment of the price on specified conditions, need not make the vendor, who obtained the money from the bank without compliance with the conditions, a defendant, where no relief is demanded from the vendor.[10] In an action by a husband to recover from a bank money deposited by him in his wife's name, but not given to her, the wife's estate need not be represented.[11] In an action to recover money deposited by plaintiff with defendant under an agreement that it is to be paid to a third person on condition that the latter deliver a deed to plaintiff within a certain time, such person is not a necessary party.[12] Where one of the payees of a check payable to two persons as government officers indorses it for both, and deposits it to his individual account in a bank, with the consent of his co-payee, the co-payee is not a proper party to an action against an assignee in insolvency of the bank to recover the proceeds of the check.[13]

Deposit Subject to Joint Order.—Where two persons have deposited money and papers with a bank upon the agreement that the same shall be drawn out only upon their joint order, an action by one against the bank for the recovery of the deposits, to which the other was not made a party, is not maintainable.[14]

Suit to Establish Trust.—As the direct liability of a bank for money deposited subject to check, is only to the depositor,[15] if a third party seeks by bill in equity to establish a trust in such deposit, and to set up a title adverse to the depositor, the depositor is a necessary party.[16] To a suit in

8. **Judges of court depositing money.**—Gregory *v.* Merchants' Nat. Bank, 171 Mass. 67, 50 N. E. 520.

9. Walsh *v.* National Broadway Bank, 13 Misc. Rep. 3, 33 N. Y. S. 998, 67 N. Y. St. Rep. 848, affirming 11 Misc. Rep. 249, 32 N. Y. S. 734.

10. **Party obtaining money from bank.**—Banco Minero *v.* Ross (Tex. Civ. App.), 138 S. W. 224.

11. **Action by husband.**—Davis *v.* Lenawee County Sav. Bank, 53 Mich. 163, 18 N. W. 629.

12. **Action for money deposited for third person.**—Ullrich *v.* Santa Rosa Nat. Bank, 103 Cal. xviii, 37 Pac. 500.

13. **Co-payee of check deposited not necessary party.**—Meldrum *v.* Henderson, 7 Colo. App. 256, 43 Pac. 148.

14. **Deposit subject to joint order.**—Rand *v.* State Nat. Bank, 77 N. C. 152.

Where a wife, upon her marriage, had her deposit at a bank transferred from her individual account to the joint account of herself and husband, so that the signatures of both were required to withdraw funds, the husband had such an apparent interest in the deposit that he should be made a party to an action to compel the bank to pay it. Murphy *v.* Franklin Sav. Bank, 131 App. Div. 759, 116 N. Y. S. 228.

15. **Direct liability to depositor.**—Gregory *v.* Merchants' Nat. Bank, 171 Mass. 67, 50 N. E. 520; Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6; Bank *v.* Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897; State Nat. Bank *v.* Dodge, 124 U. S. 333, 31 L. Ed. 458, 8 S. Ct. 521.

16. **Depositor necessary party.**—Gregory *v.* Merchants' Nat. Bank, 171 Mass. 67, 50 N. E. 520.

Where one deposits money in his own name in trust for another, with the intention of making a gift to the cestui que trust, the latter can not, during the life of the trustee, maintain

equity which has for its object the disposal of any trust fund, all known claimants of the fund should be made parties.[17]

Trust Money—Joinder of Cestui Que Trust.—Where trust money deposited in bank by a trustee to his credit as agent is sued for by him as trustee, it will not vitiate the action that he joins with himself in the suit the beneficiaries of the trust, since, though they are not necessary parties, the bank can not be prejudiced thereby.[18]

Interpleader.—Where there are conflicting claims to a deposit held by a bank, the bank may, just as anyone else, interplead the conflicting claimants.[19] Such a case is presented where a deposit is made in the name of public officers whose title is afterwards questioned by other claimants of the office.[20] Where joint depositors of a fund in a bank are in dispute as to each one's share in the fund, and they refuse to execute a joint check, the bank may maintain a bill in equity to compel the depositors to interplead, and settle their dispute in one suit.[21] Where a deposit is made to the credit of "B. or C.," the case is a proper one for interpleader, after notice from one of the depositors not to pay the other.[22] Where one person deposits money in trust for another, but retains the bank book, the bank is entitled to an interpleader, if the fund is claimed by both the depositor and the beneficiary.[23] Where a bank certifies a check drawn on it to the order of the payee, if the plaintiff claims title to the check through endorsement, while the payee denies the transfer, and claims title, and notifies the bank not to pay the check, the bank is entitled to an interpleader.[24]

Permissive Statute.—Where a cestui que trust of a deposit made in trust sought to recover it from the bank in an action in which the trustee

an action against the bank to recover the deposit without making the trustee a party. Hemmerich *v.* Union Dime Sav. Inst., 144 App. Div. 413, 129 N. Y. S. 267.

17. All known claimants.—Gregory *v.* Merchants' Nat. Bank, 171 Mass. 67, 50 N. E. 520; Williams *v.* Bankhead (U. S.), 19 Wall. 563, 22 L. Ed. 184.

18. Beneficiaries of trust fund.—Munnerlyn *v.* Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159.

19. Right to interplead conflicting claimant.—German Exch. Bank *v.* Commissioners (N. Y.), 57 How. Prac. 187, 6 Abb. N. C. 394.

There were deposited in bank 14 bags of silver coin of an ascertained value, which were claimed by another person as administrator. Upon the refusal of the bank to deliver the coin to the depositor, detinue was instituted to recover it. Held, that under Code 1868, c. 107, § 1, the bank having filed the affidavit therein prescribed, the administrator was properly compelled to interplead. Dickeschied *v.* Exchange Bank, 28 W. Va. 340.

Where a banking firm is sued to recover money deposited, a member of the firm can not intervene as administrator of an estate claiming such deposit, under Code, § 2610, giving such right to one "not a party to the suit, without collusion with him." Jackson *v.* Jackson, 91 Ala. 292, 10 So. 31.

20. Where public officers title is in dispute.—German Exch. Bank *v.* Commissioners (N. Y.), 57 How. Prac. 187, 6 Abb. N. C. 394.

21. Joint depositors in dispute.—Foss *v.* First Nat. Bank, 3 Fed. 185, 1 McCrary 474.

22. Deposit made to credit of B. or C.—Mulcahy *v.* Devlin, 2 City Ct. R. 218.

23. Party making deposit retaining bank book.—Weber *v.* Bank (N. Y.), 1 City Ct. R. 70.

24. Dispute between payee and one claiming transfer.—Bruggemann *v.* Bank (N. Y.), 1 City Ct. R. 86.

was not joined, and the bank defended on the ground that the trustee was not a party to the action, its rights were not prejudiced because it failed to implead the trustee, where the statute providing that, where funds are demanded by more than one claimant, those not joined may be interpleaded, is permissive and not mandatory. The duty of making the trustee a party rests upon the plaintiff.[25]

§ 154 (5) Pleading—§ 154 (5a) Petition or Complaint.—In an action against a bank to recover a deposit, the petition must set forth all the constitutive elements of a bank deposit.[26] The petition should state the amount deposited, the balance due,[27] and a refusal of payment.[28] A count in a declaration, alleging that plaintiff delivered or caused to be delivered to defendant bank a sum claimed to be held by the defendant for plaintiff's use, is broad enough to cover a deposit made with the defendant by the plaintiff personally.[29] In an action against a bank, an allegation of the declaration that plaintiff made a deposit on or about a certain date does not preclude plaintiff from relying on a deposit made three or four days subse-

25. Permissive statute.—Hemmerich *v.* Union Dime Sav. Inst., 144 App. Div. 413, 129 N. Y. S. 267.

26. Sufficiency of petition.—A petition alleged that defendant's predecessor was a banking corporation doing a general banking business; that it bought certain bonds issued by counties in aid of a railroad then building as a branch of plaintiff's predecessor's line, and, by agreement among the vendors, the bank and plaintiff's predecessor agreed to hold and did hold certain of the proceeds for the benefit of plaintiff's predecessor payable to its order when certain conditions as to track laying should be complied with, and thereupon entered a credit upon its books in favor of plaintiff's predecessor; that, on part compliance with the conditions, it paid one-half the sum and held the remainder; and that thereafter, on full compliance, it paid part of the balance to plaintiff's predecessor on its order, and thereafter it and its successors have held the balance subject to the order of its owner. Held, that the constitutive elements of a bank deposit were pleaded, and the petition was broad enough to admit evidence to show the relation of banker and depositor. Missouri Pac. R. Co. *v.* Continental Nat. Bank, 212 Mo. 505, 111 S. W. 574.

A complaint which alleges that the assignor of the plaintiff drew a post-dated check on defendant bank, on which he stopped payment before the time for payment arrived, but which defendant paid, fails to state a cause of action where it is not alleged that the maker of the check was a depositor, or that defendant held any funds of the maker, or that the check was paid out of any such funds. Lippner *v.* Century Bank, 141 App. Div. 254, 125 N. Y. S. 1097.

27. Allegation of amount deposited and balance due.—In an action by a depositor against a bank, a complaint alleging that defendant, "without the knowledge or consent of plaintiff, deducted from the said bank account of plaintiff sums of money aggregating in all the total sum of $24," and that plaintiff demanded the return of this sum "deducted as aforesaid, but such demand was refused by the defendant, and instead the defendant has converted to its own use the said sum of $24," states no cause of action; it neither stating the amount deposited nor the balance, if any, remaining due. Nelson *v.* Van Norden Trust Co. (App. Div.), 109 N. Y. S. 879.

28. Refusal of payment.—A complaint alleging that defendants were conducting a banking business, that plaintiff deposited a stated sum with them to his credit on open account and payable to him or his order on demand, that payment of his check for the amount when presented was refused, and that no part has been repaid, states a cause of action for its recovery; the latter allegation covering every manner of repayment. Levy *v.* Larson, 92 C. C. A. 562, 167 Fed. 110.

29. Allegation sufficient to cover deposit.—Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

quent to that date.[30] In an action on a certificate of deposit, a petition which alleges that the certificate was duly issued, that plaintiff is the owner of it, that it was duly presented, and payment refused, and that defendant claims to have a partial defense, can not be successfully assailed by general demurrer.[31] And a petition which fails to give the dates and amounts of checks drawn on a deposit, the balance being sued for, is sufficient on general demurrer, all the facts being in the possession of the defendant, who claims that the whole deposit had been accounted for, demand and refusal being alleged.[32]

Allegation as to Evidence of Debt.—A complaint to recover money deposited with a banker should show that some form of written evidence of payment was offered.[33] Where, in a certificate of deposit, the amount stated in the body of the certificate is different from that in figures in the margin, the former will be taken to be the sum deposited; and, if the certificate is declared on for the marginal amount, plaintiff can not recover.[34]

Allegation as to Ownership.—A complaint by an administrator, alleging that defendant delivered to plaintiff's intestate a certain certificate of deposit, impliedly alleges that such intestate was the holder and owner thereof.[35]

Bill of Particulars.—Where the declaration in an action to recover the balance of a deposit in a bank is accompanied by an affidavit showing the nature of plaintiff's claim, and the amount due, to which is attached the bank book, containing the bank's own entries, and showing the balance due, there is a sufficient compliance with the law, requiring a bill of particulars.[36]

Compliance with Conditions Precedent—In General—Demand.—A formal demand must be alleged in the complaint; and where the money counts do not aver a demand, nor any excuse for not making it, they are insufficient.[37] The allegation of demand and refusal may be sufficient, without alleging demand made during banking hours.[38] It has been held that if

30. **Allegation as to date of deposit.**—Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

31. **Petition sufficient on general demurrer.**—Seven Valleys Bank *v.* Wise, 61 Neb. 880, 86 N. W. 923.

32. A petition in conversion alleged a deposit in defendants' bank of money in plaintiff's own name, as her separate estate, and not to be checked out by any other person; that she had only given some small checks, and that there was a balance still in the bank, although the cashier claimed to have paid out money on checks not signed by her, and for which she was not responsible; that she could not give the exact dates or amounts of the checks, as all the facts were in possession of defendants, who claimed that all the deposits had been accounted for, and that demand and refusal to pay had been made. Held sufficient on general demurrer. Coleman *v.* First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938, affirmed in 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871.

33. **Allegations as to evidence of debt.**—McEwen *v.* Davis, 39 Ind. 109.

34. Payne *v.* Clark & Bros., 19 Mo. 152, 59 Am. Dec. 333.

35. **Allegation as to ownership.**—Eans *v.* Exchange Bank, 79 Mo. 182.

36. **Bill of particulars.**—Bank *v.* Hull, 74 Ill. 106.

37. **Allegation of demand.**—Tobias *v.* Morris, 126 Ala. 535, 28 So. 517.

38. **Demand made during banking hours.**—A complaint alleging that defendant was a corporation duly organized under the banking laws, that plaintiff indorsed over to and deposited with defendant a draft, and that defendant thereupon promised to

it be necessary to draw a check on a bank before suing for the amount of a deposit, a failure to allege such drawing in the petition is excused by an allegation that plaintiff did not know the amount of the balance in the bank, and that defendants claim that all the funds have been accounted for.[39]

Where a certificate of deposit is issued payable to a third person, a petition alleging that the conditions of said certificate of deposit have been fully complied with by such third person is subject to demurrer calling for a specific allegation of performance of the conditions precedent as stated in the certificate.[40] No action can be maintained on a certificate of deposit "payable on demand and on presentation of the certificate," without showing such demand and presentation; and this should be alleged in the declaration.[41] In an action by an executor of the depositor named in the certificate of deposit in a bank, and made "payable to the order of himself upon the return of the certificate properly indorsed," it is not necessary, in alleging a demand of payment of the bank by the executor before suit, to allege that the certificate was properly indorsed at or before the demand.[42]

Allegation of Estoppel Constituting New Cause of Action.—The right to recover the amount of a certificate of deposit, based on an agreement by the bank receiving the deposit and issuing the certificate to pay the amount thereof, provided a judgment is obtained, and the judgment is obtained, is founded on estoppel in the form of a new cause of action, and to be available must be pleaded; and the holder of the certificate who seeks a recovery on the theory of an express or implied contract may not recover on the new cause of action.[43]

Allegation as to Consideration of Notes Set Off.—A plaintiff, in an action at law to recover deposits in a bank, need not allege in the complaint that notes executed to him by the bank, and set forth by it as a counterclaim, were without consideration. The plaintiff can not be required to anticipate a defense.[44]

§ 154 (5b) Plea.—It is competent for the defendant to specially plead and prove any matter which legally constitutes a complete or partial defense to cause of action as set forth by the plaintiff's allegations.[45]

pay plaintiff the amount thereof, that plaintiff had repeatedly demanded of defendant that it pay him the money so deposited, and that defendant refused to honor plaintiff's checks, stated a cause of action without alleging that plaintiff demanded payment during banking hours. McAndrews *v.* Security State Bank, 25 S. Dak. 590, 127 N. W. 536.

39. **Allegation as to failure to draw check.**—Coleman *v.* First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938, affirmed 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871.

40. **Specific allegation of performance of condition.**—Lamar, etc., Drug Co. *v.* First Nat. Bank, 127 Ga. 448, 56 S. E. 486.

41. **Conditions precedent—Presentation and demand.**—Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377.

42. **Allegation of indorsement.**—Emerson *v.* Thatcher, 6 Kan. App. 325, 51 Pac. 50.

43. **Allegation of estoppel—New cause of action.**—Dollar *v.* International Banking Corp., 13 Cal. App. 331, 109 Pac. 499.

44. **Allegation as to consideration of note set off.**—Boothe *v.* Farmers' Nat. Bank (Ore.), 98 Pac. 509.

45. Where suit was brought against

Sufficiency of Plea or Answer.—An answer which denies the allegations of the complaint and states a defense it seems is sufficient against a general demurrer.[46] Where the defendant has a defense to allegations in the complaint, he must plead so as to make his contention an open question.[47] And a mere general denial is sufficient for some purposes.[48] In some cases it is provided that under a mere general denial of an allegation, no evidence shall be introduced which does not tend to negative what the party making the allegation is bound to prove.[49] But this does not mean that all evidence introduced must be directly negative in character, but facts independent of those averred in the complaint, of a nature affirmative but which have a negative effect on the complaint, are admissible.[50] So where the complaint alleges an indebtedness to plaintiff on account of a deposit, the defendant may, under a general denial, prove by any fact or circumstances that it never owed or incurred the debt.[51] But a defense which is special should be specially set up by plea or answer; otherwise it is not open to defendant.[52] In some instances the law provides that new matter con-

a bank to recover on a deposit account, the plaintiff being named as R. & Co., a firm alleged to be composed of R. and his wife, it was competent to plead and prove that the wife was not a member of such alleged firm, that there was no such firm, that the title was simply a name under which R. deposited his funds in the bank, and that he was indebted to the bank on a matured debt an amount greater than the amount due on the deposit account. Bank *v.* Rockmore & Co., 129 Ga. 582, 59 S. E. 291.

46. Where, in an action to recover an alleged bank deposit, defendant's answer denied that it had ever received any sum from plaintiff, except that it sold plaintiff a bill of exchange for $1,000, payable to the order of a third person, and received therefor $1,001, the answer stated a defense, and was not subject to general demurrer. Anderson *v.* Bank, 4 Cal. App. 427, 88 Pac. 379.

47. Pleading so as to open question.—Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

48. Mere general denial.—Hess *v.* Union State Bank, 156 Ind. 523, 60 N. E. 305; Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

49. Effect of general denial.—Hess *v.* Union State Bank, 156 Ind. 523, 60 N. E. 305.

50. Negative effect of fact determines admissibility.—Hess *v.* Union State Bank, 156 Ind. 523, 60 N. E. 305.

51. Plaintiff, who was cashier of a bank, drew his personal check for $10,000 on a correspondent bank with which he had no personal account, to pay his personal notes held by such correspondent bank, which check was honored, and charged to the account of plaintiff's bank. Plaintiff, as cashier, received a statement from the correspondent bank, which showed the charge of the amount of the check, but made no record of the transaction on the books of his bank, and did not repay the amount charged against it on account of his check. Two years later plaintiff deposited $7,600 of his own money in the correspondent bank to the credit of his bank, but made no record of that transaction on its books, though the bank drew against its account so increased, and used the money in the usual course of its business. Four years after making this deposit, plaintiff made demands on the bank for its return, and on refusal brought suit, alleging the deposit of the $7,600, its appropriation, and the refusal to return it. Held that, under a general denial of indebtedness, defendant bank was entitled to prove the facts as to plaintiff's personal check for $10,000 being charged to the bank's account, since, while such evidence was of an affirmative nature, it had a negative effect on the issues, and was therefore admissible under a general denial. Hess *v.* Union State Bank, 156 Ind. 523, 60 N. E. 305.

52. Special defense should be specially pleaded.—Where a bank paid the note of a depositor, and charged it to his account, and the depositor brought an action for the amount so paid, and the answer was a general

stituting a complete or partial defense must be specially pleaded.[53] Where the purpose of a suit is to determine whether or not plaintiff has a certain balance in defendant bank, the payment of certain checks being pleaded by way of defense completely raises the issue of the forgery or alteration of the checks and plaintiff's conduct with reference to their preparation and custody.[54] New matter according to the most approved interpretation, is any fact extrinsic to the matter alleged as a cause of action, and includes all defenses whether legal or equitable not included in a denial of the allegations of the petition.[55] Where a bank is sued to recover an amount alleged to have been due from defendant on a certain date on account of a deposit, a special plea of set-off is not necessary to entitled the defendant to prove as a defense that prior to such date it had applied the money to the payment of notes it held against the depositor; but such defense may be shown under the general issue, or a plea that on the date laid the defendant did not have in its possession the sum named, or any sum deposited by the depositor.[56] On the question of the sufficiency of a plea or answer, the pleading must be interpreted in the light of that which it alleges and not in the light of what the counsel in his brief may assert he intended to plead.[57]

denial and plea of payment, and no claim in set-off was filed, nor an averment of ownership made, a defense that the bank had the rights of a bona fide purchaser for value before maturity, and that it was a holder in due course, was not open to defendant. Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

In an action against a bank for money deposited by a trustee to his own account, evidence of payment by the bank of checks subsequently drawn by the trustee, relying in good faith on his apparent title to the fund, is inadmissible under a general denial, as such fact to be available as a defense must be specially pleaded. Union Stock Yards Nat. Bank *v.* Haskell, 2 Neb. 839, 90 N. W. 233.

53. New matter.—Cady *v.* South Omaha Nat. Bank, 46 Neb. 756, 65 N. W. 906.

Under Code Civ. Proc., § 500, requiring an answer to contain a statement of any new matter constituting a defense, an answer, in an action by a depositor for a deposit paid on forged checks, which alleges the making of the deposit, the drawing of checks, the delivery to the depositor of the balanced passbook with the checks, and which alleges that no objection to the account was made until after the expiration of a year, etc., states facts constituting a defense under Negotiable Instruments Law (Consol. Laws, 1909, c. 38), § 326, providing that no bank shall be liable to a depositor for the payment of a forged check unless, within one year after the return to the depositor of the voucher of payment, he shall notify the bank that the check was forged. Shattuck *v.* Guardian Trust Co., 145 App. Div. 734, 130 N. Y. S. 658.

54. Plea raising issue of forgery or alteration and negligence and estoppel.—Where defendant bank denied plaintiff's balance because of the payment of certain forged checks, it was not necessary that an issue on the alteration of the checks should be made by the pleadings to enable defendant to take advantage of plaintiff's negligence in providing for the preparation and execution of checks by its agents. Otis Elevator Co. *v.* First Nat. Bank (Cal.), 124 Pac. 704.

55. What is new matter.—Cady *v.* South Omaha Nat. Bank, 46 Neb. 756, 65 N. W. 906.

56. Plea of set-off unnecessary.—Durkee *v.* National Bank, 42 C. C. A. 674, 102 Fed. 845.

57. Interpretation of plea or answer.—Schnabel *v.* Hanover Nat. Bank, 78 Misc. Rep. 35, 137 N. Y. S. 727.

In an action for the proceeds of checks to which plaintiff's indorsement was claimed to have been forged, the answer held not to sufficiently allege knowledge of the forgeries by plaintiff, so as to estop him from asserting defendant bank's liability for paying

Failure to Notify Bank of Forgery.—Where the law provides that no bank shall be liable to a depositor for the payment by it of a forged check unless, within one year after the return to the depositor of the voucher of such payment, he shall notify the bank that the check was forged, such defense must be pleaded and proved to be available, and the provision is not a condition precedent to be pleaded as a part of a cause of action by a depositor, suing his bank for a deposit depleted by the payment of forged checks, but is in effect a statute of limitations.[58]

Plea of Tender.—Where a bank gives general notice to its depositors that it will pay its deposits only in its own notes, in an action alleging a promise to pay a deposit in current bank notes, a plea of a tender of the notes of the bank, without alleging that they were current at the time of the tender, is bad on demurrer.[59]

Plea of Fraud.—A plea of fraud is defective if it fails to show that the defendant was an innocent party, and especially so where it indicates the contrary.[60] A bank can not participate in a scheme to defraud others, or in a fraud against itself and be relieved in equity from the consequences of such wrongful act.[61]

§ 154 (6) Presumptions and Burden of Proof.—The general rule is well settled that the burden of establishing the cause of action as set forth in the complaint rests upon the plaintiff.[62] In a more limited sense each party has the right to rest on such presumptions as have been raised in his favor until they have been overthrown.[63] So in an action against a banker on a certificate of deposit signed by one as teller, plaintiff should prove that the person signing was defendant's teller.[64] Where the plaintiff

the checks. Schnabel *v.* Hanover Nat. Bank, 78 Misc. Rep. 35, 137 N. Y. S. 727.

58. Failure to notify bank of forgery of check.—Shattuck *v.* Guardian Trust Co., 145 App. Div. 734, 130 N. Y. S. 658. See ante, "Liabilities of Bank to Depositor, Payee or Owner," § 148.

59. Plea of tender.—Bank *v.* King (Ill.), 4 Scam. 199.

60. Plea of fraud.—In an action to recover from a bank an alleged balance due on a deposit, allegations that one of the plaintiffs opened the account in the name of a firm, pretending that his wife was a member thereof, for the purpose of defrauding his creditors, and that there was no such firm, the plea as a plea of fraud perpetrated on the bank was defective in that it did not show that the bank was an innocent party, but rather indicated that if there was a fraud the bank knew of it, and was properly stricken. Bank *v.* Rockmore & Co., 129 Ga. 582, 59 S. E. 291.

61. Bank *v.* Rockmore & Co., 129 Ga. 582, 59 S. E. 291.

62. Burden of proof.—American Nat. Bank *v.* Bushey, 45 Mich. 135, 7 N. W. 725.

In an action by a wife against the bank to recover for the conversion of her separate funds which her husband had deposited and which the bank allowed him to check out and convert, it was held that the burden was not on the defendant to prove payment, and to produce evidence as to whom it was paid, showing proper receipts, vouchers, and orders, and that the same was paid to a person authorized to collect and receive it, but the burden of proof was on the plaintiff to establish her cause of action. Coleman *v.* First Nat. Bank (Tex. Civ. App.), 64 S. W. 93; Republic Life Ins. Co. *v.* Hudson Trust Co., 130 App. Div. 618, 115 N. Y. 503, affirmed in 198 N. Y. 590, 92 N. E. 1100.

63. Right to rest on presumptions.—American Nat. Bank *v.* Bushey, 45 Mich. 135, 7 N. W. 725.

64. Proving person signing certificate.—Cruikshank *v.* Comyns, 24 Ill. 602.

claims to have placed a draft to his deposit and the bank contends that it purchased the draft from the plaintiff, paying cash therefor, the burden of establishing the payment therefor is upon the defendant bank.[65]

Deposit Presumed to Be General.—Deposits of money made in a bank in the ordinary course of business are presumed to be general, and the burden of proof is on the depositor to overcome such presumption by showing that the deposit was made under such stipulations or directions as to constitute it a special deposit.[66] It devolves upon the party claiming it to show that it was received by the bank with an express or clearly implied agreement that it should be kept separate from the other funds of the bank and the identical money or property be returned to the depositor.[67]

Ownership of Deposit.—The prima facie presumption is that a fund deposited in a bank belongs to the person in whose name it has been deposited. The burden of proof is upon another claiming such funds.[68] Where a fund is deposited in a bank in the name of a certain depositor, it shows a prima facie title in the depositor, and a claimant thereof in an interpleader's suit must show a clear title thereto.[69]

Presumption of Equal Interests.—Where a deposit stands in the names of two persons jointly, and the facts indicate that each has some interest therein, but there is no competent evidence of the extent of their respective interests, it may be presumed that their interests are equal.[70]

Proving Title to Passbook.—Where a bank paid a deposit to one whose signature and description coincided with those of the depositor, on presentation of the passbook, and the administrator of one among whose effects a passbook was found calling for such deposit, but whose name and description were different from those of the depositor, claimed the deposit, the burden was on him to prove his intestate's title to the passbook so found.[71]

65. **Burden of proving payment for draft.**—Goff *v.* Stoughton State Bank, 84 Wis. 369, 54 N. W. 732.

"If the plaintiff had sold any ordinary article of personal property to the defendant, the burden of proving payment therefor would certainly be upon the defendant. Rossiter *v.* Schultz, 62 Wis. 655, 22 N. W. 839." Goff *v.* Stoughton State Bank, 84 Wis. 369, 54 N. W. 732.

"It is true that in an action upon a negotiable instrument against makers or indorsers the holder is presumed to be the owner for value before due." Goff *v.* Stoughton State Bank, 84 Wis. 369, 54 N. W. 732.

"But there is no such case here. The action is not brought to recover upon commercial paper, nor is the integrity of the paper in any way involved. It is brought by one not in any way a party to a negotiable instrument, against a purchaser thereof, to recover the purchase price. We see no reason why there should be any presumption that it was paid for when sold, any more than in case of sale of any other chattel." Goff *v.* Stoughton State Bank, 84 Wis. 369, 54 N. W. 732.

66. **Deposit presumed to be general.**—Bank *v.* Dean, 9 Okl. 626, 60 Pac. 226.

67. **Burden of showing different agreement.**—Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564.

68. **In general—Ownership of deposit.**—Egbert *v.* Payne, 99 Pa. 239.

69. **Claimant in interpleader.**—Detroit Sav. Bank *v.* Haines, 128 Mich. 38, 87 N. W. 66.

70. **Presumption of equal interest.**—Tompkins *v.* McGinn (Tex. Civ. App.), 85 S. W. 452.

71. **Proving title to passbook.**—People *v.* Third Ave. Sav. Bank, 98 N. Y. 661.

Money Deposited by One as Agent, Trustee, Collector, etc.—Where money is deposited in a bank by plaintiff as "agent," and there is nothing on the face of the deposit to show for whom he is agent, and the bank refuses to pay plaintiff's checks, and pays the money over to a third party, it does so at its peril; and in a suit by the plaintiff the burden of proof is on the bank to show that the money did not belong to plaintiff, but did belong to the party to whom it was paid.[72] Where three persons deposited money in a bank in their names as trustees of a Grand Army post, and the bank paid the money to one of them after notice from the post not to pay him, in an action by the post against the bank to recover the money so paid the burden is on defendant to show that it belonged to the persons who deposited it.[73] When a collector of the customs deposits money in a bank upon an account kept in his own name, with the word "Collector" added thereto, in the absence of evidence to the contrary, it is to be regarded as his own fund, and subject to his draft, and not as the money of the United States.[74]

Showing Receiver's Right to Deposit.—Where a person claims that a deposit which a bank had appropriated to satisfy a claim of its own against the depositor belongs to the receiver of the depositor, it is incumbent on him to establish affirmatively that the receiver was appointed before the bank made the appropriation.[75]

Deposit in Name of Another for Special Purpose.—Where money is deposited in a bank to a depositor's account, but intended to be used for the purpose of paying a note given to the depositor by the person putting the money in bank, the burden is on the holder of the note when suing for the deposit to show notice of such intended application to the bank.[76]

Presumption as to Which Fund Checked against.—Where a legatee, who has the right to consume the entire estate of her testator, places in a bank funds, some of which belong to the estate and some of her personally, in the absence of evidence to the contrary, after her death, checks

72. **Money deposited by plaintiff as agent.**—Patterson *v.* Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778.

73. **Money deposited by persons as trustees.**—Arnold *v.* Macungie Sav. Bank, 71 Pa. 287.

Where three persons deposited money in a bank in their names as "trustees of Post 13, G. A. R.," the money prima facie belonged to the post. Arnold *v.* Macungie Sav. Bank, 71 Pa. 287.

H. deposited funds in a bank to the credit of himself as trustee of a society, and the bank paid the deposit to H. after notice from the society not to pay him. In an action by the society against the bank it was held that, since the money prima facie belonged to the society, the burden was on the bank to show that it was the property of H. Arnold *v.* Macungie Sav. Bank, 71 Pa. 287.

74. **Money deposited by one as collector.**—Swartwout *v.* Mechanics' Bank (N. Y.), 5 Denio 555.

75. **Showing receiver's right to deposit.**—London, etc., Bank *v.* Hanover Nat. Bank, 36 App. Div. 187, 55 N. Y. S. 941.

76. **Deposit in name of another for special purpose.**—First Nat. Bank *v.* City Nat. Bank, 102 Mo. App. 357, 76 S. W. 489. See Smith *v.* Des Moines Nat. Bank, 107 Iowa 620, 78 N. W. 238. See ante, "Application of Deposits to Debts Due Bank or Set Off by Bank," § 134.

previously drawn by her without designating the fund will be presumed to be against her personal fund.[77]

Proving Payment or Other Defense.—When the plaintiff fully proves the making of the deposit, and a demand and refusal, then the burden shifts to the defendant to prove that the deposit has been repaid or other defense as the case may be.[78] When a bank receives money on deposit, the burden is on the bank, in a suit therefor, to show a proper disposition of it.[79] This rule applies where the defendant pleads set-off.[80] And where a suit is brought to recover a balance from a bank, the burden is on the bank to show a payment made without receiving a check or other voucher.[81] So if a receiver of a bank is sued for the purpose of establishing an indebtedness to a depositor, the burden is on the receiver to show payment of the deposit.[82] And if a bank, which is sued for a deposit, admits having received it, the burden of proving payment is upon the bank.[83] Where a depositor draws a check on a general deposit, payable to the bank or order, the purpose being, as the depositor claims, to change a general deposit into a time deposit in the same bank, and the check is returned indorsed "Paid," and the bank seeks to avoid its liability by a plea of payment, the burden of proof is on the bank to show that the amount of the check was paid at the depositor's

77. **Presumption as to which fund checked against.**—A legatee had the right to consume the estate of her testator, but what was unconsumed was to go over. She made deposits of money in bank from time to time after the death of her testator. The earlier deposits were from the funds of her testator's estate, but the later deposits were her own. She checked out a portion of the total deposit, but a portion remained at her death. There was no evidence of what funds she had intended to check out. Held, that the presumption was that she intended to check against her own funds, and hence the balance was a part of her testator's estate, which went over. Hall *v.* Otis, 77 Me. 122.

78. **Proving payment or other defense.**—In an action to recover a deposit, proof that the money was deposited with the bank and payment thereof demanded constitutes a prima facie case, and the burden of proving payment to or for the use of the depositor is on the bank. O'Neil *v.* New England Trust Co., 28 R. I. 311, 67 Atl. 63.

In an action by a depositor against a bank for an alleged balance of deposit, plaintiff proved the deposit, and the defendant attempted to prove that it had been paid out on checks drawn by his authority. Held error to instruct the jury that the burden of proof was upon the plaintiff to prove his case, since after proof of the deposit the burden shifted to the defendant. Deland *v.* Dixon Nat. Bank, 111 Ill. 323.

The burden of proving payment was on defendant. Donijanovic *v.* Hartman (Mo. App.), 152 S. W. 424.

79. Where a bank received money for the benefit of a depositor, it must show a proper disposition thereof, and the depositor's administrator, suing for the money, need not, in addition to proving that the bank received the money, also prove that it converted the money to its own use or applied it wrongfully. Padgett *v.* Bank (Mo. App.), 125 S. W. 219.

80. **Plea of set-off.**—In an action by a bank depositor for a balance claimed to be due, where the defense of set-off was based on the claim that the plaintiff had overdrawn his account, the burden of proving the set-off was upon the defendant. Marine Bank *v.* Stirling (Md.), 80 Atl. 736.

81. **Payment without receiving check or other defense.**—Kuenster *v.* Woodhouse, 101 Wis. 216, 77 N. W. 165.

82. **Suit against receiver.**—Wiggins *v.* Stevens, 33 App. Div. 83, 53 N. Y. S. 90.

83. **Effect of admission of receipt of deposit.**—Yarborough *v.* Banking Loan, etc., Co., 142 N. C. 377, 55 S. E. 296.

request to a third party.[84]

Payment of Check—Burden of Showing Proper Payment.—Where a bank pays a check, the burden is on the bank to show that the payment was to the person named in the check, or that the depositor was guilty of negligence precluding him from recovering for payment to the wrong person.[85] This is in pursuance of the ordinary rule that the banker must ascertain at his peril the identity of the payee of a check.[86] It is only when the banker is misled by some negligence or other fault of the drawer that he can set up such a mistake on his own part in this particular against the drawer.[87]

Payment of Check—Notice Not to Pay.—Where a drawer of a check has given to the bank timely notice not to pay it, the burden of proving that it has already been paid is on the bank, when the bank is sued by the depositor for the amount of his deposit.[88] In an action to recover deposits made for plaintiff, and which were drawn out on forged checks, the burden is on defendant to show how and when plaintiff's false signature in its signature book was placed there.[89]

Genuineness of Indorsement of Check.—Where a bank has paid a check drawn payable to order, and indorsed with the name of the payee, the burden of proving the genuineness of the indorsement is upon the bank in an action against it by the maker for the amount so paid plaintiff having rejected the check when returned and disputed the account.[90] But where

84. Patterson *v.* First Nat. Bank, 73 Neb. 384, 102 N. W. 765.

"Under the evidence the plaintiff was entitled to recover unless the bank showed by a preponderance of the evidence that she intended by the transaction in question to change her deposit in the bank to a loan to Samuelson individually. The check drawn by her was payable to the bank, and the burden of proof was upon the bank to show that the transaction by which her money was paid to Samuelson, instead of being placed as a time deposit, for which purpose she says the check was given, was had with her knowledge and consent, and the money thus paid at her request; and it was error to state otherwise. Zeigler *v.* First Nat. Bank, 93 Pa. 393; Steckel *v.* First Nat. Bank, 93 Pa. 376, 39 Am. Rep. 758; Resh *v.* First Nat. Bank, 93 Pa. 397." Patterson *v.* First Nat. Bank, 73 Neb. 384, 102 N. W. 765.

85. Burden of showing proper payment.—Murphy *v.* Metropolitan Nat. Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595.

86. Banker's duty to ascertain payee's identity.—Murphy *v.* Metropolitan Nat. Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595.

87. Negligence or fault of drawer.—Murphy *v.* Metropolitan Nat. Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595, citing National Bank *v.* Bangs, 106 Mass. 441, 8 Am. Rep. 349; First Nat. Bank *v.* First Nat. Bank, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450; Greenfield Sav. Bank *v.* Stowell, 123 Mass. 196, 25 Am. Rep. 67, and cases cited; Dedham Nat. Bank *v.* Everett Nat. Bank, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286; Welsh *v.* German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Shipman *v.* Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Hardy *v.* Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325. See ante, "Duties and Liabilities of Bank to Depositor," § 138; "Payment of Lost or Stolen Paper," § 146; "Payment of Forged or Altered Paper," § 147.

88. Burden of proving payment of check.—Albers *v.* Commercial Bank, 85 Mo. 173, 55 Am. Rep. 353.

89. Forged check.—Second Nat. Bank *v.* Gibboney, 43 Ind. App. 492, 87 N. E. 1064. See ante, "Payment of Forged or Altered Paper," § 147, et seq.

90. Genuineness of indorsement of check.—Morgan *v.* State Bank, 8 N. Y. Super. Ct. (1 Duer) 434.

In an action against a bank for the

certain checks are cashed on forged indorsements, if the checks are properly returned to plaintiff by defendant, with a statement of account, and retained by him for a long time, without objection, the burden is on plaintiff to show the forgery, though plaintiff's clerk, who had charge of the returned checks, was himself the forger, and had concealed the checks when returned from the bank.[91] Where the defendants rely upon an indorsement to corroborate their claims that they had been instructed to apply the deposit to the credit of a third person; plaintiff's denial raises an issue respecting a writing relied on by defendant and the affirmative of the issue is upon the defendants.[92] Although the introduction of the certificate with the indorsement makes a prima facie case for defendant, the same being true in any suit upon an instrument showing an erasure, or words recast, or an interlineation, yet, if the party sought to be charged raises an issue respecting such erasure, etc., the burden is thrown upon the party relying upon the instrument.[93]

Claim of Erroneous Settlement.—Where the plaintiff's passbook has been written up, received and kept by him for a long time, the burden of proving his cause of action which is based upon the claim of an erroneous settlement is upon him.[94] But in an action against a bank to recover a balance in a passbook, the burden is upon the bank to show fraud or error in

amount of a check cashed on a forged indorsement, plaintiff having rejected the check when returned from the bank, and disputed the account, the burden is on defendant to show that the indorsement is genuine. August *v.* Fourth Nat. Bank, 48 Hun 620, 1 N. Y. S. 139, 15 N. Y. St. Rep. 956.

91. Retention of cancelled checks for long period.—August *v.* Fourth Nat. Bank, 48 Hun 620, 1 N. Y. S. 139, 15 N. Y. St. Rep. 956.

92. Writing relied upon denied.—Von Eherenkrook *v.* Webber, 100 Mich. 314, 58 N. W. 665, 60 N. W. 761.

93. Issue raised by denial—Erasure, words recast, etc.—Von Eherenkrook *v.* Webber, 100 Mich. 314, 58 N. W. 665, 60 N. W. 761.

"In Willett *v.* Shepard, 34 Mich. 106, defendants admitted the signature to the note sued upon, but insisted that in the clause 'ten per cent after due, value received,' the printed words 'after due' had been erased. 'The controversy began with the claim made by defendant in error that the note, in substance and effect, as it now appears, was made by the plaintiffs in error, and this the latter denied; and on this issue, and with the parties in these relative positions, the litigation has invariably proceeded. There has never been any change. It was incumbent on defendant in error, in every stage, to maintain his side of that issue by a preponderance of evidence.'" Von Eherenkrook *v.* Webber, 100 Mich. 314, 58 N. W. 665, 60 N. W. 761.

"In Comstock *v.* Smith, 26 Mich. 306, it was held that where plaintiff relied, as a basis of recovery, upon a clause in a deed which was claimed to have been written over an erasure, the burden of proof as to the genuineness of the clause was upon him, and in such case there was no presumption of law that the clause in question was seasonably or unseasonably made, which shifted this burden." Von Eherenkrook *v.* Webber, 100 Mich. 314, 58 N. W. 665, 60 N. W. 761.

94. Claim of error in settlement—Delay of plaintiff.—In an action against a bank to recover a deposit, it appeared that plaintiff's passbook had been taken by the bank, written up, and returned to plaintiff, without showing a credit to plaintiff of the money in dispute, and that plaintiff retained the book a long time without complaint. Held, that the court properly instructed the jury that the burden was on plaintiff to show that the settlement was erroneous. Anderson *v.* Leverich, 70 Iowa 741, 30 N. W. 39.

striking the balance, the presumption being that the balance stated by its own officers is correct and truly represents the account between the parties.[95]

§ 154 (7) Admissibility of Evidence.—Evidence to Establish or Rebut Existence of Deposit.—Where a plaintiff sues to recover a deposit, if the bank denies the existence of such a deposit, any evidence which tends in a material degree to establish or rebut the existence of such deposit is admissible. And evidence which corroborates other testimony admitted to support or rebut such allegation is competent.[96] Where the plaintiff contends that a draft was placed to his deposit and the bank contends that they paid the amount of the draft to plaintiff, the plaintiff is entitled to show that he had an open account with the bank at that time, and his bank book is admissible for that purpose.[97] But matter which is entirely irrelevant to the issue of the existence of the deposit, and tending to establish the bank's liability on grounds not alleged is incompetent and should be excluded.[98] And where a complaint against a bank for paying a check against instructions fails to state that the drawer was a depositor, evidence that the drawer was a depositor admitted over the objection of the defendant without an amendment of the complaint is improperly received.[99] Testimony that the

95. **Burden on bank to prove error in balance stated.**—Greenhalgh Co. *v.* Farmers' Nat. Bank, 226 Pa. 184, 75 Atl. 260.

96. **Evidence to establish or rebut existence of deposit.**—In an action against a bank on an alleged lost certificate of deposit, where defendant's employees testified from their books and records that no deposit was made, the bank could explain its methods of business at the time of the alleged deposit, and could offer, in connection with the testimony denying the deposit, the consecutively numbered blank certificates of deposit and the register of the certificates of deposit, which accounted for all the consecutive numbers on or about the date of the alleged deposit, its system of bookkeeping, and plan of checks and balances, and all other records relating to the receipt of money; it being admissible to corroborate the testimony denying the deposit and as tending to show affirmatively that no deposit was made, and not merely to prove that defendant's books did not show a deposit, so that plaintiff's admission that the records did not show a deposit did not render the evidence inadmissible. Wagner *v.* Valley Nat. Bank (Iowa), 118 N. W. 523.

In such case, plaintiff having testified that, after losing the certificate of deposit, he asked an officer of the bank how much he had on deposit, and the latter referred to some records, and told plaintiff he had $100, which was the amount of the alleged certificate, the evidence offered was admissible, in connection with the other testimony, to rebut the inference that the bank records then contained some record of the deposit. Wagner *v.* Valley Nat. Bank (Iowa), 118 N. W. 523.

97. **To establish existence of open account.**—In an action against a bank for the amount of a draft which plaintiff claimed to have handed in with his bank book with a request that the latter be balanced, while defendant claimed that plaintiff handed the draft without the book to defendant's cashier, who immediately gave plaintiff the amount thereof in cash, plaintiff's bank book was admissible to show that he had an open account with the bank. Goff *v.* Stoughton State Bank, 84 Wis. 369, 54 N. W. 732.

98. **Evidence tending to establish liability on other grounds.**—In a suit against a bank to recover the money deposited, evidence that no money was deposited, but that a certificate of deposit, issued by another bank, was indorsed to defendant bank, and seeking to show negligence of defendant bank in its collection, is incompetent. Hilsinger *v.* Trickett (O.), 99 N. E. 305.

99. Lippner *v.* Century Bank, 141 App. Div. 254, 125 N. Y. S. 1097.

cashier of a bank failed to enter deposits on its books is not admissible as against the depositor to show that the deposits were made with the cashier in his individual capacity.[1]

Receipt of Cashier.—The receipt of the cashier of a State Bank for money received of an individual is evidence of a deposit by that individual.[2]

As to Amount of Money Deposited.—Under the definition of a relevant fact, which is, one which renders probable or improbable the existence of the fact in issue,[3] where the question arises as to the denomination of a bill deposited, the fact that within a short time prior to the deposit the plaintiff received a bill of the denomination of the one he claims to have deposited is relevant.[4]

Passbooks.—In an action for a deposit against an insolvent banking firm, plaintiff's passbook was properly admitted, where the co-partnership of the bank, the depositor's dealings with it, and the entries in the passbook by the bank, were previously shown.[5] Furthermore, the plaintiff's bank book is admissible on the question as to when the account between plaintiff and defendant was last balanced.[6] Such books are also admissible for the purpose of showing deposits and withdrawals and the conditions on which deposits could be withdrawn.[7]

Bank Books.—Books of a savings bank are admissible in evidence to show deposits that have been made, and to whom such deposits belong.[8]

Parol Evidence to Explain Certificate.—A certificate of deposit issued by a bank, being an evidence of debt, is in the nature of a receipt, and may be explained by parol evidence.[9]

Evidence to Prove Ownership of Deposit.—Where it is proper for a person suing a bank for the amount of a deposit which he made in another's name, but claims as belonging to himself, to prove his title to it, he may

1. **Defense that deposit made with cashier individually.**—L'Herbette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354.

2. **Cashier's receipt.**—State *v.* Kain, 1 Ill. (Breese) 75.

3. **Amount of deposit made—Relevant fact.**—Kemble *v.* National Bank, 94 App. Div. 544, 88 N. Y. S. 246, affirmed in 183 N. Y. 545, 76 N. E. 1098; Stevens Digest of Evidence.

4. On the question whether a bill presented to a bank was a $100 gold certificate or a $1,000 greenback, the fact that within an hour and a half of the time of its deposit the depositor had received a $1,000 greenback and a $500 gold certificate is relevant. Judgment, Kemble *v.* National Bank, 94 App. Div. 544, 88 N. Y. S. 246, affirmed. Kemble *v.* Rondout Nat. Bank, 183 N. Y. 545, 76 N. E. 1098.

5. Arnold *v.* Hart, 176 Ill. 442, 52 N. E. 936, affirming 75 Ill. App. 165.

6. **To show balancing of account.**—Goff *v.* Stoughton State Bank, 84 Wis. 369, 54 N. W. 732.

7. In an action by a bank depositor for a balance claimed to be due, the plaintiff identified two bank books as those issued to him, which when issued contained extracts from the by-laws of the bank, one relating to the depositor's right of withdrawal, but which were blank on the line for the bank president's signature thereto, and showed deposits made and accepted with reference to the by-laws for two years. Held, that the books were admissible to show deposits and withdrawals, and the conditions on which deposits could be withdrawn. Marine Bank *v.* Stirling (Md.), 80 Atl. 736.

8. **Bank books.**—McKavlin *v.* Bresslin (Mass.), 8 Gray 177.

9. **Parol evidence.**—Hotchkiss *v.* Mosher, 48 N. Y. 478.

properly show everything connected with the origin and history of the deposit and the other person's statements in derogation of his own interest.[10] Where money is deposited in a bank to the credit of another, a letter written by the bank to the assignee for creditors of the one to whose credit the deposit is made, stating that such person had funds in the bank, is not evidence that such person owned the funds, in an action by his assignee against the bank.[11] The recognition by a bank of the right of both persons in whose names an account stands to draw the entire deposit is merely a legal inference drawn by the bank from the facts, which is immaterial on the issue of the right to the funds.[12]

Evidence to Support or Rebut Defense.—Any claim or defense which it is allowable for the defendant to set up, the defendant has the right to support,[13] and the plaintiff has the right to meet and rebut by any evidence having a legal tendency in that direction.[14] Where the defendant sets up a defense to plaintiff's claim, such as payment to the depositor,[15] payment upon

10. Evidence to prove ownership of deposit.—Davis *v.* Lenawee County Sav. Bank, 53 Mich. 163, 18 N. W. 629.

11. Letter written to assignee in bankruptcy.—Leech *v.* First Nat. Bank, 99 Mo. App. 681, 74 S. W. 416.

12. Fact of recognition of ownership by bank.—Tompkins *v.* McGinn (Tex. Civ. App.), 85 S. W. 452.

13. Evidence to support defense.—Anniston Nat. Bank *v.* Howell, 116 Ala. 375, 22 So. 471.

Where a depositor sued the receiver of a bank for the amount of a deposit, and he pleaded that a part of the deposit was used to pay the depositor's subscription to the capital stock of the bank, evidence that the president and cashier, who made the alleged sale to the depositor, had been given parol authority by the board of directors to sell the stock, was admissible. Somerset Nat. Banking Co.'s Receiver *v.* Adams, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

14. Evidence to rebut defense.—Davis *v.* Windsor Sav. Bank, 48 Vt. 532.

Testator's sister deposited money in defendant bank to the testator's credit, and subsequently drew it out under such circumstances that her right to do so depended on contract between her and the testator. The testator's administrator cum test. brought suit against the bank for the recovery of the money. Held, that plaintiff, to rebut the claim made by defendant that the money belonged to the testator's sister, but was deposited in the testator's name to prevent its being taken on her husband's debts, might show that she had money in the bank at the same time, deposited in her own name. Davis *v.* Windsor Sav. Bank, 48 Vt. 532.

In an action by a depositor for the balance of a deposit, where the bank claimed that his account was overdrawn $5,700 at about the time the bank's report was published, which showed total overdrafts, $82.04, and there was evidence in explanation that the defendant did not discover all the plaintiff's checks until afterwards, a copy of the report offered by plaintiff and admitted to be such by the bank's president was admissible. Marine Bank *v.* Stirling (Md.), 80 Atl. 736.

15. Matter tending to support or rebut defense—Evidence as to payment.—Brown *v.* Pike, 34 La. Ann. 576.

In an action on a certificate of deposit which defendant alleged had been paid, a bookkeeper of the depositary, who had no personal knowledge of the transaction between the depositor and the depositary testified from memory that the deposit remained an open account on the depositary's books, which had become lost, and could not be produced. Defendant offered in evidence abstracts made by an expert accountant, who had examined such books in connection with certain legal proceedings, showing the depositary's indebtedness and assets and a list of its creditors and debtors, with the amounts due to and from them, respectively, and in which nothing appeared to be owing the depositor. Held, that such abstracts were admissible to contradict such bookkeeper. Rosenstock *v.* Dessar, 109 App. Div. 10, 95 N. Y. S. 1064.

valid checks by depositor,[16] or one authorized to check against the deposit,[17] levy of execution against plaintiff on deposit in behalf of one of his judgment creditors,[18] transfer of deposit to the account of another at plaintiff's request,[19] or application to an existing indebtedness of plaintiff or some third party in pursuance of an alleged order of plaintiff, circumstances tending to support or rebut such defense are admissible.[20] But evidence which is immaterial to the issue should be excluded.[21] In an action to recover a

16. **Checks of depositor.**—American Nat. Bank *v.* Bushey, 45 Mich. 135, 7 N. W. 725.

Where, in an action against a bank for a deposit, the questions were whether the depositor signed the check for the amount of the deposit payable to a third person and paid by the bank, or whether she ratified the payment by the bank, the admission in evidence of a part of a paragraph of the answer setting up the defense that the remedy of the depositor was against the third person who had received the money, and excluding the part of the paragraph stating the legal conclusions and hearsay, was not prejudicial to the bank. Yarborough *v.* Banking, Loan, etc., Co., 142 N. C. 377, 55 S. E. 296.

17. **Checks by one authorized to check.**—Anniston Nat. Bank *v.* Howell, 116 Ala. 375, 22 So. 471.

It must depend upon testimony to be established what persons have authority to draw checks and to what extent. American Nat. Bank *v.* Bushey, 45 Mich. 135, 7 N. W. 725.

18. **Levy of execution on deposit.**—In an action for a balance due on general deposits in a bank, the defense alleged was that the balance due had been levied on under an execution against plaintiff in behalf of one of his judgment creditors. Held, that the return of the sheriff on such execution, showing such levy, and the payment of the money and its application, was properly rejected as evidence under the answer, because the money was not shown to be subject to such levy. Scott, etc., Co. *v.* Smith, 2 Kan. 438.

19. **Transfer of deposit to account of another.**—In an action to recover a deposit, allegations of the answer that the money in fact belonged to another and defendant transferred it to such other at his request, and paid it upon his order, and that plaintiff directed the credit to be entered to such other, and assented that payment be made to him, raised the issue of whether the transfer was made from plaintiff to such other pursuant to a valid agreement, and whether plaintiff ratified the transfer. Whitsett *v.* People's Nat. Bank, 138 Mo. App. 81, 119 S. W. 999.

In an action to recover a deposit made with defendant bank, defendant could show by circumstantial evidence an agreement between plaintiff and another by which the deposit was transferred to such other. Whitsett *v.* People's Nat. Bank, 138 Mo. App. 81, 119 S. W. 999.

While a bank, after receiving a deposit, can not plead title or ownership in another when sued therefor, it may show as a defense that the deposit was transferred on its books to another pursuant to the agreement and direction of the depositor. Whitsett *v.* People's Nat. Bank, 138 Mo. App. 81, 119 S. W. 999.

20. **Application to existing indebtedness.**—In an action to recover the amount of a certificate of deposit issued by defendants (bankers), plaintiff claimed that she indorsed the certificate in blank, and delivered it to one of defendants, to be placed to her credit. Defendants claimed that, before she indorsed the certificate, such defendant wrote on the back of it, in pencil, the words, "For C. & Co., account," and that she wrote her name under them. C. & Co., of which firm plaintiff's husband had been a member, were indebted to the bank, and defendants placed the deposits to their credit. Plaintiff put the certificate in evidence. Held, that it was proper to show that defendants had received from C. & Co. a conveyance to secure such firm's indebtedness to them, and that they retained it after such deposit, and up to the time of trial. Von Eherenkrook *v.* Webber, 100 Mich. 314, 58 N. W. 665, 60 N. W. 761.

21. **Immaterial evidence.**—In a suit to recover a balance of a bank account alleged by the bank to have been paid, testimony that during such time plaintiffs were associated in business with third persons is immaterial. Kuenster *v.* Woodhouse, 101 Wis. 216, 77 N. W. 165.

In an action to recover a deposit

deposit made in a bank, the defense of payment on the depositor's checks can only be established by the production of the checks, or, if lost, by proof thereof, of their existence, genuineness, and contents.[22] Under a law which provides that merchants' books can not be given in their favor, in a suit to recover a deposit made in a bank the bank's books are inadmissible to show that the bank has paid the amount of the deposit on checks of the depositor, which have been lost.[23] In an action to recover a balance of a bank account alleged by the bank to have been paid, the book entries of the bank of moneys received and paid out on the day in question are evidence only so far as they show transactions with plaintiffs.[24] The bank may show that the person making a deposit of his own funds in the name of depositor reserved the right to check against the fund and did check out all of that part sued for, thus showing that there was no complete transfer of the title to the deposit.[25] Where in an action on a certificate of deposit the defendant sets up that the deposit was of notes of a certain bank, which the depositor represented to be good, while in fact the bank was insolvent, the fact that the bank notes were taken at a greater discount than the usual charge for exchange was a circumstance tending to show that they were taken at the

where it was claimed that the part of the deposit had, with the depositor's authority, been used to purchase a bond for him, evidence that the property upon which the bond was secured could have been sold for more than enough to pay the bond issue was inadmissible; the authority of the bank being the question in issue. Trainer *v.* Marine Nat. Bank (Me.), 85 Atl. 478.

Testimony of defendant that he owned the business or premises and there carried on a banking business was irrelevant. Donijanovic *v.* Hartman (Mo. App.), 152 S. W. 424.

Where defendant's president and cashier knew that a certain $50,000 draft was procured by its assistant cashier with plaintiff's funds, and that he had no right to use any of such funds to pay his individual debt, the question as to whether defendant was a bona fide holder of such draft in an action to recover the proceeds thereof was immaterial, since, if it was used to pay the individual indebtedness of the assistant cashier to defendant, and not to reimburse defendant for money used by him to pay warrants or other items properly charged against plaintiff, defendant was liable. Supreme Tent Knights *v.* Port Huron Sav. Bank, 137 Mich. 627, 100 N. W. 898, 109 Am. St. Rep. 690.

In an action by a purchaser against a bank for the conversion of money deposited with the bank for payment to the vendor on specified conditions, evidence of fraudulent representations inducing the execution of the contract of purchase, was inadmissible, the bank not being a party to the contract, and the matters relating thereto as between the parties having been adjudicated without affecting the liability of the bank for the deposit. Banco Minero *v.* Ross (Tex. Civ. App.), 138 S. W. 224.

22. Rebutting claim of transfer of checks.—Brown *v.* Pike, 34 La. Ann. 576.

23. Bank's books.—Brown *v.* Pike, 34 La. Ann. 576.

24. Book entries of bank.—Kuenster *v.* Woodhouse, 101 Wis. 216, 77 N. W. 165.

25. Rebutting claim of transfer of title to deposit.—In an action for money, it appeared that plaintiff's husband had, from his own funds, made a deposit in plaintiff's name in defendant bank, and received the passbook which plaintiff got possession of before her husband's death. In his lifetime the husband had checked out the money without plaintiff's authority. Held, that defendant could show, as proving no completed transfer of the money to the absolute ownership and control of plaintiff, that, at the time the deposit was made, the husband instructed defendant to honor either his own or his wife's checks. Anniston Nat. Bank *v.* Howell, 116 Ala. 375, 22 So. 471.

purchaser's risk, and not on the faith of the depositor's representations.[26]

Evidence to Support or Rebut Claim of Forgery.—The rule is that where there is a charge of fraud in the procurement of a bond, bill, note, check, etc., or of forgery in its execution, a very large latitude is allowed to the courts in admitting testimony to show the relations of the parties.[27] Thus, evidence that criminal intimacy between the payee of a check and the drawer was discovered by payee's husband and that the check was given in remuneration, is admissible as showing a state of affairs rendering it probable that plaintiff had given the check.[28] Where the plaintiff claims that certain checks signed with his name are forgeries, his testimony regarding the authority of persons to draw checks, other than the person drawing the checks in controversy, which can have no tendency to show that the signer never had such authority, is inadmissible for that purpose.[29] In an action to recover a bank deposit, on an issue as to the forgery of a check charged against it, evidence that plaintiff caused a warrant to issue for the person charged with the forgery, and that one of the bank's officers had refused to contribute to a reward for the arrest of the forger, is inadmissible.[30] And so is evidence that the drawer was skillful in the imitation of signatures, that years before in Alaska he went under an alias, and that he could imitate the witness' signature so closely that witness could not detect the real from the assumed.[31]

Negligence in Paying Forged Checks.—To prove negligence in paying checks purporting to be drawn by plaintiff against his account with defendant bank, it is competent to show that a check merely stamped with plaintiff's name, but not signed by any one, was paid, though the money drawn by it was not converted by the forger, but used by plaintiff.[32]

26. Evidence to rebut special defense.—Johnson *v.* Barney & Co., 1 Iowa 531.

27. Evidence as to forgery—Relation of parties.—Crane *v.* Dexter, etc., Co., 5 Wash. 479, 32 Pac. 223; Robb *v.* Mann, 11 Pa. 300, 51 Am. Dec. 551; Olmsted *v.* Hoyt, 11 Conn. 376; Burkholder *v.* Plank, 69 Pa. 225. See ante, "Liabilities of Bank to Depositor, Payee or Owner," § 148.

In an action by an administrator against a bank for the amount of decedent's deposit, alleged to have been paid out upon a forged check presented and cashed through a conspiracy in which decedent's wife, who received the proceeds, participated, evidence was admissible to show that the wife actually obtained the money by unlawful means, though it appeared that she received the money directly from decedent, who previously had cashed the check. Reed *v.* Mattapan Deposit, etc., Co., 198 Mass. 306, 84 N. E. 469.

28. Evidence of criminal intimacy.—Crane *v.* Dexter, etc., Co., 5 Wash. 479, 32 Pac. 223.

29. To support claim of forgery.—In an action against a bank by a depositor for moneys paid out on checks signed in his name by other persons, plaintiff's testimony that, when sick, he signed checks himself, and that he never authorized his daughter and others who attended to writing his letters to do so, had no tendency to show that he never gave such authority to the signer of the checks, and was inadmissible for that purpose. American Nat. Bank *v.* Bushey, 45 Mich. 135, 7 N. W. 725.

30. Evidence as warrant and arrest of forger.—Buell *v.* Aberdeen State Bank, 58 Wash. 407, 108 Pac. 951.

31. Evidence of ability to imitate signatures, etc.—Buell *v.* Aberdeen State Bank, 58 Wash. 407, 108 Pac. 951.

32. To prove negligence in paying forged checks.—Kenneth Inv. Co. *v.* National Bank, 103 Mo. App. 613, 77 S. W. 1002.

To Support or Rebut Existence of Trust.—When seeking to establish or rebut the existence of a trust in the deposit sued for, evidence to be admissible, must, as in other cases, be material and relevant.[33] Thus the custom of a bank in striking out the name of a party to a passbook is entirely immaterial,[34] especially where the witness, in case, has already testified that he did not know the name had been striken out at the bank.[35] As the fact that a savings bank book designates the depositor as trustee for one who subsequently sues for the deposit, is not conclusive of the existence of a trust,[36] evidence is admissible in such suit to explain the form of deposit adopted and to rebut the intention to make a gift.[37]

Evidence to Show Misappropriation.—Plaintiff having proved ownership of certain moneys which have been deposited in defendant bank, testimony of one of the latter's clerks that the president and cashier had directed that such money be paid out in discharge of debts of the bank is admissible, such officers having authority to make such directions.[38]

Evidence to Explain Delay in Suing.—Where an estoppel is claimed by reason of plaintiff's delay in suing for a long time, having the certificate in his possession showing the fraudulent payment, evidence of illiteracy of plaintiff and his wife is admissible to explain their delay in making the discovery.[39]

33. Evidence to establish or rebut trust—Must be material and relevant.—O'Brien *v.* Weiler, 68 Hun 64, 22 N. Y. S. 627, 52 N. Y. St. Rep. 17, judgment affirmed in 140 N. Y. 285, 35 N. E. 587.

34. Custom of bank.—In an action by an executor to recover a deposit which had been made in deceased's name "as guardian," where it was claimed that deceased had accounted for the amount by purchasing bonds for the cestui que trust, where it appeared that the latter's name had been stricken from the passbook, it is not competent to prove the custom of the bank when striking out the name of a party in a passbook. O'Brien *v.* Weiler, 68 Hun 64, 22 N. Y. S. 627, 52 N. Y. St. Rep. 17, judgment affirmed in 140 N. Y. 281, 35 N. E. 587.

35. O'Brien *v.* Weiler, 68 Hun 64, 22 N. Y. S. 627, 52 N. Y. St. Rep. 17, judgment affirmed in 140 N. Y. 281, 35 N. E. 587.

36. Parkman *v.* Suffolk Sav. Bank, 151 Mass. 218, 24 N. E. 43, citing Brabrook *v.* Boston, etc., Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222; Clark *v.* Clark, 108 Mass. 522; Powers *v.* Provident Inst., 124 Mass. 377; Sherman *v.* New Bedford, etc., Sav. Bank, 138 Mass. 581; Alger *v.* North End Sav. Bank, 146 Mass. 418, 422, 15 N. E. 916, 4 Am. St. Rep. 331. See, also, Robinson *v.* Ring, 72 Me. 140, 39 Am. Rep. 308; Marcy *v.* Amazeen, 61 N. H. 131, 60 Am. Rep. 320.

37. Evidence admissible to explain form adopted.—Parkman *v.* Suffolk Sav. Bank, 151 Mass. 218, 24 N. E. 43.

In an action for money deposited by plaintiff's intestate in a bank, when the deposit book designates the depositor as trustee for another, evidence that intestate had deposited in his own name the full amount allowed by the rules of the bank is admissible, as offering a possible explanation for the form in which the deposit in controversy was made, other than an intent to make a gift. Parkman *v.* Suffolk Sav. Bank, 151 Mass. 218, 24 N. E. 43.

38. Evidence to show misappropriation.—City Bank *v.* Batemen (Md.), 7 Har. & J. 104.

39. Evidence to explain delay in suing.—When plaintiff, after accepting a certificate of deposit of $200, and $100 in cash, in lieu of a certificate of $400 on which was indorsed a payment of $100, sued to recover such $100, as having been paid to an unauthorized person, 14 months after it was made, it was proper to allow the jury to consider the illiteracy of plaintiff and his wife in explanation of such delay. Devine *v.* Bank, 91 Wis. 68, 64 N. W. 589.

Liability for Money Deposited in Branch Bank.—Where suit is brought against defendant to hold it liable for money deposited in another bank, as a branch bank, any evidence which tends to establish that relation between such banks is admissible. And any evidence which tends to estop the directors of the defendant bank from denying such relation is competent.[40]

§ 154 (8) Weight and Sufficiency of Evidence.—Evidence That Deposit Made.—Where the question arises as to whether or not a particular deposit was made, the general rules as to the weight and sufficiency of the evidence apply. The burden of proof must be borne by a preponderance of the evidence.[41] On an issue as to whether defendant is entitled to credit

40. **Liability for money deposited in branch bank.**—See ante, "Branches," § 33.

In an action to hold defendant bank for deposits in the C bank, on the ground of its being a branch of defendant, plaintiff offered in evidence an application for a bond to secure the deposits of public funds in the C bank, and the bond executed pursuant thereto, the application being made in the name of defendant, and signed by S as its vice president, and by C as its cashier, and reciting that the C bank was controlled by defendant, and that defendant held itself responsible for it, and the bond, executed by both banks as principals, reciting such control of the C bank by defendant; and, though no previous authority from defendant's board of directors to such officers to sign such papers was shown, such officers were shown to be largely charged with control of its affairs, and it was otherwise shown that its president had practically the same knowledge of such matters as they had. Held, that the evidence was admissible; it being for the jury to say whether defendant's board of directors, by the exercise of reasonable and ordinary diligence, which they were bound to exercise, should not have known the facts. Ames *v.* Farmers', etc., Bank (Wash.), 93 Pac. 530.

So under such circumstances letters written to defendant on letter heads of the C bank, conspicuously stating that it was a branch of defendant, and letters written by and to defendant's officers, on their face having some bearing on the subject, are admissible for what they are worth on the question of the C bank being a branch of defendant. Ames *v.* Farmers', etc., Bank (Wash.), 93 Pac. 530.

In an action to hold defendant, a bank, having its chief place of business at S, liable for deposits in a bank at C, on the ground that C bank was conducted by defendant, an advertisement of the C bank stating that it was a branch of the S bank, published at the instance of H, who had immediate charge of the C bank, is competent evidence that the C bank was a branch of defendant, in connection with evidence that it was mailed directly to defendant at its home office, that the affairs of defendant were largely left with its executive officers in the immediate charge of the banking business, and that the C bank was organized by the authority of defendant's vice president, who placed H in charge thereof. Ames *v.* Farmers,' etc., Bank (Wash.), 93 Pac. 530.

41. **Rules as to preponderance of evidence apply.**—In a suit against a bank for an alleged deposit, where the evidence showed that plaintiff had left a note as collateral, and that after the secured indebtedness had been paid the maker of the collateral note executed another note to the bank for the balance due on the collateral note, the proof of the implied deposit sufficiently conformed to the allegations, since defendant should have credited plaintiff with the amount, and that which in equity ought to be done is to be considered as done. First Nat. Bank *v.* Pickens, 7 Ind. T. 725, 104 S. W. 947.

It was not error to charge that if plaintiff deposited her money with I. as president of defendant bank, if she so intended it, then it was not necessary for plaintiff to show that it went on the books of the bank to her credit, where the court added "if the bank held up I. as a representative," and authorized him to receive deposits, and he received these deposits in the exercise of that authority, and plaintiff honestly dealt with him under that authority. Jumper *v.* Commercial Bank, 48 S. C. 430, 26 S. E. 725.

In an action to recover a deposit in

for deposits represented by certain deposit slips found among the papers of plaintiff bank, and if so, whether such credit has been given, the existence of those slips is not sufficient in itself to charge the bank with said deposits, and it is proper to submit the issue to the jury with the bank's explanation that the slips were misdated, and were credited to defendant at their proper dates.[42] In an action against a bank to recover a deposit, made without any deposit ticket, passbook, or certificate of deposit, the fact that it is the custom of the bank to provide some such evidence of the deposit will not defeat the depositor's right to recover the money if he can produce other evidence that he made the deposit.[43] In an action to recover deposits alleged to have been accepted by defendant as a banker for safe-keeping and afterwards converted to his own use, recovery could not be had upon mere proof of transaction between a banker and depositor giving rise to the ordinary relation of debtor and creditor.[44] Where there is a conflict in the evidence as to the making of a certain deposit, it being an unusual deposit and greatly in excess of any deposit plaintiff had made and apparently considerably beyond the receipts of his business, it devolves upon him to prove from whence he derived the funds alleged to have been deposited.[45]

a bank, evidence held sufficient to support the finding that the deposit was made. Corbin Banking Co. *v.* Bryant (Ky.), 151 S. W. 393.

Evidence of deposit insufficient.—Lemon *v.* Mechanics', etc., Bank (N. Y.), 107 N. Y. S. 9.

A depositor made a deposit of $100 on a certain day, which was credited to him. Under the same date, an entry of another item of the same amount was made by the bank officer upon the depositor's passbook, but was not credited to him on the bank's books. The depositor claimed that this second deposit was not made on the day of its date, but that subsequently, when he made a deposit of $35, he sent the sum of $100 by his wife, which was deposited and was represented by this credit. The depositor and his wife had few financial transactions, but could not recollect whether this claimed deposit was made in currency or by check. They lived at such a distance from the bank that the wife's journey to make the deposit could not be completed in one day; yet neither could fix the month when the purported deposit was made. Though the bank had a careful system of bookkeeping, there was no deposit ticket, and the cash and books had daily balanced. The bank's officers claimed that the same deposit had been erroneously entered twice in the passbook. Held, that the evidence was insufficient to support a verdict finding that the deposit had been made. French *v.* Eastern Trust, etc., Co., 91 Me. 485, 40 Atl. 327.

42. Deposit slips as evidence.—Pool *v.* White, 175 Pa. 459, 34 Atl. 801.

43. Effect of evidence of custom to provide evidence of deposit.—Jackson Ins. Co. *v.* Cross, 56 Tenn. (9 Heisk.) 283.

44. Ordinary relation of debtor and creditor.—De Lucia *v.* Cellilo (N. Y.), 123 N. Y. S. 229.

45. Evidence of making certain deposit.—A. S. drew a check for $340.25, which was duly paid, but by mistake charged to the account of D. S. Soon afterwards the mistake was discovered, and, to correct it, D. S. was credited with the sum named. Thereafter, D. S. deposited $250 in the bank, and about that time received his bank book posted up to date. A few days later he stated to the cashier, who had been absent, that a mistake had been made in not giving him credit for $345. The cashier, without a full investigation, gave him credit on his bank book for the sum stated. The entry was afterwards erased. In an action against the bank to recover the $345 claimed to have been deposited, he testified to making the deposit, and also to the deposit of $250, and also from what source the latter sum had been received, but failed to show from whence he received the $345. The bank employees testified that no such deposit was made by D. S., and explained the mistake above set forth. Held, that it devolved on

Evidence as to Existing Liability.—Where the question in issue is whether the deposit or a part thereof remains unpaid, the rule in regard to the weight and sufficiency of the evidence is the same as in other cases, which is that it must preponderate in favor of the party upon whom the burden rests. Thus, where the defendant answers that no deposit was in fact made, but that the certificate was issued as a part of a scheme to defraud, if the oral evidence is contradictory and the certificate of deposit shows that the cash was paid in, a verdict for the plaintiff will not be disturbed.[46] Where the uncontradicted evidence shows that money deposited and placed to the credit of plaintiff was his money, and there is no evidence that the money was drawn out either by him or by one having authority from him to do so, he is entitled to a judgment against the bank for the amount shown to have been deposited to his account.[47]

A valid certificate of deposit is prima facie evidence of liability,[48] and it seems that it is conclusive that the money was received on deposit.[49] In a

plaintiff, in view of the fact that, from his previous deposit account with the bank, it did not appear that he had been in the habit of depositing on any day so much money as the aggregate of the sums named, to show from whence he derived the money in dispute he claimed to have deposited; the aggregate being an unusual deposit. State Bank *v.* Smith, 29 Neb. 434, 45 N. W. 691.

In a suit to recover balance of a sum deposited in a bank, where the evidence of the plaintiff is her account book, wherein the bank enters the debits and credits, several leaves of which have been torn out, and the evidence of the defendant is the bank ledger, which corresponds with her account book up to the torn leaves, and which shows that she has drawn her whole deposit save five cents, and which the bank officers swear is correctly kept, tender of the balance due having been shown, judgment was rendered in favor of the defendant. Wilson *v.* Hibernia Nat. Bank (La.), Man. Unrep. Cas. 170.

Where, in an action by an administrator against a bank to recover the amount of a deposit made by decedent, a passbook produced by defendant showed a deposit make by deceased on a certain date, and a subsequent withdrawal thereof, but there was no proof as to the date of decedent's death, the complaint was properly dismissed for failure of proof that at the time of his death there was any money belonging to decedent on deposit with defendant. Harris *v.* State Bank, 49 Misc. Rep. 458, 97 N. Y. S. 1044.

46. Where, in an action by administrators against the receiver of an insolvent bank to recover money deposited by them, the defense is that, though a certificate was issued by the cashier, no deposit was in fact made, but that it was a mere cover to a scheme to defraud both the plaintiffs' cestuis que trustent and the bank, by the president of the bank using the money in speculations, and dividing the profits with the plaintiffs, the oral evidence being contradictory, and the certificate of deposit showing that the money was paid in, a verdict for plaintiffs will not be set aside as against the weight of the evidence. Bingham *v.* Marine Nat. Bank, 112 N. Y. 661, 19 N. E. 416, 2 Silvernail 137.

47. Evidence entitling plaintiff to judgment.—Madden *v.* Wright, 108 Ga. 400, 33 S. E. 987.

Proof that a certificate of deposit was paid to another than the depositor without indorsement thereon, unexplained, establishes prima facie a case in favor of the depositor to recover of the bank. Somers *v.* Germania Nat. Bank (Wis.), 138 N. W. 713.

48. A certificate, signed by the cashier, stating that money has been deposited to one's credit, to be paid out on the happening of a certain contingency, is prima facie evidence of the liability of the bank. American Nat. Bank *v.* Presnall, 58 Kan. 69, 48 Pac. 556.

49. Conclusiveness of certificate.—In an action on a certificate of deposit, it can not be shown that no money was received therefor. Carroll *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500.

suit against a bank on the common counts, a certificate of deposit, signed by the teller of the bank, and delivered to the plaintiff, when produced, and proof made that it was signed by the proper officer of the bank, makes a prima facie case. The certificate is an acknowledgment that the bank had the sum of money specified therein on its books to the credit of the plaintiff, and the burden of proof is on it to show that it has in some way discharged the liability.[50] The holder of a certificate of deposit payable in "current funds," who is otherwise entitled to recover thereon, is entitled to judgment for the amount specified in the certificate without proof of value.[51] The maker of a certificate of deposit can not overcome its effect as evidence of the deposit, except by clear and satisfactory evidence.[52]

Check as Evidence.—Where a check is drawn by a depositor on his deposit payable to the same bank or order, its indorsement by the bank and return to the drawer as paid is prima facie evidence of the receipt by the bank of the amount shown by the check, but is open to explanation.[53]

Claim of Deposit of Worthless Currency.—A bank which seeks to avoid repayment of deposits by alleging that, although credited to the depositor in dollars and cents, the funds deposited were actually only Confederate currency, must make clear and unquestionable proof of the fact.[54]

Amount of Deposit.—A written statement given by a bank showing that a county treasurer had to his credit a certain amount in the bank is not a contract fixing the rights of the county in the bank. It occupies no higher plane than would a verbal statement or admission, and, apart from the question of estoppel, is not conclusive, and can be explained or contradicted.[55] An entry by a bank, on a passbook delivered to a depositor, of the amount credited on such depositor's account, is not a contract. It is of no more force than a receipt, and may be explained as may a receipt. Such an entry, unexplained, may be prima facie evidence of an obligation on the part of the bank to pay to the order of the depositor the sum stated; but it is not conclusive proof of that fact.[56]

Evidence of Demand.—Where the plaintiff alleges a demand for pay-

50. Certificate an acknowledgment of deposit.—Cushman *v.* Illinois Starch Co., 79 Ill. 281.

51. Proof of value.—Fallon *v.* Safety Banking, etc., Co., 45 Pa. Super. Ct. 193.

52. First Nat. Bank *v.* Myers, 83 Ill. 507.

53. Check as evidence.—Patterson *v.* First Nat. Bank, 73 Neb. 384, 102 N. W. 765.

54. Evidence that worthless bills were deposited.—Greeves *v.* Louisiana State Bank, 22 La. Ann. 228.

55. Amount of deposit.—Anderson *v.* Walker (Tex. Civ. App.), 49 S. W. 937, affirmed in 93 Tex. 119, 53 S. W. 821. In order that statements by a bank as to the amount of county funds a treasurer had on deposit, made to a finance committee appointed by the district court to examine his accounts, should estop the bank from denying that it so held the amount represented, it should appear that the statement in question came to the knowledge of the authorities representing the county and influenced them to take or omit some action by reason of it, and that the county had sustained loss of its money in consequence of the representation. Anderson *v.* Walker, 93 Tex. 119, 53 S. W. 821, affirmed in 49 S. W. 937.

56. Entry on passbook.—Anderson *v.* Walker (Tex. Civ. App.), 49 S. W. 937, affirmed in 93 Tex. 119, 53 S. W. 821.

ment of the deposit, the evidence must, as in other civil cases, preponderate in his favor.[57] In an action to recover money which had been deposited in defendant bank to plaintiff's credit, plaintiff's testimony that he had demanded payment is sufficient evidence of such demand, when uncontradicted.[58] Where there is no evidence as to the exact balance and no evidence that any check of plaintiff had been dishonored, or payment of any check refused, the only evidence of demand being plaintiff's statement that he asked the bank to give him the sum sued for, and to give him credit for that amount, and that both requests were refused, it is insufficient to support a judgment for plaintiff, as a depositor can not bring suit against a bank, and make it liable for costs, for a balance due on his account, without attempting to collect the same in the ordinary way, by presenting a check or putting the bank in default in some formal manner.[59]

Payment or Other Disposition.—Where the bank sets up in defense payment or other rightful disposition of the deposit sued for, such payment or disposition must be shown by a preponderance of the evidence, and the verdict of a jury will not be disturbed unless it is clearly contrary to the evidence.[60] This rule applies when the defendant attempts to establish a de-

57. Evidence of demand.—In an action against a bank to recover an amount of money claimed to have been deposited, evidence held sufficient to authorize the jury to find that plaintiff demanded the sum due. Judgment. Kemble *v.* National Bank, 94 App. Div. 544, 88 N. Y. S. 246, affirmed. Kemble *v.* Rondout Nat. Bank, 183 N. Y. 545, 76 N. E. 1098.

58. Plaintiff's uncontradicted evidence.—Cole *v.* Charles City Nat. Bank, 114 Iowa 632, 87 N. W. 671; Weis *v.* Morris, 102 Iowa 327, 71 N. W. 208. See ante, "Conditions Precedent," § 154 (3).

59. Evidence insufficient.—Wasserstrom *v.* Public Bank (N. Y.), 123 N. Y. S. 55.

60. Payment or other disposition.—Tecumseh Nat. Bank *v.* McGee, 61 Neb. 709, 85 N. W. 949.

Evidence held to establish that a bank had notice that checks cashed by it were not to be paid out of the private account of plaintiff and that the drawer of the checks had no authority to check on plaintiff's account. Crab *v.* Citizens' State Bank (Idaho), 126 Pac. 520.

In an action by a depositor to recover from a bank the amount of a check claimed to have been erroneously applied by the bank to the payment of a note, instead of being paid in currency, it appeared that the check was destroyed by plaintiff after it was returned to him, that, if produced, it would show whether paid in currency or not, and the paying teller's books showed that he had paid currency for the check. Held, that a verdict for the defendant would not be disturbed. Pugh *v.* Merchants' Bank, 33 Ill. App. 353.

In an action by a depositor against the receiver of a bank to recover a deposit, where defendant pleaded that the deposit had been used to pay for stock subscribed for by plaintiff, evidence considered, and held insufficient to show that plaintiff purchased the stock. Somerset Nat. Banking Co.'s Receiver *v.* Brinkley, 24 Ky. L. Rep. 2088, 72 S. W. 1129.

In an action to recover the amount of a deposit where the bank claimed with the depositor's authority to have purchased a bond out of the proceeds of such deposit, evidence held sufficient to support a finding that the depositor had not authorized the purchase. Trainer *v.* Marine Nat. Bank (Me.), 85 Atl. 478.

Evidence, in an action against a bank to recover as for money had and received, held to warrant the jury in finding that defendant bank had properly accounted to plaintiff for the amount of certain checks, which had been collected by it through a clearing house, and had been received in cash from the bank by an employee of the plaintiff, who assumed to have authority to receive the same. Scanlon-Gipson Lumber Co. *v.*

fense by way of set-off.[61] Where a bank teller is accustomed to fill out a depositor's check, in an action to recover the deposit, his testimony, given positively and circumstantially, that he had paid a check of the depositor for

Germania Bank, 90 Minn. 478, 97 N. W. 380.

In an action against a bank to recover the difference between the aggregates of sums deposited and the sums withdrawn, evidence held to sustain a judgment for defendant. West *v.* Bank, 110 Mo. App. 490, 85 S. W. 601.

Where in an action by an administrator based on an alleged deposit in a bank, which it claimed to have discharged by payment to another bank on intestate's directions, it is not error to instruct that unless the jury found that defendant had proved by a fair preponderance of the evidence that it had paid to plaintiff's intestate, or to such bank on the authority of the intestate, such deposit and interest, if interest was to be paid, they should find for plaintiff. Tecumseh Nat. Bank *v.* McGee, 61 Neb. 709, 85 N. W. 949.

In an action by an administrator based on a deposit in a bank, the obligation for which it claimed to have discharged by payment to another bank under intestate's directions, evidence that intestate deposited the money in the defendant bank, and it was the only party with which he dealt at the time of making the deposit, and that such other bank was merged into defendant bank, which became its successor, is sufficient to sustain a judgment for plaintiff for the amount of the deposit. Tecumseh Nat. Bank *v.* McGee, 61 Neb. 709, 85 N. W. 949.

In an action against a bank to recover money claimed to be the balance of plaintiff's deposit paid out on checks which the bank was unable to produce, evidence examined, and held insufficient to support a verdict for the plaintiff. Clark *v.* Mechanics' Nat. Bank (N. Y.), 8 Daly 481.

The assignee of an insolvent estate, who had a deposit as such in a bank of which he was cashier, drew a check, as assignee, for the amount of the deposit, and placed it on the spindle where paid checks were placed by the paying teller, and the check was entered in the bank's books. Held, that a rebuttable presumption of payment of the deposit arose. Wiggins *v.* Stevens, 33 App. Div. 83, 53 N. Y. S. 90.

Plaintiff testified that defendant, a broker, had sold a note for him, and that he had refused to pay over the proceeds. Defendant gave evidence tending to show that the relation of banker and customer existed between him and plaintiff, and that he had paid out such proceeds on checks drawn by plaintiff. A letter from plaintiff was put in evidence in which he spoke of leaving money on deposit with the defendant. Held, that a judgment for plaintiff for such proceeds would not be disturbed. Darrah *v.* Boys, 10 N. Y. S. 697, 16 Daly 209, 32 N. Y. St. Rep. 297, judgment affirmed 130 N. Y. 700, 30 N. E. 68.

Where there was no proof that defendant bank had any knowledge of the want of authority of plaintiff's cashier to direct the application of plaintiff's deposit with defendant to the cashier's own indebtedness to defendant, and there was positive evidence that defendant's officers knew nothing of the cashier's misappropriation of the money, and defendant claimed that plaintiff was estopped to recover the money so applied, it was not error for the court to fail to condition such estoppel on the fact of defendant's ignorance as to the cashier's authority. Iron City Nat. Bank *v.* Fifth Nat. Bank, 31 Tex. Civ. App. 308, 71 S. W. 612.

Evidence in an action to recover money which plaintiff deposited with defendant bank to apply in payment of stock held insufficient to show that the stock, in payment for which defendant applied the money, was not the stock plaintiff intended to buy. Foran *v.* Royal Bank, 141 App. Div. 548, 126 N. Y. S. 575.

Notice to stop payment on check.—Evidence held to show that a check was paid before the bank received notice to stop payment. Brandt *v.* Public Bank, 139 App. Div. 173, 123 N. Y. S. 807.

61. Set-off.—In an action by a bank depositor for the balance of the deposit, it is proper to instruct that the burden was upon the defendant to establish its defense of set-off by a preponderance of evidence, and, if the minds of the jury were in an even balance as to whether anything was due the defendant under the set-off, then they should find for the plaintiff; it having no tendency to mislead the jury as to burden of proof. Marine Bank *v.* Stirling (Md.), 80 Atl. 736.

a certain amount, is sufficient to show such payment.[62]

Payment on Forged Paper—Forged Indorsement.—The general rules as to the weight and sufficiency of evidence apply in cases where the point to be determined is the validity or forgery of a check against a deposit.[63] If a check drawn payable to order, and indorsed with the name of the payee, and paid, has never been in the hands of the payee, it is a necessary inference that it has been obtained by fraud from the maker, and the indorsement forged.[64]

Ownership of Deposit.—Where the ownership of a deposit is in question, the only material evidence for the plaintiff being her own, incompetent because it relates to transactions between her and a decedent, and unreliable because it is conflicting, the cause should not be submitted to the jury.[65] Evidence of a banker's understanding that certain money deposited with him by deceased, for which the certificates were issued jointly to deceased and his wife, belonged to the former, is entitled to no weight on an issue between

62. Testimony of bank teller.—Brown *v.* Pike, 34 La. Ann. 576.

63. Payment on forged paper.—See ante, "Payment of Forged or Altered Paper," § 147.

A depositor, long after he had supposed he had withdrawn all his deposits, sued the bank for a balance, which the bank claimed he had drawn, and part of which had been paid out on checks signed by a third person in his name. It appeared that the depositor had been in the habit of checking out the whole of a deposit shortly after making it, and had neglected to present his bank book for balancing, or to withdraw his checks. Held, that such fact was in itself strong evidence that the account was correct and should have been so treated, and it was misleading to treat it as bearing only on the probabilities as to whether such third person, who had signed the checks, would have risked detection by acting without authority. American Nat. Bank *v.* Bushey, 45 Mich. 135, 7 N. W. 725.

In an action against a bank by a depositor to recover the amount of checks drawn by plaintiff, but alleged to have been paid by defendant on indorsements of the payees' names, forged by plaintiff's cashier, part of whose duty was to fill in the body of checks for plaintiff to sign, pay bills, and keep the accounts, it appeared that the money on the checks in question had been obtained by plaintiff's cashier, but there was no evidence that any payees had been named in them, the canceled checks having been destroyed by the cashier. Held, that plaintiff could not recover, as it would not be presumed that the cashier committed forgery in addition to the embezzlement, when he could have avoided forgery by making the checks payable to "cash" or "bearer," in which event defendant would not be liable. National Board *v.* National Bank, 9 Misc. Rep. 362, 29 N. Y. S. 698, 60 N. Y. St. Rep. 625.

64. Forged indorsement.—Morgan *v.* State Bank, 8 N. Y. Super. Ct. (1 Duer) 434. See ante, "Payment of Forged or Altered Paper," § 147.

65. Ownership of deposit.—Plaintiff sued to recover from a savings bank a deposit alleged to have been made with her money, by and in the name of a man now dead, whom she lived with as wife. She pleaded that the money was hers, and also that deceased assigned to her his right and title thereto. She testified that the bank book was always in her possession, but an entry showed that deceased had checked out a large part of the original deposit, which the evidence showed he invested in his own name. She testified also that the deposit was made in her presence by a draft from another bank which she never saw. She did not produce the draft, nor explain where she got the money. The evidence as to the means of deceased was conflicting. Held that, as the only material evidence for plaintiff was her own, and was incompetent, because it related to transactions between her and deceased, and was unreliable, because she swore to two inconsistent causes of action, and was conflicting, it was error to submit the case to the jury. Gunning *v.* Gunning, 66 Hun, 626, 20 N. Y. S. 804, 49 N. Y. St. Rep. 417.

the executor and the wife as to the ownership of such money.[66] Where a husband deposited money in a bank, and took the certificate in the names of himself and wife, in a suit against the executor of the husband, evidence to the effect that the wife had bought a portion of the farm and that the money deposited was earned on the farm does not show that the money was not jointly owned by the husband and wife, as indicated by the joint certificate.[67] The fact that on the death of the husband assignments of deposits standing in a wife's name, which had been executed from the wife to the husband, were found among his papers, did not necessarily show that the deposits belonged to her, and not to him.[68] And where the plaintiff claims under an assignment of the deposit, the assignment and the validity thereof must be proven by a preponderance of the testimony.[69] The possession of a passbook to an account standing in the name of the person possessing the same and another, evidences merely a deposit in their joint names, and it is not evidence of the possessor's dominion over the fund.[70]

Notice to Apply Deposit on Obligation.—Where the question arises as to whether or not plaintiff gave the defendant bank notice to apply the deposit on a certain obligation he had outstanding, the fact of such notice must be shown by a preponderance of the evidence, the burden being on the plaintiff.[71]

Evidence to Establish Trust Fund.—In an action to recover a deposit, alleged to be a trust fund, the existence of the trust must be established by a preponderance of the evidence just the same as other issues arising in civil cases.[72]

Transfer of Liabilities of Old to New Firm.—In an action to recover a deposit made with partners in a banking business, defendant having thereafter taken one of the partners places in the firm, the production of plain-

66. **Evidence of banker's understanding.**—In re Brown's Estate, 113 Iowa 351, 85 N. W. 617.

67. **Joint deposit—Evidence insufficient to show sole ownership.**—In re Brown's Estate, 113 Iowa 351, 85 N. W. 617.

68. **Assignments standing in wife's name.**—Dodge *v.* Lunt, 181 Mass. 320, 63 N. E. 891.

69. Testimony of J. B. that he opened a depositor's account with defendant bank, a bank book containing an account of M. B. & Son with the bank, and further testimony of J. B. that he assigned his claim to plaintiff, does not authorize a recovery for plaintiff, it not being shown who M. B. & Son were, or what authority J. B. had to assign an account belonging to them as evidenced by the bank book. Robbins *v.* Bank, 90 N. Y. S. 288.

70. **Possession of passbook, etc.**—Tompkins *v.* McGinn (Tex. Civ. App.), 85 S. W. 452.

71. **Notice to apply deposit on obligation.**—In an action against a bank to recover money deposited to the credit of the depositor's general account, but alleged to have been intended to be applied to the payment of the depositor's note held by another bank, evidence reviewed, and held insufficient to establish notice of such application to the bank in which the money was deposited. First Nat. Bank *v.* City Nat. Bank, 102 Mo. App. 357, 76 S. W. 489.

72. **Evidence to establish trust.**—In an action against the receiver of a bank, for dividends on a debt for a deposit in the name of "S., Trustee," the mere general statement of S. that the money deposited was his daughter's, in connection with evidence that she owned property which he managed, and from which the fund deposited might have been derived therefrom, is not sufficient to enable the daughter to recover. Sowles *v.* Witters, 35 Fed. 463. See ante, "Trust Funds," § 130.

tiff's bank book, which showed his account, commencing before the defendant came in as a partner, and running down after he came in, with balances struck after that time, and evidence that this account, so kept, was but a transcript of the ledger of the concern, was sufficient to show that the defendant had assented to the transfer of the liabilities of the old to the new firm.[73]

§ 154 (9) Trial and Judgment.—Issues—When Properly Raised.—Where, in an action at law to recover deposits in a bank, the answer, by alleging that plaintiff had executed notes to the bank, which were set up as a counterclaim, alleged that the notes were supported by a consideration, a reply averring that no consideration for the notes existed presented the issue of consideration.[74]

Instructions.—The charge of the court should be consistent with the pleadings of the parties,[75] and the evidence admitted.[76] A charge which

73. Transfer of liabilities of old to new firm.—Hoyt *v.* Reed, 16 Mo. 294.

74. Issues—When properly raised.—Boothe *v.* Farmers', etc., Nat. Bank, 53 Ore. 576, 98 Pac. 509, 101 Pac. 390.

75. Charge consistent with pleading.—Plaintiff claimed a balance from a bank of $490. The passbook showed a credit for a deposit of $245, which afterwards had been changed to a debit for moneys drawn out, on the theory of there having been a mistake in making the entry as a credit instead of a debit. Verdict was rendered for the plaintiff. Held, that an instruction that, if no mistake was found, plaintiff was entitled to verdict for the sum of $490, not separating the issue as to whether any such deposit was made, was not erroneous. Hall *v.* Farmers,' etc., Sav. Bank, 55 Iowa, 612, 8 N. W. 448.

In an action on a certificate of deposit originally made out to a wife and bearing a purported indorsement to her husband, the defense was payment and limitations. Both husband and wife were dead, and the bank's papers had been destroyed. The bank's theory was that a duplicate had been issued to the wife on an allegation of loss and had been paid to her, and that the indorsement on the original in suit had been made after her death by some one else, but the genuineness of the indorsement was not put in issue by the pleadings. Evidence was given of a demand by the wife on the bank which would start limitations running. The court charged that from the time the certificate was issued to the wife she must be deemed the legal owner, but that after indorsement, if made, and delivery, she would not be the owner. Held, that the charge was not objectionable as submitting the issue of the genuineness of the indorsement. Elliott *v.* Capital City State Bank, 149 Iowa 309, 128 N. W. 369.

In an action against a bank to recover a deposit, where the defense is that the plaintiff had instructed the bank to pay the deposit to his partner, it is not error to instruct the jury that if the plaintiff made the deposit he was entitled to recover, unless the jury believed that he directed the deposit to be changed from his credit to that of his partner, and that such change was made, and that the custom of the bank, as to paying out money only on checks, had nothing to do with the case, if the jury believed that the deposit was so changed. Neff *v.* Greene County Nat. Bank, 89 Mo. 581, 1 S. W. 747.

76. Consistent with evidence admitted.—Yarborough *v.* Banking, etc., Trust Co., 142 N. C. 377, 55 S. E. 296.

A married woman depositing money in a bank in her own name sued the bank therefor. The bank paid a check bearing the depositor's name for the amount thereof. The proceeds of the check were placed in another bank to the credit of her husband. The check was paid in December, 1904, and the bank received no notice of any objection thereto until September, 1905. She denied signing the check, and the testimony on the issue of ratification was conflicting. Held, that an instruction authorizing the jury to consider, in determining whether the wife ratified the deposit in her husband's name, whether she dealt with the fund after it had been deposited in her husband's name, knowing that it was in her husband's name, or if with that knowledge

misstates the issues in the case is erroneous, and especially so where such misstatements cause the burden of proof to be placed upon the wrong party.[77] The court properly refuses to charge on an issue which is not raised by the evidence admitted on the trial.[78] An instruction should not be given which is based, even in part, on a hypothesis which there is evidence tending to show did not exist.[79] Thus where there is evidence that a bank had notice that a deposit by one in the name of a child was a gift to the child, a charge on the hypothesis that the bank did not have such notice is properly refused.[80]

she allowed it to remain in his name without taking steps to have the same placed to her credit, and if the jury found that she adopted the deposit in her husband's name the bank was not liable, otherwise it was, properly submitted the issues to the jury. Yarborough *v.* Banking, etc., Trust Co., 142 N. C. 377, 55 S. E. 296.

There was no error in refusing to charge on defendant's so-called affirmative defense, in an action against defendant bank to recover deposits made in the C bank, on the ground that such bank was a branch of defendant, such defense being the mere statement that plaintiff, with the assignors of his claims, had been in possession and control of the assets of the C bank, and that no part thereof had ever come into the possession of defendant or its agents; the whole controversy raised by the complaint and denials thereto being whether defendant had all the time been in possession through its agents, so that the affirmative matter raised no new issue, and it not only not being capable of being treated as intended for purposes of set-off, as defendant in no way admitted a liability, but the evidence not showing the value of assets, and it being conceded by plaintiff that whatever assets of the C bank remained should be applied to reduce the judgment against defendant. Ames *v.* Farmers', etc., Bank (Wash.), 93 Pac. 530.

77. Misstatement of issue.—Where a depositor claims that a check on a bank, payable to the bank, was given by her in order to change her general deposit into a time deposit, and the only controversy is whether or not a certain time check signed by the president by his individual name alone was fraudulently delivered to her in exchange for the check, instead of a certificate of deposit, or whether the check was paid and the money loaned by her to the president individually, and the time check given by him as evidence of his own debt, it is error to charge that, before plaintiff can recover, she must prove, not only that the check was fraudulently procured from her, but also that the time check given her was fraudulent, as plaintiff does not claim there was fraud in procuring her check. Patterson *v.* First Nat. Bank, 73 Neb. 384, 102 N. W. 765.

78. Charge on issue not raised properly refused.—Where the cashier of plaintiff bank had directed defendant bank to apply plaintiff's deposit to the payment of a loan to the cashier, and there was no evidence of any understanding between the cashier and any of defendant's officers when the deposit was made that it should be so applied, an instruction, in an action to recover the deposit, that if plaintiff's deposit account with defendant was begun and agreed to be made on the part of the cashier, and was accepted on the part of defendant's officers, with the intention or understanding on the part of the cashier and any of defendant's officers that the deposit should be used to satisfy the loan made or to be made by defendant to the cashier, then the jury should find for plaintiff, was properly refused. Iron City Nat. Bank *v.* Fifth Nat. Bank, 31 Tex. Civ. App. 308, 71 S. W. 612.

79. Based on hypothesis contrary to existing evidence.—Eagle, etc., Mfg. Co. *v.* Belcher, 89 Ga. 218, 15 S. E. 482.

80. Notice of gift—Hypothesis not supported by evidence.—In an action by a mother, as guardian of her child, against a bank, to recover a deposit made by the grandmother of the child in its name, there being evidence tending to show that the money was a gift to the child from its mother, and was intrusted to the grandmother to be deposited, and that the bank at the time it paid out the money on the grandmother's check had notice of the gift, an instruction based in part upon the hypothesis that it did not have such notice was rightly refused. Eagle, etc., Mfg. Co. *v.* Belcher, 89 Ga. 218, 15 S. E. 482.

Charge Taken as a Whole.—Where the charge taken as a whole properly presents the law as to the point in issue it will not be nullified by picking out isolated portions or sentences to which exceptions might be made.[81]

Charge on Weight of Evidence.—The charge of the court should not comment on the weight of the evidence nor should it point out portions of the evidence as tending to show or disprove a particular fact. Such charges are misleading and should be refused when requested.[82]

Scope of Instruction.—The charge of the court should not, in view of the pleadings and evidence, be too limited.[83] A charge which purports to submit the whole case to the jury, but, in effect, excludes from their consideration the defenses pleaded, is erroneous.[84]

81. Charge taken as a whole.—In an action on a certificate of deposit which was issued in plaintiff's name for money deposited by her husband, and which was afterwards paid to him without her consent, it appeared that the money was the proceeds of the sale of the husband's homestead, and plaintiff testified that he had given it to her. The court began its charge to the jury by stating that when plaintiff had proved the certificate of deposit she had established a prima facie case. Held, that this was not prejudicial to defendant, as relieving plaintiff of the burden of proving a valid gift to her by her husband, where the charge proceeded to state that as soon as it was shown that the money had belonged to the husband the burden was shifted, and plaintiff was bound to prove such a valid gift. Laurel *v.* State Nat. Bank, 25 Minn. 48.

An instruction in an action against the S bank for deposits made in the C bank that one is liable to the same extent by subsequent ratification that he would be by precedent authority, and that, if the jury should find that any officer of defendant bank purported to start or open a bank at C, and to do business on behalf of defendant, representing that it was a branch of defendant, and that defendant, through its officers or stockholders became aware thereof, and failed within a reasonable time to repudiate said things, then defendant, by and through its officers and stockholders, is presumed to have ratified such things, and, if ratified, will be bound thereby, when considered as a whole, is not erroneous as authorizing the finding of a ratification on mere constructive knowledge. It authorizes such a finding only when the knowledge comes to defendant through its officers or stockholders. Ames *v.* Farmers', etc., Bank (Wash.), 93 Pac. 530.

82. Charge on weight of evidence.—An instruction on the part of the plaintiff based on such facts, to the effect that the custom of the bank in paying out money only on checks is to be considered, in connection with all the facts, in favor of such deposit not having been drawn out by the plaintiff, and as a strong circumstance going to show that it had not been paid, is misleading, as being a commentary on the evidence, and it is not error to reject it. Neff *v.* Greene County Nat. Bank, 89 Mo. 581, 1 S. W. 747.

In an action against a bank to recover the balance of a deposit alleged to be due to plaintiffs, where there is no question that certain checks were drawn by the plaintiffs and placed with the defendant bank, it is not error for the court to state in its charge to the jury that it was admitted that plaintiffs drew the checks and caused them to be placed with defendant, and such charge is not objectionable as being on the weight of the evidence. Farmers', etc., Bank *v.* Slayden, 8 Tex. Civ. App. 63, 27 S. W. 424.

83. Scope of instruction.—In an action against a bank to recover a deposit in which plaintiff by reply denied that a check for the amount sued for, which defendant had paid, was signed by her, or by her authority, it was error to instruct the jury that, in order to find for defendant, it must believe that the check was signed by plaintiff, but the court should, as requested by defendant, have instructed the jury to find for defendant if it believed that the check was signed by plaintiff, "or by another for her and with her consent, or by her authority." Phœnix Nat. Bank *v.* Taylor, 113 Ky. 61, 23 Ky. L. Rep. 2307, 67 S. W. 27.

84. Exclusion of defenses.—The proceeds of a sale of cattle were deposited in defendant bank, which paid them to R after notice of plaintiff's claim. In

Questions of Law and Fact.—In actions for the recovery of money deposited in a bank, as in other cases, questions of law are for the court,[85] and questions of fact for the jury.[86] In an action against a bank to recover a

an action to recover the amount, the jury would have been warranted in finding that the cattle were covered by a mortgage to plaintiff; and defendant bank pleaded that plaintiff, by a failure to take steps to assert its rights to the proceeds of the cattle after being advised and requested to do so, was estopped to claim such proceeds as against defendant. Held, that an instruction that, if the jury found that the cattle were a part of those owned by E, and conveyed by him to plaintiff by the chattel mortgage in question, then the payment of the proceeds by defendant to R, either with the consent or pursuant to the direction of the consignee, etc., constituted no defense to the action, was erroneous, in that it purported to submit the whole case to the jury, and, in effect, excluded from their consideration the defenses pleaded. Drumm-Flato Commission Co. *v.* Gerlach Bank, 107 Mo. App. 426, 81 S. W. 503.

85. Questions of law.—Chesapeake Bank *v.* Swain, 29 Md. 483.

86. Questions of fact.—Chesapeake Bank *v.* Swain, 29 Md. 483; Whitsett *v.* People's Nat. Bank, 138 Mo. App. 81, 119 S. W. 999; Republic Life Ins. Co. *v.* Hudson Trust Co., 130 App. Div. 618, 115 N. Y. S. 503; Brown *v.* Lynchburg Nat. Bank, 109 Va. 530, 64 S. E. 950; Castello *v.* Citizens' State Bank, 140 Wis. 275, 122 N. W. 769.

In an action by a depositor against a bank for money paid on fraudulently altered checks, the question of the negligence of the bank in the payment of the checks held for the jury. National Dredging Co. *v.* Farmers' Bank, 6 Pen. 580, 69 Atl. 607.

Evidence held to present a question for the jury whether, in certain transactions between a depositor and a cashier of a bank, the cashier acted for the bank or the transactions were personal between him and the depositor. Lemon *v.* Sigourney Sav. Bank, 131 Iowa 79, 108 N. W. 104.

In an action for moneys deposited with defendant bank, it appeared that the deposits stood in the name of plaintiff, and that a deposit book had been issued in her name. She testified that some of the deposits were of her money, and that other deposits were of money given her by her father. The latter had possession of the bank book, and drew on her account, but there was evidence that plaintiff had no knowledge of payments to the father. Held, that the question as to the ownership by plaintiff of such deposits should have been left to the jury. Dickinson *v.* Leominster Sav. Bank, 152 Mass. 49, 25 N. E. 12.

On evidence in an action to recover the balance of his deposit from a private banker, held, that whether the deposit had been repaid was for the jury. Donijanovic *v.* Hartman (Mo.), 152 S. W. 424.

In an action to recover money on deposit a witness for defendant testified that plaintiff's passbook was presented at the bank when the regular teller was absent, and the money was drawn out in each case a day or two after being deposited, and in about the same amounts, and paid by him to the person presenting the passbook, whom he believed to be plaintiff, but whom he did not know. Plaintiff denied having presented the passbook or received or authorized the several payments. Held, that the questions whether she did or not, or whether the passbook was stolen from her and clandestinely presented to the bank, and the money obtained by a third person, were for the jury. Fox *v.* Onondaga County Sav. Bank, 53 Hun 638, 7 N. Y. S. 17, 25 N. Y. St. Rep. 672, 3 Silvernail 397.

T deposited money to S company's credit in defendant bank conditionally, though the condition never arose. The company drew a check for the amount in favor of the plaintiff corporation, and a bank officer who did not know of the condition credited the plaintiff with the amount in a passbook issued to it. Before any account was opened on the books, it was discovered that the deposit was not subject to check and the S company was notified within 24 hours, the check was returned and defendant refused to transfer the account. It does not appear that plaintiff was a bona fide purchaser of the deposit or that its position was changed to its prejudice upon the issuance of the passbook and the notice to the S company. Held under the evidence that the questions whether defendant intended to and did accept the check conditionally as cash and whether the S company acted in bad faith in inducing defendant to permit it to check out the fund were questions of fact. Republic Life

deposit, what is lawful money of the United States other than gold and silver coin is a question of law.[87] The question as to whether or not plaintiff had ratified the disposition the bank has made with the money he had on deposit, is one for the jury,[88] and whether or not plaintiff is estopped from disputing the authority of her husband to draw on her account is for the

Ins. Co. *v.* Hudson Trust Co., 130 App. Div. 618, 115 N. Y. S. 503, order affirmed, 198 N. Y. 590, 92 N. E. 1100.

Whether a balance in a bank passbook was so impeached for fraud or error that the bank is estopped from denying liability therefor is a question of fact for the jury. Greenhalgh Co. *v.* Farmers' Nat. Bank, 226 Pa. 184, 75 Atl. 260.

In an action against a bank to recover money claimed by plaintiff to have been a deposit in course of banking business, and by defendant to have been private loans to the cashier, where the evidence was conflicting, the nature of the transaction was for the jury. Greenhalgh Co. *v.* Farmers' Nat. Bank, 226 Pa. 184, 75 Atl. 260.

A county treasurer, who had misappropriated county funds, gave to the bank with which he deposited such funds his demand note, as treasurer, for the amount of the misappropriation, and procured the entry of a credit of a like sum on his account as treasurer. At the same time he gave to the bank his check, as treasurer, for such sum, payable on the next day; and on that day the bank charged up the check, thus balancing the credit, and also canceled the note. It appeared that, on the day the note was given, the bank represented to a committee appointed by the district court to investigate the county's finances that the treasurer's balance was a certain sum, which included the amount of the note; but the officers of the bank testified to their good faith in the transaction, and that they relied on the treasurer's statement that the county needed the money and would replace it the next day, and that they only agreed to extend a credit until that time, and for that purpose made the entry and canceled the credit. Held that, in view of the fact that the county treasurer could not bind the county by the note given, the question whether the bank misapplied the amount represented by it was for the jury. Judgment (Civ. App.), 49 S. W. 937, modified. Anderson *v.* Walker, 93 Tex. 119, 53 S. W. 821.

In an action against a bank based on certificates of deposit signed "I., Manager," it appeared that the money was delivered to I., who was president of defendant bank, and it claimed the money was not deposited with it. Held, that it was not error to refuse a nonsuit based on the ground that the evidence had established that the certificates sued on "were certificates of an old partnership bank," and that plaintiff intended to deposit her money in the old partnership bank; such questions being for the jury. Jumper *v.* Commercial Bank, 48 S. C. 430, 26 S. E. 725.

In an action on a certificate of deposit brought by the payee's executors 26 years after its date, evidence examined, and held that the question whether the certificate had been paid was for the jury. Judgment 33 Misc. Rep. 419, 67 N. Y. S. 657, reversed. Rosenstock *v.* Dessar, 85 App. Div. 501, 83 N. Y. S. 334.

87. What is lawful money.—Chesapeake Bank *v.* Swain, 29 Md. 483.

88. Ratification of disposition of deposit.—In an action to recover money deposited by plaintiff with defendant bank, plaintiff testified that he was defendant's broker for the sale of its silver coin; that each week he gave a check, signed in blank, on which was indorsed the amount of silver paid to plaintiff, and that at the commencement of the next week he would give defendant a check for the total amount and destroy the blank check; that on one occasion when he went to settle, a check for the amount sued for was presented for him to sign, and he denied that he had received that amount of silver, but, being urged by the president and cashier, he signed the check; that he was afterwards told that the check was given to cover a defalcation made by the teller, and not for silver paid to plaintiff. The answer alleged that the check was given for the teller's defalcation. Afterwards plaintiff obtained from the teller's father a note for the amount of such check. Plaintiff's account was overdrawn by the check, and to make it good he had borrowed money from defendant. Held, that it was a question for the jury whether plaintiff ratified the appropriation of his check to the teller's defalcation. Smalley *v.* Fulton Bank, 87 Hun 79, 33 N. Y. S. 882, 67 N. Y. St. Rep. 505.

jury to decide.[89] The plaintiff's negligence in failing to examine his passbook and discover a mistake,[90] or forgeries,[91] is for the jury to determine.

Mixed Question of Law and Fact.—What is a reasonable time within which a third person claiming a bank deposit is entitled to assert his rights thereto, as against the beneficiary thereof, is a mixed question of law and fact for the jury; there being no fixed and certain rules for the determination thereof, and the issue not having been clearly established by uncontroverted evidence.[92]

Directing Verdict.—Although the jurors are the recognized triers of questions of fact,[93] the power of courts to direct a verdict for one party or the other is undoubted.[94] It is a settled rule that whenever in a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for one party, and that if such verdict is given the other party will be entitled to a new trial, it is the right and duty of the court to direct the jury to find according to the views of the court.[95] The case should be left with the

89. Estoppel to dispute authority to draw on deposit.—Plaintiff sued defendants, bankers, to recover on a deposit, and the defense was payment. The plaintiff testified that she took a draft which had been sent her, and with her husband and J. went to defendants' bank, where J. or her husband handed the draft to the receiving teller, asking that it be deposited to plaintiff's credit; that the teller examined the draft, and handed it back to J., saying that plaintiff must indorse it first, which plaintiff did, returning it to J., who handed it to the teller; and that nothing else occurred. Defendants' teller testified that at the time the account was opened he had all the negotiations with plaintiff's husband, and was not aware that plaintiff was present; that plaintiff's husband deposited the draft to plaintiff's credit, and stated that it would be checked out in his wife's name by him; and that the husband wrote in the record of signatures that of his wife; and that all the money then or thereafter deposited was paid out on checks signed "B. T., by M. S. T." Held, that it was error to charge, if the jury believed the evidence, to find for defendants, since the question whether plaintiff was estopped by her conduct from disputing her husband's authority to draw on her account was a question of fact for the jury. Tobias *v.* Morris, 126 Ala. 535, 28 So. 517.

90. Plaintiff's negligence. — Where plaintiff sued to recover money deposited to his credit in a bank, but which he did not receive because of fraud or mistake in his settlement with the bank, the question of plaintiff's negligence in not carefully examining his passbook and discovering the mistake was for the jury. Cole *v.* Charles City Nat. Bank, 114 Iowa 632, 87 N. W. 671.

In an action against a bank to recover a balance of a deposit, evidence held to present a question for the jury whether the depositor exercised reasonable care and diligence in examining the passbook and vouchers returned to him by the bank each month. First Nat. Bank *v.* Richmond Elect. Co., 106 Va. 347, 56 S. E. 152, 7 L. R. A., N. S., 744.

91. Failure to discover forgeries.—Where a bank book in the custody of depositors' agent was first balanced August 11th, after forgeries by the agent began, it was proper to submit to the jury the question whether the depositors were negligent in failing, before issuance of another forged check on August 24th, to discover a shortage which a proper examination of the book would have disclosed. Morgan *v.* United States Mortg., etc., Co., 125 App. Div. 22, 109 N. Y. S. 274.

92. Mixed question of law and fact.—Drumm-Flato Commission Co. *v.* Gerlach Bank, 107 Mo. App. 426, 81 S. W. 503.

93. Directing verdict—Jury triers of fact.—See ante, "Questions of Law and Fact," § 154.

94. Glines *v.* State Sav. Bank, 132 Mich. 638, 94 N. W. 195.

95. When verdict directed.—Glines *v.* State Sav. Bank, 132 Mich. 638, 94 N. W. 195. See Fredonia Nat. Bank

jury, unless the conclusion follows as a matter of law, upon any view which can properly be taken of the facts the evidence establishes.[96]

Variance.—A material variance between the allegations in an action to recover a deposit and the proof precludes a recovery by the plaintiff and is grounds for directing a verdict for the defendant bank. Instances of the application of the foregoing rule are given in the notes.[97] But a variance may

v. Tommei, 131 Mich. 674, 92 N. W. 348.

In an action to recover from a bank on two certificates of deposit, it appeared that plaintiff indorsed the certificates, and turned them over to the cashier of the bank for safekeeping, not receiving any money or any credit on the bank's books therefor, and that the cashier absconded, taking with him the amount represented by the certificates. Held, that a verdict for plaintiff was properly directed. Griffin *v.* Marlette State Bank, 150 Mich. 499, 114 N. W. 325.

In an action against a bank for the value of a package which it kept in its vault as gratuitous bailee, and which was stolen, evidence considered, and held insufficient to require submission to the jury of the issue whether the loss was due to defendant's negligence. Gerrish *v.* Muskegon Sav. Bank, 138 Mich. 46, 100 N. W. 1000, citing Keen *v.* Beckman, 66 Iowa 672, 24 N. W. 270; Carlyon *v.* Fitzhenry, 2 Ariz. 266, 15 Pac. 273; Whitney *v.* First Nat. Bank, 55 Vt. 154, 45 Am. Rep. 598; Davis *v.* Gay, 141 Mass. 531, 6 N. E. 549; Scott & Bro. *v.* National Bank, 72 Pa. 471, 13 Am. Rep. 711; Story, Bailments (9th Ed.), § 23; Knights *v.* Piella, 111 Mich. 9, 69 N. W. 92, 66 Am. St. Rep. 375; Marshall *v.* Pontiac, etc., R. Co., 126 Mich. 45, 85 N. W. 242.

Where, in an action by the depositor of a check in an insolvent bank against a bank which had received it from the former bank, and paid out its proceeds on checks, there was no evidence that defendant did not act in good faith, a verdict should have been directed for defendant. Glines *v.* State Sav. Bank, 132 Mich. 638, 94 N. W. 195.

96. Case should be left to jury.—Townsend *v.* Webster, etc., Sav. Bank, 143 Mass. 147, 9 N. E. 521.

In an action by a married woman against a bank for money deposited, where the answer admits a deposit in the plaintiff's name, but claims that a part was held and paid under trustee process against plaintiff's husband, and plaintiff testifies that the money was her own, and her husband disclaims the fund, the court should not direct a verdict for the defendant. Townsend *v.* Webster, etc., Sav. Bank, 143 Mass. 147, 9 N. E. 521.

In 1890, deceased, an old man, transferred a bank deposit of $185 from his own name to the joint account of himself and daughter, the defendant. The deposit was added to from time to time, and at the death of deceased amounted to $1,538. Deceased's two sons paid him $12.50 per month, and supported and clothed him, and also paid him $300 per annum for three years in addition to his monthly allowance. In 1897 deceased made a will devising $850 in general legacies, and made defendant his residuary legatee, and had no property other than the bank account. The passbook was in defendant's possession, and several times deceased requested its return, and defendant promised to do so without asserting any claim to the deposit. Held, in an action by deceased's executor to recover the deposit, that the direction of a verdict for defendant at the close of plaintiff's evidence was erroneous, since it was sufficient to justify a finding that the deposit did not belong wholly to defendant, and the intention of the parties in making the transfer and in keeping a joint account was for the jury. Wood *v.* Zornstorff, 59 App. Div. 538, 69 N. Y. S. 241.

In an action by an illiterate depositor against a bank to recover the amount of his deposit, the case is for the jury where the testimony of the plaintiff himself tends to show that he was misled by the representations of an officer in charge of one of the departments of the bank into accepting the individual obligation of the officer believing that he was receiving the bank's obligation for the payment of his deposit with interest thereon. Bos *v.* People's Nat. Bank, 41 Pa. Super. Ct. 388.

97. Plaintiff sued defendant bank to recover an alleged deposit charging that it was payable on demand, and that demand had been made and payment refused. The proof showed that plain-

be immaterial and not prejudicial to the defendant, when it will be held against the plaintiff.[98]

Setting Aside Verdict.—Where the jurors are unable to agree on a very material issue, a verdict rendered by them should be set aside.[99]

Verdict Contrary to Evidence.—Where the preponderance of the evidence is decidedly contrary to the verdict, the verdict should be set aside and the case remanded for a new trial.[1]

Excessive Verdict.—In an action against a banker to recover a deposit, where the evidence as to the amount of the deposit is conflicting, a verdict for plaintiff in a sum 26 cents greater than the banker himself admits to be due will not be set aside as excessive.[2]

tiff's husband deposited the money in the bank, stating to the cashier that the money was deposited for plaintiff, and that the cashier should execute to her a certificate of deposit. The cashier informed plaintiff that, if she left the money in the bank six months, she would get 3 per cent interest, at the same time wrote out and handed to her his personal check on the bank, which plaintiff accepted, thinking it to be a certificate of deposit and kept it for several months, when she demanded payment from the bank, there being nothing to suggest a loan of money from plaintiff to the cashier other than the check. Held, that the evidence did not constitute a fatal variance, in that it showed a loan to the cashier, and not a deposit. Castello *v.* Citizens' State Bank, 140 Wis. 275, 122 N. W. 769.

In a suit to recover a deposit in a bank, where the terms of the deposit required a demand on the part of the depositor, a motion for a verdict "on the ground that the promise shown by the evidence has a condition precedent, and the condition is not shown to have been complied with," does not point out any variance, but simply challenges plaintiff's right to recover for want of proof of a demand. Judgment 75 Ill. App. 165, affirmed. Arnold *v.* Hart, 176 Ill. 442, 52 N. E. 936.

98. Immaterial variance.—A variance in an action for money had and received against a bank, in that the petition alleged that the mistake in sending the proceeds of a sale of hogs to the bank in the name of an agent of plaintiff was made by a commission company, whereas the evidence showed that the mistake, if any, was made by the railroad in shipping the hogs in the name of plaintiff's agent, was not prejudicial to the bank, where other evidence showed the manner in which the hogs were shipped and the reason why the proceeds of the sale thereof were sent to the bank in the name of the agent. Mingus *v.* Bank (Mo. App.), 117 S. W. 683.

99. Failure to agree on material issue.—Where, in an action by a depositor against a bank for the amount of a forged check, a verdict was returned for the depositor, but the jury stated, in answer to a special question, that they were unable to agree on the material issue of whether the signature to the check was written by the depositor, it was error to refuse to set aside the verdict and to render judgment thereon. First State Bank *v.* Vogeli, 78 Kan. 264, 96 Pac. 490.

1. Verdict contrary to evidence.—West *v.* Bank, 110 Mo. App. 490, 85 S. W. 601; Tecumseh Nat. Bank *v.* McGee, 61 Neb. 709, 85 N. W. 949.

Plaintiff, who was a depositor of defendant bank, denied signing a certain check and obtaining the money thereon, for the reason that the check was signed with her initials, contrary to her custom; and an expert witness stated that, in his opinion, the check was not signed by the same person who wrote plaintiff's signature for comparison, admitted to be genuine. The bank's cashier and one of its employees, who were both acquainted with plaintiff, testified that they saw her sign the check and get the money, and that plaintiff had previously signed checks, in her dealings with other banks, using her initials only. Other experts testified that the signature was genuine. Held, that a verdict finding that plaintiff did not sign the check was contrary to the weight of evidence. People's Sav. Bank, etc., Co. *v.* Keith, 136 Ala. 469, 34 So. 925.

2. Excessive verdict.—Conklin *v.* Graham, 32 Neb. 546, 49 N. W. 460.

Judgment for Interest.—In an action against a bank for interest on a deposit, where the petition admits that payments have been made on account of such deposit, without itemizing them, it is error to give judgment for interest on the entire deposit, without taking an account of such payments.[3]

§ 155. Actions by Payee or Holder of Check against Bank[3a]—§ 155 (1) Form of Action.—The holder or payee of a banker's check may maintain a suit at law against the bank having funds of the drawer, where presentation has been duly made, and payment demanded.[4]

Assumpsit[5] for money had and received[6] may be maintained against a bank refusing to pay checks, although it is guilty of conversion.[7]

§ 155 (2) Limitation of Action.—The holder of a bank check, which has been marked as "good" by the bank on which it is drawn, is bound to present it and demand payment within six years from the time of the marking of the check, or the claim will be barred by the statute of limitations in Pennsylvania.[8]

§ 155 (3) Substituting Drawer as Plaintiff.—Where a check is drawn by a depositor to the order of a named payee the drawer's rights of action being different from that of the payee, it is error in an action by the latter against the bank, where there has been no acceptance, to allow an amendment substituting the drawer as the legal plaintiff, particularly when his rights are subject to the bar of the statute of limitations.[9]

§ 155 (4) Pleading—§ 155 (4a) Declaration, Petition or Complaint.—Allegations of Sufficiency of Funds.—A declaration, by which it is sought to recover from a bank the amount of a check drawn thereon, is

3. Judgment for interest.—Marion Nat. Bank *v.* Fidelity Trust, etc., Co., 12 Ky. L. Rep. 492, 14 S. W. 371.

As to interest on deposits, see ante, "Interest on Deposits," § 132.

3a. By national banks, see post, "Collections," § 268. For negligence of bank in making collections, see post, "Action for Negligence or Default," § 175.

4. Form of action.—Senter *v.* Continental Bank, 7 Mo. App. 532.

5. Assumpsit.—Fogarties *v.* State Bank (S. C.), 12 Rich. L. 518, 78 Am. Dec. 468.

Where a check is drawn by a depositor on a bank having sufficient of his funds to meet the check, the holder, on giving notice to the bank, has the right to be paid, and, if payment be refused, may maintain an action of assumpsit against the bank, on the implied promise which the law raises in his behalf; and this is especially true where the charter of the bank declares that it "shall receive money on deposit, and pay away the same to order, free of expense." Fogarties *v.* State Bank (S. C.), 12 Rich. L. 518, 78 Am. Dec. 468.

6. A., in Boston, sent to a bank in Maine a check drawn thereon by one having funds in the bank, requesting in return a check on some Boston bank; whereupon the bank mailed him a check of C. on a Boston bank, which was never received. C. refused to duplicate the check, and soon became bankrupt. Held, that A. could recover of the bank the amount of the check sent by him, in an action for money had and received. Ames *v.* York Nat. Bank, 103 Mass. 326.

7. A bank, receiving a fund with notice of the person to whom it belongs, and refusing to pay it over, while guilty of conversion, may also be held liable in an action for money had and received. York *v.* Farmers' Bank, 105 Mo. App. 127, 79 S. W. 968.

8. Limitation of action.—Girard Bank *v.* Bank (Pa.), 4 Phila. 104.

9. Substituting drawer as plaintiff.—First Nat. Bank *v.* Shoemaker, 117 Pa. 94, 11 Atl. 304, 2 Am. St. Rep. 649.

fatally defective in not alleging that such bank had on hand sufficient funds at the time of its presentation with which to pay the same.[10]

Customs in derogation of the common law must be strictly pleaded, and, when well pleaded, the court must show a case clearly within the usage. Therefore, an allegation of a custom that when a check is presented at the clearing house to a bank against which the check is drawn, it shall be returned within a certain time if not paid, does not cover the case of the presentment of a check to a bank which is the agent of the bank upon which it is drawn.[11]

§ 155 (4b) Answer.—Amendment.—Where an action is brought on an accepted check by a transferee thereof, and the answer as interposed is frivolous, the bank should be allowed to interpose an amended answer sufficient to put at issue the allegations of the complainant.[12]

§ 155 (4c) Reply.—A reply, in a suit against a bank by the holder of an unaccepted check, where the bank answered that it held a note against the drawer, amounting to almost the amount of his deposit, and had applied the deposit to the note, and paid the balance to the drawer; that the note was for rent of a farm owned by the bank and leased to the drawer, which the bank had agreed would be cancelled if the drawer would find a purchaser for the farm, and that the drawer had found a purchaser, shows a good cause of action although the note remained uncancelled in the possession of the bank, as the plaintiff had the same right against the bank as the drawer of the check.[13]

§ 155 (5) Issues and Proof.—Where the issue in an action by a holder of an unaccepted check involved the question of the performance of a collateral agreement by the depositor whereby his note held by the bank had been discharged, the plaintiff was entitled to prove the making of the agreement.[14] The bank would have the right to deny the alleged agree-

10. **Allegations of sufficiency of funds.**—Hall *v.* First Nat. Bank, 120 Ill. App. 441.

11. Overman *v.* Hoboken City Bank, 30 N. J. L. 61.

12. **Amendment.**—Negotiable Instruments Law, § 323 (Laws 1897, p. 756, c. 612), provides that, where a check is certified by the bank on which it is drawn, the certificate is equivalent to an acceptance; and § 79 (Laws 1897, p. 731, c. 612) declares that where the holder of an instrument payable to his order transfers it for value, without indorsement, the transfer vests in the transferee the title of the transferor. Held that, where a check drawn to the payee's order was transferred without indorsement, and then certified, and the bank's answer in an action thereon, denying information sufficient to form a belief, etc., was stricken out as frivolous, it was error for the court to refuse to permit the bank to file an amended answer denying information as to whether the payee had transferred the check to plaintiff for value. Meuer *v.* Phenix Nat. Bank, 87 App. Div. 281, 84 N. Y. S. 321.

13. **Reply.**—Bloom *v.* Winthrop State Bank, 121 Iowa 101, 96 N. W. 733.

14. **Issues and proof.**—In a suit against a bank by the holder of an unaccepted check it appeared that the bank held two notes against the drawer, amounting to almost the amount of his deposit in the bank, and the bank answered that it had applied the deposit to the notes, and paid the balance to the drawer. Plaintiff replied that one of the notes was for

ment, and if upon trial of such issue the court defeated the claim made by the plaintiff, its right to offset the amount of the note against the deposit to the credit of the drawer or otherwise proceed to collect the indebtedness according to its own election would be unquestioned.[15]

Evidence Admissible.—In an action by a bank against the receiver of an insolvent bank on a fraudulently certified check discounted by plaintiff, it was proper, on the issue as to plaintiff's good faith in taking the check, to show the knowledge of plaintiff's officers as to the pecuniary standing and dealings of the drawer of the check and the insolvent, the volume of similar business done, the terms upon which it was done, whether the transactions were ordinary in their character, that the business done with the drawer of the check by plaintiff was not known to plaintiff's directors, that the transaction was a loan to the drawer instead of a legitimate transaction, and that printed official statements of the insolvent brought to the knowledge of plaintiff's officers showed an item of certified checks less in amount than certified checks on the insolvent held by plaintiff at the time.[16]

§ 155 (6) Question for Jury.—In actions by the payee or holder of a dishonored check against the bank refusing to pay it, the question of mental capacity of drawer,[17] bona fides of purchase,[18] and the question of fraud,[19] are for the jury.

§ 155 (7) Evidence—§ 155 (7a) Burden of Proof.—In an action by the payee of a check against a bank for paying it to a per-

rent of a farm owned by the bank and leased to the drawer, and that the bank had agreed that, if the drawer would find a purchaser for the farm, the rent note would be canceled, and that the drawer had found a purchaser. Held, that under the issues plaintiff was entitled to prove the making of such agreement. Bloom *v.* Winthrop State Bank, 121 Iowa 101, 96 N. W. 733.

15. Bloom *v.* Winthrop State Bank, 121 Iowa 101, 96 N. W. 733.

16. Evidence admissible.—Detroit Nat. Bank *v.* Union Trust Co., 145 Mich. 656, 108 N. W. 1092.

17. Questions for jury.—In an action to determine the issue of the mental capacity of the drawer of a check, evidence held insufficient to take the question to the jury. Central Guarantee, etc., Co. *v.* White, 206 Pa. 611, 56 Atl. 76.

18. In an action against the receiver of an insolvent bank on a fraudulently certified check, held a question for the jury whether plaintiff was a bona fide purchaser. Detroit Nat. Bank *v.* Union Trust Co., 145 Mich. 656, 108 N. W. 1092.

19. In an action against a bank by the payee of a certified check, the defense was fraud. It appeared that plaintiff and his brother, as a firm, had on deposit with defendant a little over $2,000, when a check of the firm, payable to plaintiff, was certified at plaintiff's request; that the same was retained 10 months before presentation, during which the account was drawn down to $96, and plaintiff borrowing several thousand dollars, falsely stating to the notary before whom a mortgage was acknowledged that he was unmarried. His explanation as to the delay in presentment was that he had given the check to his wife to deposit, and supposed she had done so until he found it just before presentment. His marriage certificate showed he was not married when he claimed to have given his wife the check, but he testified that he had in fact been married prior to that time, but that the ceremony evidenced by the certificate had been performed to please his mother. It was shown that plaintiff knew the bank's teller was not in the habit of charging up certified checks until drawn. Held, that the evidence was sufficient to send the question of fraud to the jury. Muth *v.* St. Louis Trust Co., 94 Mo. App. 94, 67 S. W. 978.

son who indorsed the payee's name thereon without authority, the burden was on the payee to show want of authority, that the payee never ratified the indorsement, that he was not estopped by negligence from claiming that the indorsement was not authorized, and that he suffered damages.[20]

Bona Fide Purchaser.—In an action against the receiver of an insolvent bank on a fraudulently certified check, the burden was on plaintiff to show that he was a bona fide purchaser.[21]

§ 155 (7b) Admissibility and Competency.—An agreement between a bank and the drawer of a check, that if the latter would find a purchaser for a farm for the rent of which he was indebted to the bank, that the rent note would be cancelled, being parol evidence of statements by the officer of the bank in relation thereto and testimony of the drawer of the check that he had fulfilled the agreement, was competent.[22]

Proof of Withdrawal of Deposit.—A bank may establish the withdrawal of a deposit by the checks signed by the depositor, which checks the bank may retain, or by the entries in its books proven, as required by Civ. Code Prac., § 606, providing that one may testify for himself as to the correctness of original entries made by him against persons since deceased, etc.[23]

Notice of Certification of Check.—Evidence that the vice president of plaintiff bank kept a scrap book, in which were pasted statements of local banks, including that of defendant bank for a certain month and showing a small amount of outstanding certified checks, was not competent as showing actual notice to plaintiff that the certification by defendant of a large check payable to plaintiff was illegal; it not appearing that either the vice president or the assistant cashier, who procured the certification, examined the book or the statements.[24]

§ 155 (7c) Weight and Sufficiency.—Instances in which the evidence was held sufficient to show, that the indorsement in question was without the authority of the payee;[25] the bank's acceptance, or promise to pay checks drawn by a depositor;[26] that the bank had notice that a de-

20. **Burden of proof.**—Ellery *v.* People's Bank (N. Y.), 114 N. Y. S. 108.

21. **Bona fide purchaser.**—Detroit Nat. Bank *v.* Union Trust Co., 145 Mich. 656, 108 N. W. 1092.

In an action by the payee of a certified check against the bank certifying the same, the burden is on plaintiff to show by a preponderance of the evidence that he is a bona fide holder of the check and the certification thereon for value. First Nat. Bank *v.* Union Trust Co., 158 Mich. 94, 122 N. W. 547.

22. **Admissibility and competency.**—Bloom *v.* Winthrop State Bank, 121 Iowa 101, 96 N. W. 733.

23. **Proof of withdrawal of deposit.**—Leonora Nat. Bank *v.* Ragland, 32 Ky. L. Rep. 1403, 108 S. W. 854.

24. **Notice of certification of check.**—First Nat. Bank *v.* Union Trust Co., 158 Mich. 94, 122 N. W. 547.

25. **Weight and sufficiency.**—Ellery *v.* People's Bank (N. Y.), 114 N. Y. S. 108.

26. Evidence held insufficient to show a bank's acceptance, or promise to pay checks drawn by a depositor. Home Nat. Bank *v.* First State Bank, etc., Co. (Tex. Civ. App.), 133 S. W. 935.

Evidence held sufficient to sustain

posit was a special deposit for the payment of plaintiff's checks;[27] are found in the cases cited in the footnotes.

a finding that there was an agreement by a bank to honor checks to be given in payment for a car load of horses by the drawers. Falls City State Bank *v.* Wehrli, 68 Neb. 75, 93 N. W. 994.

27. Evidence in an action against a bank by the payees of a check held to show that the bank had notice that a deposit was a special deposit for the payment of plaintiff's check. First Nat. Bank *v.* Barger (Ky.), 115 S. W. 726.

CHAPTER X.

D. Collections.

§ 156. Relation between Bank and Depositor for Collection.
§ 156 (1) In General.
§ 156 (2) Consideration for Bank's Undertaking.
§ 156 (3) By What Law Contract Governed.
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§ 166 (3) Liability Where Collection Is Made by Charging to Account of Depositor.
§ 166 (4) Liability of Transmitting Bank on Insolvency of Correspondent Bank.
§ 167. —— Insolvency of Transmitting Bank.
§ 167 (1) General Rule as to Liability of Collecting Bank to Owner of Paper.
§ 167 (2) Right of Correspondent to Retain Proceeds on Account of Debt Due from Remitting Bank.

§ 168. Payment of Proceeds.
§ 169. —— Liability in General.
§ 169 (1) Duty to Account to Principal for Proceeds.
§ 169 (2) Duty to Obey Instructions as to Disposition of Proceeds.
§ 169 (3) Duty as to Remittance of Proceeds.
§ 169 (4) Sufficiency and Medium of Payment.
§ 169 (5) Recovery Back of Payment Made under Mistake.
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§ 171. Failure to Collect.
§ 171 (1) Liability of Bank in General.
§ 171 (2) Negligence of Collecting Bank in General.
§ 171 (3) Negligence in Sending Paper Directly to Debtor.
§ 171 (4) Failure to Present or Delay in Presenting Paper for Acceptance and Payment.
§ 171 (5) Duty to Give Notice of Nonpayment or Dishonor.
§ 171 (6) Liability of Transmitting Bank for Default of Correspondent.
§ 171 (7) Liability Where Checks or Drafts, Received in Payment, Are Not Paid.
§ 171 (8) Notes, Checks, or Drafts Lost in Course of Transmission.
§ 171 (9) Failure to Apply Deposit to Note Due from Depositor.
§ 171 (10) Permitting Paper to Be Renewed.
§ 171 (11) Failure to Collect Interest.
§ 171 (12) Waiver of Right of Action against Bank, or Ratification of Bank's Acts.
§ 172. Failure to Fix Liability of Indorser or of Drawer of Note, Check or Draft.
§ 172 (1) In General.
§ 172 (2) Duty of Collecting Bank to Protest Paper.
§ 172 (3) Liability for Default or Negligence of Correspondents, Subagents, or Notaries.
§ 172 (4) Recovery Back by Indorser of Payment Made in Ignorance of Bank's Negligence.
§ 173. Collection of Lost or Stolen Paper.
§ 174. Collection of Forged or Altered Paper.
§ 174½. Suits by Collecting Bank to Enforce Payment of Paper Transmitted by Correspondent.
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§ 175. Actions for Negligence or Default.
§ 175 (1) Nature and Form of Remedy.
§ 175 (1½) Who May Sue.
§ 175 (2) Pleading.
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§ 175 (3) Evidence.
§ 175 (3a) Presumptions and Burden of Proof.
§ 175 (3b) Admissibility of Evidence.
§ 175 (3c) Weight and Sufficiency of Evidence.
§ 175 (4) Instructions.
§ 175 (5) Questions for Jury.
§ 175 (6) Measure of Damages.

D. COLLECTIONS.

§ 156. Relation between Bank and Depositor for Collection—§ 156 (1) In General.—It is a well-established rule that where negotiable paper is deposited with a bank for the purpose of collection, the relation of principal and agent is thereby created between the depositor and the bank,[1] and not the relation of creditor and debtor.[2] The bank becomes the agent of the holder or payee, not of the drawer or maker.[3] A bank,

1. **Deposit for collection as creating relation of principal and agent.**—*Alabama.*—Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246; Hutchinson *v.* National Bank, 145 Ala. 196, 41 So. 143.

Missouri.—Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608.

Nebraska.—Crilly *v.* Ruyle, 87 Neb. 367, 127 N. W. 251.

New York.—National Revere Bank *v.* National Bank, 172 N. Y. 102, 64 N. E. 799; Kelley *v.* Phœnix Nat. Bank, 17 App. Div. 496, 45 N. Y. S. 533.

North Carolina.—Murchison Nat. Bank *v.* Dunn Oil Mills Co., 150 N. C. 718, 64 S. E. 885.

Ohio.—Mad River Nat. Bank *v.* Melhorn, 8 O. C. C. 191, 4 O. C. D. 401; Reeves, etc., Co. *v.* State Bank, 8 O. St. 465; Hermann *v.* Dayton, etc., State Bank, 10 O. St. 446; Bridge Co. *v.* Savings Bank, 46 O. St. 224, 20 N. E. 339; Jones *v.* Kilbreth, 49 O. St. 401, 31 N. E. 346; First Nat. Bank *v.* Moore, 8 Am. L. Rec. 97; Huff *v.* Hatch, 2 Disn. 63, 13 O. Dec. 39.

South Dakota.—Fanset *v.* Garden City State Bank, 24 S. Dak. 248, 123 N. W. 686.

Texas.—Merchants' Nat. Bank *v.* Dorchester (Tex. Civ. App.), 136 S. W. 551; Schumacher *v.* Trent, 18 Tex. Civ. App. 17, 44 S. W. 460.

A holder of a draft sent it to a bank for collection, with instructions to collect and remit the proceeds to a banker for the holder's credit. Held that, in view of the instructions, the relation between the bank and holder was that of principal and agent, and not that of creditor and debtor or general depositor, and the bank could not, without the consent of the holder, change the relation by any conduct in dealing with the proceeds. Hutchinson *v.* National Bank, 145 Ala. 196, 41 So. 143.

When a note or draft is sent by one individual or bank to another bank for collection and to remit the proceeds to the sender, the relation of principal and agent is created, and not that of creditor and debtor. Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608.

The relation of principal and agent was created by the deposit of a check with a bank for collection requiring it to exercise due diligence in presenting the check for collection. Merchants' Nat. Bank *v.* Dorchester (Tex. Civ. App.), 136 S. W. 551.

Where plaintiff sent school orders to a bank for collection, and the proprietor of such bank was also treasurer of the school district, and as such treasurer he stamped the orders as paid, and delivered them to the clerk of the district, and as proprietor of the bank entered said orders as paid on the collection register of the bank, instructions that, by sending said orders to such bank for collection, plaintiff had made the bank his agent, and whatever the bank had done in the way of collecting the orders was binding on plaintiff, were not misleading. Globe Furniture Co. *v.* School Dist. No. 22, 6 Kan. App. 889, 50 Pac. 978.

The relation of a branch of the Bank of the United States to another branch, or to the parent bank, which has forwarded paper for collection, is simply that of principal and agent. Bank *v.* Goddard, 5 Mason 366, Fed. Cas. No. 917.

2. **Relation not that of creditor and debtor.**—Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608.

When money collected a trust fund.—Where there has been no course of dealing between the parties, but securities are sent to a bank with instructions simply to collect, the collection of the fund establishes the relation of debtor and creditor between the parties; but when the paper is accepted for collection under express directions to collect and remit, then the money in the hands of the bank is a trust fund. National Life Ins. Co. *v.* Mather, 118 Ill. App. 491.

3. **Agent for holder, not drawer.**—Ward *v.* Smith (U. S.), 7 Wall. 447, 19

having received paper for collection, does not owe the amount thereof to the sender until collected, and though it may enter a credit in its books therefor, such a credit may be treated as provisional if the paper is afterwards dishonored, and it may cancel the credit.[4]

L. Ed. 207; Bank *v.* Triplett, 1 Pet. 25, 7 L. Ed. 37; Dodge *v.* Freedman's Sav., etc., Co., 93 U. S. 379, 385, 23 L. Ed. 920.

Where an instrument payable at a bank is lodged with the bank for collection, the bank becomes the agent of the payee to receive payment. Ward *v.* Smith, 7 Wall. 447, 19 L. Ed. 207; Cheney *v.* Libby, 134 U. S. 68, 33 L. Ed. 818, 10 S. Ct. 498.

In law, a bank with whom a note is deposited for collection is the agent of the holder, and not of the maker. The maker has no interest in it, except to pay the note. Failing to do this, he leaves it to be dealt with as others interested may choose. Dodge *v.* Freedman's Sav., etc., Co., 93 U. S. 379, 23 L. Ed. 920.

4. Effect of entering credit in books of bank.—Levi *v.* National Bank, Fed. Cas. No. 8,289, 5 Dill. 104; National Commercial Bank *v.* Miller & Co., 77 Ala. 168, 54 Am. Rep. 50; Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608; Winchester Milling Co. *v.* Bank, 120 Tenn. 225, 111 S. W. 248; Pinkney *v.* Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012.

Whether a bank receiving from a customer a check endorsed by him, which it places to his credit, becomes the owner of the check or a mere agent for collection, depends upon the intention of the parties; but ordinarily a check so deposited is taken for collection by the bank as agent of the depositor, and although the bank, as a matter of favor or convenience, may permit the depositor to draw against the check so deposited before payment —the depositor in the event of nonpayment being responsible for the sums drawn—the bank does not thereby become a bona fide endorsee of the check, and in a suit by it on the check, the drawer may set up any equities he may have against the endorser. Fayette Nat. Bank *v.* Summers, 105 Va. 689, 54 S. E. 862.

That a check deposited with a bank for collection was unrestrictedly indorsed to the bank, and credit therefor given the depositor, does not pass the title to the bank, where, on nonpayment of the check, its amount was to be charged up to the depositor, so as to prevent its recovery by the depositor from a receiver appointed for the bank. Armour Packing Co. *v.* Davis, 118 N. C. 548, 24 S. E. 365.

"Neither the deposit of a check with a bank for collection, nor the entry on its books of the amount of the check as a deposit of money in favor of the owner of the check, nor yet the negligence of such bank in and about the collection of the check from the drawee bank, whereby there is a failure to collect it, nor all these facts combined, makes such check the property of the collecting bank, nor the owner of the check a depositor of the money entered to his credit, in such sense as gives him a right of action for money had and received, or otherwise, for the amount of the face of the check as money due him from the bank." Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246.

As against the payee of a draft, a bank which is the drawer's agent for collection, shown by its uniform custom, while giving him credit for such drafts, and allowing him to draw against the same, to charge them back to him if they are not paid, he has the right to arrest payment of the draft. Murchison Nat. Bank *v.* Dunn Oil Mills Co., 150 N. C. 718, 64 S. E. 885.

The settlement of a depositor's bank book on the basis of the supposed payment of drafts, deposited merely for transmission and collection elsewhere, does not alter the rights of either party, but the accounts are open to examination and correction where it appears that the drafts were not actually paid. Mechanics' Bank *v.* Earp (Pa.), 4 Rawle 384.

Where there is no express arrangement or understanding between the depositor and the bank that the deposits of out-of-town paper should be treated as cash, such an understanding can not be implied from the mere fact that the depositor was credited with the draft upon the books of the bank, as if the deposit were of money, although the deposit ticket named it under the head of checks, and that the depositor himself added on the stubs of his check book such deposits to the current amount, coupled with an al-

§ 156(2) Consideration for Bank's Undertaking.—Generally speaking, it can make no difference that a bank makes no direct charge for its services in collecting, for the benefits which it ordinarily and usually derives from the use of the funds while in its custody, and the advantages which may arise from business associations, are held and deemed to be adequate consideration for the undertaking and quite sufficient upon which to predicate the liability incident thereto.[5]

§ 156 (3) By What Law Contract Governed.—Where a bank in one state sends a draft to a bank in another state for collection in the latter state, the contract is to be governed by the laws of the latter state.[6] Where a draft was sent to a bank in pursuance of a general contract between it and the owners, who reside in another state, that it should collect paper sent it, for an agreed compensation, it can not be held, in the absence of any evidence, that the contract to collect the particular draft was made in the state where the bank is situated.[7]

leged commercial usage to allow good customers to draw against a credit thus created. St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390.

The state treasurer, being informed that the State Bank at New Brunswick, in which he had a deposit of $33,900 of state funds, was in an embarrassed condition, drew on that fund, and deposited his draft for collection in the Trenton Bank, in which he also kept a state account. The amount of the draft was credited to the treasurer, and it was forwarded for collection the same day, received by the State Bank the next day, charged to the treasurer, and credited to the Trenton Bank. At 1 o'clock on that day the State Bank closed its doors on account of insolvency, and was subsequently in the hands of a receiver. Held, that the Trenton Bank only acted as a collecting agent for the accommodation of the state in the matter, and was not chargeable with the loss of the amount of the draft; but, even if it were otherwise liable, the failure of the treasurer to communicate to the Trenton Bank his knowledge or information of the failing condition of the State Bank would, in equity, discharge the other bank. Middlesex *v.* State Bank, 32 N. J. Eq. 467.

5. **Consideration for bank's undertaking.**—Kershaw *v.* Ladd, 34 Ore. 375, 56 Pac. 402, 44 L. R. A. 236; Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. 588; Bailie *v.* Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74; Merchants' Nat. Bank *v.* Goodman, 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728; Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722, 5 S. Ct. 141.

Where commercial paper is received by a bank for collection, it is not necessary to prove an agreement for compensation for collection in order to prove a contract on the bank's part to use reasonable diligence in making the collection. Manhattan Life Ins. Co. *v.* First Nat. Bank, 20 Colo. App. 529, 80 Pac. 467.

The fact that one who keeps his deposits with a bank deposits checks for collection, and that the bank had the advantage of the rate of exchange in the place where the checks are payable, is a sufficient consideration for the undertaking to collect the checks. Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. 588.

An agreement by a banking firm to collect a check and issue a certificate of deposit for the proceeds is based on a sufficient consideration to make the firm liable for neglect of duty. Kershaw *v.* Ladd, 34 Ore. 375, 56 Pac. 402, 44 L. R. A. 236.

Right of collecting bank to compensation where maker protested.—Where a bank receives a bill of exchange from the drawer for collection, it acts as the agent of the drawer, and is entitled to no damages if the bill is protested. It can only claim expenses. Runyon *v.* Latham, 27 N. C. 551.

6. **What law governs.**—Kent *v.* Dawson Bank, Fed. Cas. No. 7,714, 13 Blatchf. 237.

7. St. Nicholas Bank *v.* State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241, reversing 59 Hun 383, 12 N. Y. S. 864.

Nor can the contract be regarded as

§ 156 (4) Revocation of Agency.—The true owner of a draft which has been sent to a bank for collection is entitled to revoke the bank's authority to collect the same, and demand a return of the draft, at any time prior to its collection, and a refusal to comply with such demand operates as a conversion of the draft.[8] Where a bank receives a check for collection only, its agency is revoked by a writ of injunction obtained by the depositor against the clearing house and the bank to restrain them from passing the check,[9] and in such case any person who is aware of the issuance of the injunction is chargeable with notice of the revocation of the bank's agency.[10] The insolvency of a bank to which a check is indorsed "for collection" revokes its agency.[11] The contract of agency arising from the deposit of a note with a bank for collection, and an entry in the bank book of the depositor, is not revoked by canceling the entry in the bank book.[12]

§ 157. Power and Duty to Make Collections.—While corporations have only such powers as are expressly or impliedly given by their charters, yet the power to receive commercial paper for collection is necessarily implied from the character of the banking business.[13]

After the suspension of a bank, its general power to collect ceases

subject to the law of that state, on the ground that it was to be performed there, when the draft was to be collected in a third state, and paid to the owner in the state of his residence. St. Nicholas Bank *v.* State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241, reversing 59 Hun 383, 12 N. Y. S. 864.

8. **Revocation of agency—Right to revoke.**—Bank *v.* Waydell, 103 App. Div. 25, 92 N. Y. S. 666, rehearing denied 104 App. Div. 620, 94 N. Y. S. 135, affirmed 187 N. Y. 115, 79 N. E. 857.

9. **Revocation by writ of injunction.**—Louisiana Ice Co. *v.* State Nat. Bank (La.), 1 McGloin 181.

10. Louisiana Ice Co. *v.* State Nat. Bank (La.), 1 McGloin 181.

11. **Insolvency of bank as revoking agency.**—Bank *v.* Gilman, 81 Hun 486, 30 N. Y. S. 1111, 63 N. Y. St. Rep. 299, affirmed in 152 N. Y. 634, 46 N. E. 1145. See post, "Insolvency of Collecting Bank," § 166.

12. **Effect of canceling entry in bank book.**—Bank *v.* Huggins, 3 Ala. 206.

13. **Power to collect implied from character of business.**—Keyes *v.* Bank, 52 Mo. App. 323; Diamond Mill Co. *v.* Groesbeeck Nat. Bank, 9 Tex. Civ. App. 31, 29 S. W. 169.

The collection of checks, bills of exchange, drafts, notes, and accounts, is within the ordinary business of banks, in behalf of their customers. Jockusch *v.* Towsey, 51 Tex. 129.

It is a well-acknowledged fact that the collection of money for others is a part of the regular business of all banks, and when a bank opens its doors for business with the public, and places officers in charge, persons dealing with them in good faith, and without any notice of any want of authority in such officer, and the act done is in the apparent scope of the officer's authority, whether the officer was actually clothed with such authority or not, the party so dealing would be protected. City Nat. Bank *v.* Martin, 70 Tex. 643, 648, 8 S. W. 507, 8 Am. St. Rep. 632.

Where a bank is authorized by its charter to deal in bills of exchange, and discount notes made negotiable and payable at the bank, with two or more good and sufficient securities, it may, under this power, undertake to collect bills of exchange on other places; the restriction, if one, extending only to promissory notes. Branch Bank *v.* Knox & Co., 1 Ala. 148.

A national bank has power to receive commercial paper for collection or protest if not paid. White *v.* Third Nat. Bank, 7 O. Dec. 666, 4 Wkly. L. Bull. 791; Mound City Paint, etc., Co. *v.* Commercial Nat. Bank, 4 Utah 353, 9 Pac. 709.

thereby, as to paper deposited with the bank previous to its suspension.[14]

§ 158. Making, Receipt, and Entry of Deposit for Collection.—In General.—The question whether the title passes to a negotiable instrument delivered to a bank under a restrictive, but ambiguous, indorsement, without an express contract, but in pursuance of an established usage, is one of fact, rather than law, and depends on the intent of the parties. As between the immediate parties, the form of an indorsement is not conclusive, and the nature of the contract may be proved by parol evidence.[15] Thus, where the uniform course of business between two banks showed that the real significance of the indorsement of a certificate of deposit by one bank to the other was to pass the certificate, not for collection merely, but as the property of the transferee, it will be treated as having that effect, though the form of the transmitting letter tends to show a remittance for collection; it being admitted that all classes of paper were remitted under this same form, and that they were differently treated thereunder.[16] Where a note has been left with the cashier of a bank for collection in his individual capacity, and not as agent for the bank, this does not constitute a deposit of the note with the bank for collection.[17] A bank check was mailed by the holder to the drawee with a request to remit by mail by a certain time. The drawer was in funds, and the drawee charged the check and returned it to the drawer as paid. Held, that the holder, instead of personally demanding immediate payment, trusted to the bank to remit; the result being simply to

14. Determination of power by suspension of bank.—Jockusch *v.* Towsey, 51 Tex. 129. See post, "Insolvency of Collecting Bank," § 166.

15. Intent of parties as determining nature of contract.—United States Nat. Bank *v.* Geer, 53 Neb. 67, 73 N. W. 266, 41 L. R. A. 439.

Where the payee of a bank certificate of deposit sends it by mail to another bank, asking for a deposit slip and two or three checks, which are forwarded to him, the transaction does not amount to a purchase of the certificate by the bank, but only to a receipt thereof for collection. Hilsinger *v.* Trickett, 86 O. St. 286, 99 N. E. 305.

16. United States Nat. Bank *v.* Geer, 53 Neb. 67, 73 N. W. 266, 41 L. R. A. 439.

Where a regular customer of and depositor in a bank had an understanding with the bank by which he was to deposit out of town checks and receive credit therefor, but was to be charged with checks which were not paid, and no charge was to be made for collecting such checks, the bank takes such a check for collection only, and is not a purchaser thereof. Fanset *v.* Garden City State Bank, 24 S. Dak. 248, 123 N. W. 686.

17. Plaintiff, the owner of a note, placed it for collection in the hands of defendant's cashier, his intimate friend, and in whom he had unbounded confidence. The cashier had the note renewed, placed the renewed note in the bank for collection as deposited for his own account individually, and used the proceeds personally. Though informed by the cashier that the renewed note had been collected, plaintiff never demanded payment from the bank, or any one else except the cashier, and never drew a check against the proceeds, or made any effort to get them. Years afterwards, when the cashier had died, and during a temporary suspension of the bank, plaintiff brought an action against it for the proceeds of the note. Held, that the court was justified in finding that the note had been left with the cashier for collection in his individual capacity, and not as agent for the bank, and that the court was not bound to believe plaintiff's confused and contradictory testimony that he had deposited the note with the bank for collection. McLennan *v.* Bank, 87 Cal. 569, 25 Pac. 760.

credit the bank, and not to constitute an agency for collection.[18] Where the owner of municipal bonds deposited them with the bank, where they were payable, for safe-keeping, this did not constitute the bank his agent, so that, when the municipality deposited the money with the bank to pay the bonds and the bank failed to use it for that purpose, the bonds were not thereby satisfied, but remained a liability of the municipality.[19] Where the holder of a promissory note delivers it to a bank, with directions to appropriate the proceeds to a specific object, the bank may realize the proceeds, either by discounting it or by collecting it of the maker at its maturity, if the holder does not make an election.[20]

Necessity for Possession of Paper by Collecting Bank.—In order that the relation of principal and agent may be created between the depositor and the bank, the paper must be lodged with the bank for collection,[21] not merely made payable there.[22] A mortgagor is not entitled to

18. People *v.* Merchants', etc., Bank, 78 N. Y. 269, 34 Am. Rep. 532.

19. *New York.*—People *v.* Green, 23 Hun 280.

20. **Effect of delivery with directions as to appropriation of proceeds.**—Drown *v.* Pawtucket Bank (Mass.), 15 Pick. 88.

21. **Paper must be actually lodged with bank for collection.**—Bloomer *v.* Dau, 122 Mich. 522, 81 N. W. 331; Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351; Caldwell *v.* Evans (Ky.), 5 Bush 380, 96 Am. Dec. 358.

Where such instrument is not lodged with the bank, whatever the bank receives from the maker to apply upon the instrument, it receives as his agent, not as the agent of the payee. Ward *v.* Smith (U. S.), 7 Wall. 447, 19 L. Ed. 207; Cheney *v.* Libby, 134 U. S. 68, 33 L. Ed. 818, 10 S. Ct. 498.

A bank directed by the makers to pay a note held the agent of the makers, rather than the agent of the owners for collection. Baldwin's Bank *v.* Smith (Sup.), 136 N. Y. S. 349.

22. **Effect of making instrument payable at bank as establishing an agency.**—Bloomer *v.* Dau, 122 Mich. 522, 81 N. W. 331.

The fact that notes are payable at a bank does not of itself, in the absence of the notes, authorize the bank to collect anything thereon before their maturity. Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351.

A bank does not become the agent of the payee to receive the amount of the notes by reason simply of the fact that notes were made payable at their bank. The funds left by obligor with them to be applied in payment of the notes are, therefore, his property, not the property of payee. Cheney *v.* Libby, 134 U. S. 68, 33 L. Ed. 818, 10 S. Ct. 498.

"In Ward *v.* Smith (U. S.), 7 Wall. 447, 450, 19 L. Ed. 207, the question arose as to whether a bank at which certain bonds were made payable was the agent of the holder to receive payment. The court said: 'It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that their holder should have them at the bank, when due, to receive payment, and that the obligors would produce there the funds to pay them. It was inserted for the mutual convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he can not be made responsible for any future damages, either as costs of suit or interest, for delay. When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment.'" Cheney *v.* Libby, 134 U. S. 68, 33 L. Ed. 818, 10 S. Ct. 498.

Where it was the course of business between a banker and his customer for the bank to pay all claims sent for collection out of the customer's deposits if he had any, charging the payment in the account when balanced, and a particular claim was sent for collection, to pay which and others the customer deposited money in his own name with the banker, with directions

presume that the agency of a bank which has had his note and mortgage for collection still continues, where he knows that the papers are no longer in its hands; and payment thereafter made to the bank is at his risk.[23] A bank holding notes as collateral to be sent to debtor bank for collection, and payable at a certain date, need not however, have the notes in the hands of collecting bank before the date fixed for payment.[24]

§ 159. Title to Paper Received for Collection—§ 159 (1) In General.—When negotiable paper is deposited in a bank for collection, the depositor remains the owner, as to the collecting bank, in the absence of special agreement to the contrary,[25] and the bank takes such paper simply

to pay the claims, the customer remained liable on the bill, if the banker failed before thus applying the money. Moore & Co. *v.* Meyer, 57 Ala. 20.

Authority was given by a bank holding a note for another bank to receive payment thereof. The maker of the note deposited the amount due in the collecting bank to his own credit, and verbally instructed the bank to remit the amount to the holder. Held, that he made such bank his agent, and, on its failure to remit, could not maintain a plea of payment in a suit on the note. Ripley Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 145 Mo. 142, 47 S. W. 1.

23. Presumption as to continuance of agency.—Bloomer *v.* Dau, 122 Mich. 522, 81 N. W. 331.

A note and mortgage had been left at a bank for collection, but before payment the mortgage withdrew his papers and terminated its authority, and notified the mortgagor by letter, which, owing to the mortgagor's change of address, was finally returned to the mortgagee. Thereupon it promptly notified the mortgagor thereof, and that the bank had no authority to receive payment; but the mortgagor had already paid the bank, knowing that it no longer held the paper, and without inquiring whether its agency continued, and the bank failed before the mortgagee was notified of the payment. Held, that the mortgagee's subsequent silence and delay to foreclose did not estop him to deny the bank's authority and to recover. Bloomer *v.* Dau, 122 Mich. 522, 81 N. W. 331.

"A bank agency continues until in some way the parties have been notified of its termination, or have sufficient facts in their possession to put them upon inquiry. Banks are collection agencies, and the courts will take judicial notice of the fact that no note and other evidence of debt accompany the agency and are placed in their hands to be surrendered when the debt is paid. It must be presumed, therefore, that defendants knew that this was the customary method of doing business, and that this bank would, in the due course of business, after its agency continued, have the note and mortgage in its hands for surrender." Bloomer *v.* Dau, 122 Mich. 522, 81 N. W. 331.

24. Necessity for possession by collecting bank for date for payment.—Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351.

A bank secured its indebtedness to a creditor bank by putting up, as collateral, notes signed by third persons, and payable to and at debtor bank. The course of business was that, when a note became due or was to be paid, it was sent for by debtor bank, and other notes sent in exchange therefor if necessary to protect the indebtedness. It was not shown that creditor bank ever directly authorized debtor bank to collect a note which had not been returned to it. Held, that debtor bank had no authority to receive payment for notes in the hands of creditor bank. Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351.

25. Retention of title by depositor.—*Alabama.*—Eufaula Grocery Co. *v.* Missouri Nat. Bank, 118 Ala. 408, 24 So. 389; Morris & Co. *v.* Alabama Carbon Co., 139 Ala. 620, 36 So. 764.

Colorado.—First Nat. Bank *v.* Leppel, 9 Colo. 594, 13 Pac. 776.

Georgia.—Central R. Co. *v.* First Nat. Bank, 73 Ga. 383; Bailie *v.* Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74.

Kansas.—Prescott *v.* Leonard, 32 Kan. 142, 4 Pac. 172.

Louisiana.—Louisiana Ice Co. *v.* State Nat. Bank, 1 McGloin 181.

Massachusetts.—Freeman's Nat. Bank *v.* National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461.

Michigan.—Fuller *v.* Bennett, 55

Mich. 357, 21 N. W. 433; Garrison *v.* Union Trust Co., 139 Mich. 392, 102 N. W. 978, 70 L. R. A. 615, 111 Am. St. Rep. 407.

New York.—Dickerson *v.* Wason, 47 N. Y. 439, 7 Am. Rep. 455; Clark & Co. *v.* Merchants' Bank, 3 N. Y. Super. Ct. 498; Hoffman *v.* Miller, 22 N. Y. Super. Ct. 334; Oppenheim *v.* West Side Bank, 22 Misc. Rep. 722, 50 N. Y. S. 148; Bank *v.* Waydell, 103 App. Div. 25, 92 N. Y. S. 666, rehearing denied 104 App. Div. 620, 94 N. Y. S. 135, affirmed 187 N. Y. 115, 79 N. E. 857.

North Carolina.—Armour Packing Co. *v.* Davis, 118 N. C. 548, 24 S. E. 365; Murchison Nat. Bank *v.* Dunn Oil Mills Co., 150 N. C. 718, 64 S. E. 885.

North Dakota.—National Bank *v.* Johnson, 6 N. Dak. 180, 69 N. W. 49.

Ohio.—Jones *v.* Kilbreth, 49 O. St. 401, 31 N. E. 346; Blake *v.* Hamilton Dime Sav. Co., 79 O. St. 189, 87 N. E. 73; Moore *v.* Central Nat. Bank, 12 O. C. C., N. S., 529, 21-31 O. C. D. 614; Quebec Bank *v.* Weyand, 13 O. Dec. 1055, 2 Cin. R. 538; National Exch. Co. *v.* Hough, 3 O. Dec. 169, 3 N. P. 289.

Pennsylvania.—Mechanics' Bank *v.* Earp, 4 Rawle 384.

Texas.—City Bank *v.* Weiss, 67 Tex. 331, 3 S. W. 299; New York Life Ins. Co. *v.* Patterson, 35 Tex. Civ. App. 447, 80 S. W. 1058, affirmed in 98 Tex. 626, no op.; Gregory *v.* Sturgis Nat. Bank (Tex. Civ. App.), 71 S. W. 66; Arkansas Fertilizer Co. *v.* City Nat. Bank (Tex. Civ. App.), 137 S. W. 1179.

Tennessee.—Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940.

United States.—St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390; Hambro *v.* Casey, 110 U. S. 216, 28 L. Ed. 125, 3 S. Ct. 583; Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533; Old Nat. Bank *v.* German-American Nat. Bank, 155 U. S. 556, 39 L. Ed. 259, 15 S. Ct. 221; Bank *v.* New England Bank, 1 How. 234, 11 L. Ed. 115; S. C., 6 How. 212, 12 L. Ed. 409; Richardson *v.* Denegre, 93 Fed. 572, 35 C. C. A. 452; Balbach *v.* Frelinghuysen, 15 Fed. 675.

Virginia.—First Nat. Bank *v.* Payne & Co., 85 Va. 890, 9 S. E. 153, 3 L. R. A. 284; Fayette Nat. Bank *v.* Summers, 105 Va. 689, 54 S. E. 862.

Washington.—Morris-Miller Co. *v.* Von Pressentin, 63 Wash. 74, 114 Pac. 912.

West Virginia.—Carroll *v.* Exchange Bank, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101; Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702.

Checks delivered to a bank by a depositor for collection and deposit at a time when the bank was insolvent, as must have been known by its officers, and which had not been collected when the bank closed its doors, remain the property of the depositor, and may be recovered by him from the receiver. Richardson *v.* Denegre, 93 Fed. 572, 35 C. C. A. 452.

In the absence of special agreement the deposit in bank to his credit of an uncertified check by the holder, whether drawn on that bank or another, is deemed to be for collection and not for payment, and if there be no funds to meet it or if it be returned dishonored the deposit bank may return it to the depositor and cancel the credit. Daniel on Negotiable Instruments, § 1623; Morse on Banks and Banking, 320 and 321. And in such case if the bank receives notice of the invalidity of the check it can not become a bona fide holder by subsequent payment. Blake *v.* Hamilton Dime Sav. Bank Co., 79 O. St. 189, 87 N. E. 73.

Where a draft was drawn in favor of the cashier of a bank to enable the latter to collect and apply the proceeds thereof to the drawer's credit, the execution of such draft did not divest the drawer's equitable ownership of the debt for which the draft was drawn. Morris & Co. *v.* Alabama Carbon Co., 139 Ala. 620, 36 So. 764.

A Cincinnati bank, as the agent of plaintiff bank, held for collection a draft of which a Cincinnati firm was the acceptor. The draft not being paid at maturity, the acceptor gave its promissory note to the Cincinnati bank as security for its payment. When the note was about to fall due, the firm obtained from defendants their accommodation note for the express purpose of taking up the draft. The Cincinnati bank refused to discount this accommodation note, but received it as collateral security only for the pre-existing debt. Plaintiff brought suit against defendants on the note at its maturity. Held that, as the Cincinnati bank, as plaintiff's agent, received the accommodation note without consideration therefor, it was received subject to any defense which defendants might have to it against the original payee. Quebec Bank *v.* Weyand, 13 O. Dec. 1055, 2 Cin. R. 538.

A bank with which a note is deposited by the payee, for collection, can not refuse to return the note, or its proceeds, to the depositor, on the ground that it was given to defraud

as agent for the owner.[26] The mere provisional credit as cash, with liberty to draw thereon, will not change the rule.[27] The question is one of fact rather than of law.[28] The general rule just laid down is also applicable where negotiable paper is transmitted by one bank or banker to another for collection by the latter,[29] except where the collection has been fully com-

creditors of a third person, unless the bank itself is one of those creditors. First Nat. Bank *v.* Leppel, 9 Colo. 594, 13 Pac. 776.

26. Prescott *v.* Leonard, 32 Kan. 142, 4 Pac. 172; Jones *v.* Kilbreth, 49 O. St. 401, 31 N. E. 346. See cases cited in notes to preceding text.

Generally, as to relation of the depositor for collection and the collecting bank, see ante, "Relation between Bank and Depositor for Collection," § 156.

Checks deposited in a bank by its customers for collection do not at once become the property of the bank. The bank continues to be the agent of the customer until the collection of the check, which remains, in the meantime, the property of the depositor. Balbach *v.* Frelinghuysen, 15 Fed. 675.

Where the bank acts merely as an agent for collection, it will hold the proceeds of the collection in trust for the depositor. Jones *v.* Kilbreth, 49 O. St. 401, 31 N. E. 346; Mad River Nat. Bank *v.* Melhorn, 8 O. C. C. 191, 4 O. C. D. 401.

A bank having in its possession a promissory note for collection is not the "holder" of the note. Moore *v.* Central Nat. Bank, 12 O. C. C., N. S., 529, 21-31 O. C. D. 614.

A bank does not own or have any interest in checks that it holds simply for the purpose of collecting the amounts called for in them. New York Life Ins. Co. *v.* Patterson, 35 Tex. Civ. App. 447, 452, 80 S. W. 1058, affirmed in 98 Tex. 626, no op., citing Clark *v.* Gillespie, 70 Tex. 513, 8 S. W. 121; Rollison *v.* Hope, 18 Tex. 446; Gamer *v.* Thomson, 35 Tex. Civ. App. 283, 79 S. W. 1083; Harris *v.* Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; Milmo Nat. Bank *v.* Convery, 8 Tex. Civ. App. 181, 27 S. W. 828.

Where a check is deposited in a bank for collection only, the bank is not liable for the value of the check as purchaser. Bailie *v.* Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74.

Rev. St. U. S., § 5228, making the assets of a national bank at the time of its suspension liable for the debts of the bank, does not apply to a certified check on a second bank, deposited with it for collection only. Louisiana Ice Co. *v.* State Nat. Bank (La.), 1 McGloin 181.

Notes having been deposited by O. with defendant bank for collection only, and as the property of plaintiff, it became entitled to demand and receive them and their proceeds, and therefore, delivery being refused without lawful excuse, to recover for their conversion, and this without regard to whether under a prior contract between plaintiff and O. the notes belonged to plaintiff, or whether thereunder a mere indebtedness of O. to plaintiff arose, to satisfy which he made the deposit; and this even if the transaction between plaintiff and O., out of which the indebtedness originated, was unlawful. Arkansas Fertilizer Co. *v.* City Nat. Bank (Tex. Civ. App.), 137 S. W. 1179.

27. Rule not changed by credit as cash with liberty to draw thereon.—See ante, "In General," § 156 (1).

28. Question of fact rather than of law.—St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390.

A bank received from a customary depositor, on deposit, a foreign draft, with the deposit ticket upon which it was described as a check, the ticket distinguishing between bills and checks, which was entered by the instructions of the assistant cashier as cash by the bank, the depositor's passbook being in the possession of the bank and no entry being made in it until some days afterwards, by the bank. The draft was sent on for collection, the bank being insolvent when same was received and closing its doors shortly afterwards. The question whether the bank became the owner of the draft, or was merely acting as agent for the depositor to collect same was one of fact rather than of law, and the bank's ownership was not established by the evidence in this case. St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390.

29. Application of rule to paper transmitted by bank to another for collection.—Commercial Nat. Bank *v.*

pleted by the receiving bank or its agent, and the terms of the arrangement show that it was not intended that the proceedings be kept on special de-

Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533; Morris-Miller Co. *v.* Von Pressentin, 63 Wash. 74, 114 Pac. 912.

Title does not vest in a bank correspondent receiving a check for collection in the usual course of business. Oppenheim *v.* West Side Bank, 22 Misc. Rep. 722, 50 N. Y. S. 148.

"Title to commercial paper received for collection by a bank, and forwarded to its correspondent in the usual course of business, without an express agreement in reference thereto, does not vest in such correspondent, even if he has remitted on general account in anticipation of collection. Title passes only by a contract to that effect, to be expressly proved, or inferred from an unequivocal course of dealing. National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612, and cases cited; National Butchers, etc., Bank *v.* Hubbell, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515." Arnot *v.* Bingham, 55 Hun 553, 9 N. Y. S. 68, 29 N. Y. St. Rep. 878.

Under a contract by an Ohio bank with a Pennsylvania bank to collect at par all points west of Pennsylvania and remit on the 1st, 11th, and 21st of each month, the Ohio Bank caused to be made and sent to the plaintiff a rubber stamp, for use in endorsing paper thus forwarded, which read "pay," etc., "for collection," etc. Business was carried on between the two banks under this arrangement until the Ohio Bank failed, having in its hands or in the hands of other banks to which the same had been sent by it for collection, proceeds of paper forwarded by plaintiff. The relation created between the banks as to uncollected paper was that of principal and agent, and the mere fact that a subagent of the Ohio Bank had collected the money due on such paper, was not a mingling of those collections with its general funds and did not operate to relieve them from the trust obligation created by the agency or create any difficulty in specifically tracing them. Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533.

A bill indorsed "For account," which has been remitted by one bank to another, accompanied by a letter of advice that it was for the benefit of the remitting bank, remains the property of the latter. Williams, etc., Co. *v.* Jones, 77 Ala. 294.

The property in business paper received for collection by one engaged in the business of banking and collection, and forwarded by him to his correspondent in the usual course of business, without any agreement in respect thereto, does not become vested in the correspondent, though he may have remitted on general account in anticipation of collections. Dickerson *v.* Wason, 47 N. Y. 439, 7 Am. Rep. 455.

Where a bank receives for collection from a payee a draft with collaterals attached, and sends it to another bank, where the draft is payable, for collection, it is entitled to recover possession of the draft and collaterals from the receiver of the latter bank appointed on its suspension before the draft was paid. In such case, having a special interest in the draft and collaterals, arising from its relations to the payee, it can maintain an action against the latter's agent, the collecting bank, to recover the property intrusted to its care, after a proper demand for it. Corn Exch. Bank *v.* Blye, 40 Hun 639, 2 N. Y. St. Rep. 112.

Where a draft was forwarded to a bank for "collection and credit," the bank became a mere agent of the forwarder for its collection, with authority only to present the draft for acceptance, collect the same when due, and credit the amount thereof to the forwarder; and it could not claim any rights in the draft higher than those possessed by the forwarder. Bank *v.* Waydell, 103 App. Div. 25, 92 N. Y. S. 666, rehearing denied 104 App. Div. 620, 94 N. Y. S. 135, affirmed in 187 N. Y. 115, 79 N. E. 857.

An indebtedness existing in favor of a bank against the forwarder of a draft for collection does not constitute the bank a holder of the draft for value, under Negotiable Instrument Law (Laws 1897, p. 727, c. 612), § 51, providing that an antecedent debt constitutes value, in such sense as to entitle the bank to retain the draft as against the true owner, where the bank does not discharge or deal with the indebtedness in any way on the faith of the draft, and the draft is not yet due, and can not be credited to the forwarder or applied on his indebtedness. Bank *v.* Waydell, 103 App. Div.

posit until remitted.[31] Though a collecting bank may remit by setting off

25, 92 N. Y. S. 666, rehearing denied 104 App. Div. 620, 94 N. Y. S. 135, affirmed in 187 N. Y. 115, 79 N. E. 857.

Plaintiff bank transmitted to its correspondent, for collection, checks on defendant bank. The correspondent transmitted them to defendant, and defendant credited the amount of an indebtedness owing it by said correspondent, but on the same day the correspondent failed. Held, that defendant was liable to plaintiff for the amount of the checks. First Nat. Bank *v.* Reno County Bank, 3 Fed. 257, 1 McCrary 491, 1 Ky. L. Rep. 241.

Where there have been, for several years, mutual and extensive dealings between two banks, and an account current kept between them, in which they mutually credited each other with the proceeds of all negotiable paper transmitted for collection when received, and accounts were regularly transmitted from the one to the other, and settled upon these principles, and balances remitted when called for and upon the face of the paper transmitted, it always appeared to be the property of the respective banks, and the collecting bank had no notice that the transmitting bank did not own the paper, and such paper was transmitted by each of the two banks on its own account, there is a lien for a general balance of account, no matter who may be the real owner of the paper. If the receiving and collecting bank, at the time of the mutual dealings with the bank sending paper, had notice that such bank had no interest in the bills or notes transmitted, and that it transmitted them for collection merely, as agent, then the collecting bank would not be entitled to retain against the owner of such paper for the general balance of the account with such bank. Carroll *v.* Exchange Bank, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101.

If the collecting bank had no notice that the bank sending the remittance was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the collecting bank is not entitled, against the real owner, unless credit was given to the bank sending the paper, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted in the usual course of dealings between the two banks. Carroll *v.* Exchange Bank, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101.

But if, in the mutual dealings between the two banks, the collecting bank regarded and treated the bank transmitting negotiable paper as the owner of such paper, which it transmitted for collection, and had no notice to the contrary, and on the credit of such remittances, made or anticipated in the usual course of dealings between them, balances were from time to time suffered to remain in the hands of the bank sending the remittances, to be met by the proceeds of such negotiable paper, then the collecting bank is entitled to retain against the real owner of the paper, for the balance of account due from the bank transmitting such paper. Carroll *v.* Exchange Bank, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101.

Where a check drawn on another bank was sent to the C. Bank for collection, the fact that the latter, believing the check had been paid, so informed the sender, and later credited the sender's account with the amount, when, in fact, the check had not been forwarded to the drawee bank or paid, the C. Bank held the check for collection only, and was not a purchaser thereof for value. Central Bank, etc., Co. *v.* Davis (Tex. Civ. App.), 149 S. W. 290.

31. Where collection fully completed, etc.—Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533; Old Nat. Bank *v.* German-American Nat. Bank, 155 U. S. 556, 39 L. Ed. 259, 15 S. Ct. 221; Garrison *v.* Union Trust Co., 139 Mich. 392, 102 N. W. 978, 70 L. R. A. 615, 111 Am. St. Rep. 407.

As to those moneys collected by subagents to whom the Ohio bank was in debt, and which collections had been credited by the subagents upon the debts of the bank to them, before its insolvency was disclosed, there the moneys had practically passed into the hands of the Fidelity, and the collection had been fully completed. It was not a mere matter of book-keeping between the bank and its agents; it was the same as though the money had actually reached the vaults of the Ohio bank. It was a completed transaction between it and its subagents, and nothing was left but the settlement between the bank and the principal. Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13

the amount against a debt due from the bank to which it should be remitted, it can not claim such set-off where the paper has not been paid, and hold the owner on his indorsement, which, though unrestricted, was merely for collection.[32]

§ 159 (2) Effect of Restrictive Indorsement.—While a general or blank indorsement would vest the legal title to negotiable paper,[33] the general rule is, that by a restrictive indorsement, the depositor retains the

S. Ct. 533; Old Nat. Bank *v.* German-American Nat. Bank, 155 U. S. 556, 39 L. Ed. 259, 15 S. Ct. 221.

By the terms of the arrangement between the banks, the relation of debtor and creditor was created when the collections were fully made. The agreement was to collect at par, and remit on the first, eleventh, and twenty-first of each month. Collections intermediate to those dates were, by the custom of banks and the evident understanding of the parties, to be mingled with the general funds of the Ohio bank, and used in its business. Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533.

It was the contemplation of the parties, and must be so adjudged according to the ordinary custom of banking, that these collections were not to be placed on special deposit and held until the day for remitting. The very fact that collections were to be made at par shows that the compensation for the trouble and expense of collection was understood to be the temporary deposit of the funds thus collected, and the temporary use thereof by the collecting bank. Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533.

32. Freeman's Nat. Bank *v.* National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461.

33. Effect of general or blank indorsement.—Sweeny *v.* Easter (U. S.), 1 Wall. 166, 17 L. Ed. 681; Drown *v.* Pawtucket Bank (Mass.), 15 Pick. 88.

Where plaintiff had indorsed in blank, and deposited in his bank to his credit, certain checks, which such bank indorsed to defendant for collection to its credit, plaintiff could not hold defendant liable for the proceeds of such checks, though such bank had become insolvent, as his indorsement transferred a good title, free from all equities in his favor. Judgment 74 Ill. App. 429, affirmed. Doppelt *v.* National Bank, 175 Ill. 432, 51 N. E. 753.

Defendant drew a check on its bank in O., and by indorsement made the check payable to its deposit bank in L., which thereafter became insolvent. The check was credited to defendant on the books of the L. Bank and sent to plaintiff, the L. Bank's correspondent for collection and credit. Plaintiff on receiving the check, payable by indorsement to the order of any bank or banker, in a letter advising that it was inclosed for collection and credit, credited the amount to the L. Bank's general account, and thereafter paid drafts against the account and made remittances to the L. Bank, so that its credit at the close of business on October 10th, when the L. Bank closed its doors, was much less than the amount of the check which, on being presented to the drawee bank for payment, payment was refused because defendant had ordered payment stopped. Held, that plaintiff bank was a bona fide purchaser of the check for value, and not a mere subagent of the insolvent bank for collection and credit, and was therefore entitled to recover in the absence of proof that he purchased the check with actual knowledge of the deposit bank's insolvency or any infirmity connected therewith. (C. C. A. 1911) Amalgamated Sugar Co. *v.* United States Nat. Bank, 187 Fed. 746, 109 C. C. A. 494, affirming judgment United States Nat. Bank *v.* Amalgamated Sugar Co., 179 Fed. 718.

The rights of plaintiff bank as a bona fide purchaser being determined in accordance with the legal as distinguished from the equitable rights of the parties, it was entitled to recover the whole amount of the check, and was not subject to a deduction to the amount in its hands to the credit of the indorsing bank at the time of the latter's failure. Amalgamated Sugar Co. *v.* United States Nat. Bank, 109 C. C. A. 494, 187 Fed. 746; United States Nat. Bank *v.* Amalgamated Sugar Co., 179 Fed. 718.

title,[34] and upon such an indorsement the owner may control his negotiable paper until it is paid, and may intercept the proceeds of it in the hands of an intermediate agent.[35] The indorsement of such paper with the words "for collection" restricts its negotiability; and a party who has thus indorsed it competent to prove that he was not the owner of it and did not mean to give title to it or to the proceeds when collected.[36] The words "for collection" are intended to limit the effect which would be given to the indorsement without that, and warn the party that, contrary to the purpose of a general or blank indorsement, it is not intended to transfer the ownership of the paper or its proceeds.[37] Such an indorsement is only intended

34. General rule as to effect of restrictive indorsement.—Freeman *v.* Exchange Bank, 87 Ga. 45, 13 S. E. 160.

35. Freeman's Nat. Bank *v.* National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461; Manufacturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553, 20 N. E. 193, 2 L. R. A. 699, 12 Am. St. Rep. 598.

36. Effect of indorsement "for collection."—Sweeny *v.* Easter (U. S.), 1 Wall. 166, 17 L. Ed. 681.

37. *United States.*—Armstrong *v.* Commercial Bank, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533; Old Nat. Bank *v.* German-American Nat. Bank, 155 U. S. 556, 39 L. Ed. 259, 15 S. Ct. 221; Balbach *v.* Frelinghuysen, 15 Fed. 675; First Nat. Bank *v.* Bank, 33 Fed. 408; Commercial Nat. Bank *v.* Armstrong, 39 Fed. 684; Sweeny *v.* Easter, 1 Wall. 166, 17 L. Ed. 681.

Georgia.—Central R. Co. *v.* First Nat. Bank, 73 Ga. 383.

Indiana.—First Nat. Bank *v.* First Nat. Bank, 76 Ind. 561, 40 Am. Rep. 261.

Iowa.—Claflin *v.* Wilson, 51 Iowa 15, 50 N. W. 578.

Kansas.—Prescott *v.* Leonard, 32 Kan. 142, 4 Pac. 172.

Kentucky.—Armstrong *v.* National Bank, 90 Ky. 431, 12 Ky. L. Rep. 393, 14 S. W. 411, 9 L. R. A. 553.

Maryland.—Tyson *v.* Western Nat. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161.

Massachusetts.—Manufacturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553, 20 N. E. 193, 2 L. R. A. 699, 12 Am. St. Rep. 598; Freeman's Nat. Bank *v.* National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461.

Minnesota.—Bank *v.* Clark, 23 Minn. 263; Merchants' Nat. Bank *v.* Hanson, 33 Minn. 40, 21 N. W. 849.

New Jersey.—Hoffman *v.* First Nat. Bank, 46 N. J. L. (17 Vr.) 604.

New York.—Naser *v.* First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077; National Butchers', etc., Bank *v.* Hubbell, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515.

North Carolina.—Boykin *v.* Bank, 118 N. C. 566, 24 S. E. 357.

North Dakota.—National Bank *v.* Johnson, 6 N. Dak. 180, 69 N. W. 49.

Ohio.—First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748; People's, etc., Bank *v.* Craig, 63 O. St. 374, 59 N. E. 102, 52 L. R. A. 872, 81 Am. St. Rep. 639.

Pennsylvania.—First Nat. Bank *v.* Gregg & Co., 79 Pa. 384.

Rhode Island.—Blaine *v.* Bourne & Co., 11 R. I. 119, 23 Am. Rep. 429.

Tennessee. — Aiken *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523; Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940.

Texas.—City Bank *v.* Weiss, 67 Tex. 331, 3 S. W. 299; Gregory *v.* Sturgis Nat. Bank (Tex. Civ. App.), 71 S. W. 66.

An indorsement for collection is notice to the drawee that the indorsee is not the owner of the paper. First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748. See also, People's, etc., Bank *v.* Craig, 63 O. St. 374, 59 N. E. 102, 52 L. R. A. 872, 81 Am. St. Rep. 639.

Daniels on Negotiable Instruments (vol. 1, § 340), under the heading, "Controversies as to the Ownership of Paper Placed in Bank to Be Collected," says: "A variety of circumstances give rise to controversies as to the right to claim paper or the proceeds of paper which was put in bank to be collected. When the holder places his paper in bank he usually does so in one of three ways: First, as a principal employing the bank as a mere agent for collection, in which

to put the paper in such shape that the bank may collect and not thereby pass that title to the bank.[38] It has so long been held by the courts that

case the restrictive indorsement 'For collection' is or should always be used, so that all subsequent holders may be advised of the bank's want of title. This is the form of indorsement generally used when the holder is not a customer of the bank. Second, as an avowed seller to the bank, in which case the indorsement is in blank, and the transaction a plain one. Third, as a customer having an account with the bank, in which case the restrictive indorsement is or is not employed, according to the relations established by agreement between the parties. If the bank treats the paper as a cash deposit, and allows the customer to draw against it in anticipation of the collection, the indorsement is generally in blank." Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702.

Where a bank receives a note from the owner, indorsed simply for collection, with instructions to apply the proceeds to the owner's indebtedness to the bank, it takes it simply as agent for the owner, and not as collateral security. Prescott *v.* Leonard, 32 Kan. 142, 4 Pac. 172.

B. received a draft endorsed to him as follows: "Pay B. or order for collection for account of the City Bank of Houston. B. F. Weames, cashier." The prior endorsement on the draft showed that it had been remitted to the City Bank of Houston for collection and for account of the City Bank of Sherman. B. collected the draft, and the City Bank of Houston, which was indebted to both B. and to the City Bank of Sherman, failed. Held, that B. could not appropriate the money collected to the payment of his debt, but that the same belonged to the City Bank of Sherman. City Bank *v.* Weiss, 67 Tex. 331, 3 S. W. 299.

Where a draft, with a bill of lading attached, was endorsed as follows: "Pay to the order of American National Bank, Kansas City, Mo. State Exchange Bank, Hutchinson, Kansas, F. W. Cooter, Cashier;" also: "Pay any bank or banker or order. American National Bank, Kansas City, Mo., G. B. Gray, Cashier," it was held that this endorsement showed that the bank, the holder of the draft, held the draft merely for collection, or at least was sufficient to put the drawee on inquiry as to the bank's ownership of the same. Gregory *v.* Sturgis Nat. Bank (Tex. Civ. App.), 71 S. W. 66.

Where a collector receives from a correspondent at another place a note indorsed to him "for collection," delay to draw for a cash balance, or the making of advances or remittances before collection, after receiving the note, does not make him a bona fide holder for value as against the owner of the note. Hoffman *v.* Miller, 22 N. Y. Super. Ct. 334.

Where a draft was drawn to the order of the cashier of a bank to enable it to collect the same, and the cashier indorsed it, "Pay to the order of M. & Co.," and signed the indorsement in his capacity as cashier, and inclosed it to M. & Co. for "collection and credit," M. & Co. took the paper in the capacity of a collecting agent for the forwarding bank, and not as a purchaser. Morris & Co. *v.* Alabama Carbon Co., 139 Ala. 620, 36 So. 764.

Intervener, holding a certificate of deposit in L. bank, indorsed it for collection to A. bank, which forwarded it for collection to N. bank. N. surrendered the certificate on receipt of L.'s draft, and credited the amount thereof to A., which issued its certificate of deposit to intervener at his request. The draft not being paid, N. charged back the amount thereof to A., and intervener, though after A.'s suspension, surrendered his certificate of deposit in A., and A. credited N. with the amount thereof. At no time since had N. claimed to own the draft, or to have any interest therein save as collateral to its claim against A. for overdraft. Held, that intervener owned the draft, and was entitled to the dividends declared thereon out of the assets of the L. bank. National Bank *v.* Johnson, 6 N. Dak. 180, 69 N. W. 49.

38. Balbach *v.* Frelinghuysen, 15 Fed. 675; Freeman's Nat. Bank *v.* National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461.

An indorsement for collection, or the like, is not a contract of indorsement, but the creation of a power, the indorsee being a mere agent to receive or enforce payment for the indorser's use. Central R. Co. *v.* First Nat. Bank, 73 Ga. 383; Freeman *v.* Exchange Bank, 87 Ga. 45, 13 S. E. 160.

Where a draft is made payable to the order of a cashier of a bank, and is by him indorsed to the cashier of another bank "for collection, for account of" the first bank, this is nothing more

an indorsement of this kind is restrictive, protecting the rights of the owner, that officers of banks must be presumed to have well understood the law, and when they have honored overdrafts drawn by other banks, which had sent paper for collection, must have done it trusting in part to the financial soundness of their correspondent, and in part to the probability that the drafts would be paid, and not to a supposed legal right to control the drafts against the owner.[39] While the deposit of paper in the bank by a customer, he indorsing it "for deposit," may operate to clothe the bank with the title under certain circumstances,[40] yet, generally, it would seem that where paper is indorsed for deposit to the credit of the indorser and deposited with that bank for collection, the indorser retains the ownership not only of such paper, but of its proceeds until they are collected and passed to his credit by the bank.[41]

than a warrant of attorney authorizing the indorsee to collect the amount due on the draft for the indorser, it conveys no title except for that purpose, and is notice to all persons subsequently dealing with it that the indorser has not parted with the title or intended to transfer the ownership of the proceeds to another. Accordingly where the cashier to whom a draft is thus indorsed in turn indorses it to a third person "for account of" the second bank, and the person to whom it is thus indorsed receives the money from the drawees, it receives that which belongs to the original payee, and thus puts it in privity with such payee to such extent that, upon failure to pay on demand, an action for money had and received will lie. The final indorsee making the collection would not apply the amount received to a claim held by him against the bank last indorsing, as against the original payee. Central R. Co. *v.* First Nat. Bank, 73 Ga. 383.

39. Freeman's Nat. Bank *v.* National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461; citing Rice *v.* Stearns, 3 Mass. 225, 3 Am. Dec. 129; Wilson *v.* Holmes, 5 Mass. 543, 4 Am. Dec. 75; Leary *v.* Blanchard, 48 Me. 269; Sweeny *v.* Easter (U. S.), 1 Wall. 166, 17 L. Ed. 681; Bank *v.* Triplett (U. S.), 1 Pet. 25, 7 L. Ed. 37; Lawrence *v.* Stonington Bank, 6 Conn. 521; Bank *v.* New England Bank, 1 How. 234, 11 L. Ed. 115; Trebbel *v.* Barandon, 8 Tamlt. 100; Signourney *v.* Lloyd, 8 Barn. & C. 622.

40. Effect of indorsing "for deposit." —Freeman *v.* Exchange Bank, 87 Ga. 45, 13 S. E. 160, citing National Commercial Bank *v.* Miller & Co., 77 Ala. 168, 54 Am. Rep. 50.

41. Freeman *v.* Exchange Bank, 87 Ga. 45, 13 S. E. 160, in which it is held that money received on such paper by a bank through whose agency it was collected, is subject to garnishment in its hands as the indorser's property.

Where a regular customer of a bank deposits his draft payable to his own order, and indorsed for deposit to the credit of the drawer, and the same is entered to his credit on the books of the bank, and forwarded by the bank to another bank for collection, the drawer, by the course of dealing, having the right to check against such deposit, and, in fact, checking against it, and his checks being honored, the title to the draft passes to the first bank, and when collected by the second the proceeds are not subject to garnishment at the instance of a creditor of the drawer. Fourth Nat. Bank *v.* Mayer, 89 Ga. 108, 14 S. E. 891, distinguishing Central R. Co. *v.* First Nat. Bank, 73 Ga. 383; Freeman *v.* Exchange Bank, 87 Ga. 45, 13 S. E. 160.

When paper is delivered to a banker for "collection and credit," the banker becomes the customer's agent to collect, with authority to pass the proceeds to the customer's account by a credit after they are collected. He cannot terminate his responsibility as an agent until he has fully discharged it, and has substituted in its place his unqualified obligation as a debtor. Until then he acquires no title to the proceeds of the paper beyond the banker's lien. Armstrong *v.* National Bank, 11 Ky. L. Rep. 90.

Where a bank receives by mail from the payee a certificate of deposit issued by a distant bank, the payee stating in the accompanying letter that it is for deposit to his credit, and asks for a deposit slip and two or three checks, the said payee never before

§ 159 (3) Lien of Collecting Bank.—It is a well-established general rule that a bank receiving paper for collection has a lien thereon for a debt of the depositor of such paper to the bank, and is entitled to retain such paper as security for the debt, in the absence of contract express or implied, to the contrary, and of notice of ownership in another.[42] Such lien is not

having had any account or dealings with the bank, and the bank responds by mail, acknowledging receipt of the certificate and advising that credit has been given to his account, and a slip is enclosed, showing that the certificate has been deposited to the payee's credit, and also enclosing two or three checks, and no other request is made or answer given, the transaction does not, in law, amount to a purchase of the certificate by the bank, but is a receipt of the same for collection only. Hilsinger *v.* Trickett, 86 O. St. 286, 99 N. E. 305.

42. Lien of collecting bank.—*United States.*—Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486; Joyce *v.* Auten, 179 U. S. 591, 45 L. Ed. 332, 21 S. Ct. 227; Bank *v.* New England Bank, 1 How. 234, 11 L. Ed. 115; S. C., 6 How. 212, 12 L. Ed. 409; Sweeny *v.* Easter (U. S.), 1 Wall. 166, 17 L. Ed. 681.

Arkansas.—Cockrill *v.* Joyce, 62 Ark. 216, 35 S. W. 221.

Illinois.—Russell *v.* Hadduck (Ill.), 3 Gilman 233, 44 Am. Dec. 693.

Indiana.—Rathbone *v.* Sanders, 9 Ind. 217.

Michigan.—Gibbons *v.* Hecox, 105 Mich. 509, 63 N. W. 519, 55 Am. St. Rep. 463.

Ohio.—Hakman, etc., Co. *v.* Schaaf, 8 O. Dec. 127, 5 Wkly. L. Bull. 851. See, however, Amelungs' Syndics *v.* Bank (La.), 1 Mart. 321, in which it is held that a bank has no lien on its debtor's notes deposited with it for collection.

As to the right of correspondent to retain proceeds on account of debt due from remitting bank, see post, "Right of Correspondent to Retain Proceeds on Account of Debt Due from Remitting Bank," § 167 (2).

"It has been long settled, that whereever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands, for the amount of his general balance, unless such securities were delivered to him under a particular agreement." Bank *v.* New England Bank, 1 How. 234, 11 L. Ed. 115; S. C., 6 How. 212, 12 L. Ed. 409.

A bank has a general lien on notes in its possession, belonging to its debtor, for the payment of the debt, whether the debtor deposited such notes to his general account, or delivered them to the bank for collection. Cockrill *v.* Joyce, 62 Ark. 216, 35 S. W. 221.

Where one indebted to a bank delivers notes to the cashier, who asks for them in order to make a good showing to the bank examiner—the intention of the debtor being that the bank should collect the notes and place them to his credit—such bank will have a general lien on the notes for the payment of its claim. Cockrill *v.* Joyce, 62 Ark. 216, 35 S. W. 221.

Where a banker receives a bill from his correspondent for collection, he has such lien thereon for any balance of account that he may have against such correspondent as will entitle him to maintain suit in his own name. Russell *v.* Hadduck (Ill.) 3 Gilman 233, 44 Am. Dec. 693.

A bank has a lien on a note deposited for collection by a debtor before maturity of his own debt, remaining uncollected and unassigned in its hands after his debt matures, for its payment. Gibbons *v.* Hecox, 105 Mich. 509, 63 N. W. 519, 55 Am. St. Rep. 463.

Notes were deposited with a bank for collection under an agreement that the proceeds as collected should be placed to the credit of the depositor as against a balance due the bank from the depositor. Held, that the bank's lien extended to notes yet uncollected by it, as against the depositor's assignee for creditors. Hakman, etc., Co. *v.* Schaaf, 8 O. Dec. 127, 5 Wkly. L. Bull. 851.

A. & B., bankers, of Pittsburgh, having dealings with C. & D., bankers, of Cincinnati, in the course of which they transmitted, on several occasions, checks upon New York and New Orleans, for credit, and sundry bills on time for collection, and at the same time drew upon C. & D. for divers sums, whereby they became indebted to C. & D. in a considerable balance, it was held that C. & D. had a lien upon the paper sent them for collection in respect of the credit given thereto, for the amount of such balance. Corn-

waived by accepting an assignment in insolvency by which the bank was a preferred creditor.[43] The lien of the bank does not include the damages on protested foreign bills.[44]

§ 159 (4) Right to Set Off Paper against Debt Owing by Bank. —In an action by an assignee for the benefit of creditors of a bank to re-

well *v.* Kinney, 1 Handy. 496, 12 O. Dec. 255.

Where, at the time of making an assignment, the insolvent was indebted to a bank which had for collection a note belonging to him, the bank is entitled to the proceeds of the note as against the assignee. Greene *v.* Jackson Bank, 18 R. I. 779, 30 Atl. 963.

The plaintiff in error received for collection a negotiable promissory note, unindorsed, with instructions to remit the proceeds, when collected, to the payee. Before the money was collected, the bank voluntarily, and without the knowledge or consent of the payee, paid to a third party a note given by a partnership of which the payee was a member. Subsequently, but before the note was collected, the bank was notified that the note had been sold to the defendant in error. He brought an action against the bank to recover the money collected by it. Held, that the bank was not entitled to set off the amount of the firm note against the money collected. Commercial State Bank *v.* Rowland, 31 Neb. 483, 48 N. W. 149, distinguishing Wood *v.* Boylston Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366.

The holder of a note, indorsed in blank by the payee, delivered it to an attorney for collection. The attorney deposited it in a bank for collection, without stating for whose account. The bank collected it, credited the attorney with it, and applied the amount in part payment of a debt of the attorney to the bank. The attorney was afterwards adjudged a bankrupt, and the bank made a settlement with his assignees, in which the amount of the note was included. The holder of the note, a year after the settlement, but as soon as he had notice that the bank had collected the claim, made a demand upon the bank for the proceeds. Held, that the holder of the note could not recover of the bank. Wood *v.* Boylston Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366.

Rev. St. U. S., § 5242, which invalidates all transfers of the notes, bonds, or bills of exchange of a national bank, after the commission of an act of insolvency, with a view to the preference of one creditor over another, does not prohibit a bank which has in good faith accepted the draft of a national bank the day before the latter's insolvency, and afterwards paid the same, from applying the proceeds of collections made by it, on paper in its hands belonging to the insolvent bank, to the payment of the draft, since its lien on such collections runs from the date of the acceptance. In re Armstrong, 41 Fed. 381.

43. Lien not waived by assignment making bank preferred creditor.—Joyce *v.* Auten, 179 U. S. 591, 45 L. Ed. 332, 21 S. Ct. 227.

A bank holding negotiable paper for collection does not lose its lien thereon for debts due it from the depositor, by reason of the fact that the depositor becomes insolvent, makes an assignment for creditors, and goes into the hands of a receiver, even if the bank accepts the assignment, where there is nothing to show any waiver of its lien. Judgment, Joyce *v.* Cockrill, 92 Fed. 838, 35 C. C. A. 38, affirmed. Joyce *v.* Auten, 179 U. S. 591, 45 L. Ed. 332, 21 S. Ct. 227.

44. Damages on protested foreign bills not included in lien.—Where foreign bills which had been remitted by a bank, their owner and holder, to its foreign correspondent for collection, were protested at maturity at an expense of $1,356, which was paid by the correspondent, the bank, the drawer and drawees having all failed before maturity, the protested bills are the property of the bank, subject in the hands of correspondent to their lien as bankers for the security of the balance due them on general account. All moneys collected by them on the bills, whether it be for principal, interest, or damages, must be passed as soon as collected to the credit of the bank. They are the holders of the bills, but in no legal sense the owners, though it may be their lien is for more than can be collected from the drawers or drawees. Clearly the law does not require the bank to pay the damages in addition to the expense of protest, when the payment, if made, must be passed to its own credit on the books of its collecting agents. Hambro *v.* Casey, 110 U. S. 216, 28 L. Ed. 125, 3 S. Ct. 583.

cover a balance due from another bank, a check drawn on the insolvent bank, which came into the hands of defendant prior to the assignment, and to which no defense is set up, should be allowed as a set-off, though the defendant is not the owner of the check, but holds it for collection.[45]

§ 159 (5) Effect of Pledge or Transfer to Third Person.—A bank receiving a note for collection merely has no implied authority to sell it.[46] While the banker who receives notes from his customers, to be got when due and placed to his account, is a special agent, and transcends his authority when he sells, pledges, or otherwise disposes of them; yet it has been held that the owner can not reclaim them from third parties who have received them bona fide and for a valuable consideration.[47]

§ 160. Authority and Acts in Making Collection—§ 161. —— Banks in General—§ 161 (1) General Rules as to Powers and Duties.—A bank which undertakes to collect negotiable paper is bound to keep within the authority conferred upon it, and exercise proper diligence to obtain payment.[48] Whether due care and diligence, under the circum-

45. **Right to set off paper against debt of bank.**—Penn Bank *v.* Farmers' Deposit Nat. Bank, 130 Pa. 209, 20 Atl. 150.

46. **No implied authority to sell paper held for collection.**—Fuller *v.* Bennett, 55 Mich. 357, 21 N. W. 433.

47. **Effect of pledge or transfer by bank.**—Greneaux *v.* Wheeler, 6 Tex. 515.

48. **Duty and authority of collecting bank in general.**—Marks *v.* Bodie Bank, 68 Cal. xix, 8 Pac. 807; Omaho Nat. Bank *v.* Kiper, 60 Neb. 33, 82 N. W. 102.

As to liability of collecting bank for failure to collect, see post, "Failure to Collect," § 171.

Where a bank receives commercial paper for collection, the law implies a contract on its part to use reasonable diligence in making the collection. Manhattan Life Ins. Co. *v.* First Nat. Bank, 20 Colo. App. 529, 80 Pac. 467.

If a bank with whom mortgages belonging to a depositor have been deposited for collection takes the responsibility of receiving checks in payment thereof, the checks belong to the depositor if he chooses to receive them, and it is the duty of the bank to use due diligence in collecting the money on the checks, and, when paid, the money becomes the property of the depositor. In re Johnson, 103 Mich. 109, 61 N. W. 352.

A bank to whom a draft was sent for collection and for the remission of the proceeds owed as agent of the sender a greater duty to the latter than it owed to its own depositor, and, when such depositor attached the funds, the bank was bound to either defend its principal's title, or to unequivocally notify such principal to defend the action. Krafft *v.* Citizens' Bank, 139 App. Div. 610, 124 N. Y. S. 214.

In such an action, a claim by defendant that plaintiff had received back the notes from the receiver of the bank which had become insolvent was an affirmative defense, and was properly ignored where not sustained by evidence. Barnett *v.* First Nat. Bank, 148 Iowa 667, 127 N. W. 1012.

Care and diligence required.—A bank having accepted an agency to collect, is bound only to reasonable care and diligence in the discharge of its assumed duties. In a case of doubt, its best judgment is all the principal has a right to require. National Bank *v.* Merchants' Nat. Bank, 91 U. S. 92, 23 L. Ed. 208.

A bank contracts to use diligence in collections; but it is bound only to reasonable care and diligence in the discharge of its assumed duties. In a case of doubt, its best judgment is all the principal has the right to require; especially if the doubt arises by reason of the neglect of the principal to give specific instructions, the bank will be acquitted, even if it exercised its discretion erroneously. Morse on Banks, vol. 1, § 218. Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

Where drafts are sent from one bank to another for collection and re-

stances of the case, was exercised or not, is a question for the jury, where there is evidence.[49] The ordinary duty of a bank receiving a note for collection extends no further than to make proper demand of payment, and sometimes in case of nonpayment to take such further action as necessary to secure and preserve the liability of all parties, by protest and notice as may be required by the law of its state.[50] The bank becomes the agent of the payee to receive payment, and its agency extends no further.[51]

Right to Obtain Preference for Debt Due Itself.—A bank holding paper for collection merely, if it duly presents the paper for collection and is guilty of no misrepresentation or fraudulent concealment, is not forbidden to obtain a preference for a debt owing to itself from the same debtor.[52]

§ 161 (2) Effect of Customs and Usages.—A principal who selects a bank as his collecting agent is bound by any reasonable usage established among the banks at the place where the collection is to be made,[53]

mittance, the measure of duty of the collecting bank is the exercise of ordinary care and reasonable diligence. Bank *v.* Monongahela Nat. Bank, 126 Fed. 436.

49. Question for jury.—Milwaukee Nat. Bank *v.* City Bank, 103 U. S. 668, 26 L. Ed. 417. See post, "Questions for Jury," § 175 (5).

50. Carpenter *v.* National Shawmut Bank, 109 C. C. A. 55, 187 Fed. 1. See post, "Failure to Fix Liability of Indorser or of Drawer of Note, Check, or Draft," § 172.

51. Cheney *v.* Libby, 134 U. S. 68, 33 L. Ed. 818, 10 S. Ct. 498; Ward *v.* Smith (U. S.), 7 Wall. 447, 19 L. Ed. 207.

In an action to foreclose a chattel mortgage for the price of a harp, testimony that on presentation for payment of the mortgage notes defendant complained of the harp's condition, and said that he would send it to plaintiff if the latter would return the money and cancel the notes and mortgage, did not show an objection to plaintiff to the condition of the harp; the collector neither having, nor assuming to have, authority from plaintiff to represent it in any way, except in collecting the notes. Rudolph Wurlitzer Co. *v.* Rhea, 147 Iowa 382, 126 N. W. 345.

Without an express agreement, it is no part of the duty of a bank to employ counsel, and bring suit upon notes left with it on deposit. It performs its whole duty by demanding payment and taking the necessary steps to fix the liability of the different parties to the notes. Crow *v.* Mechanics', etc., Bank, 12 La. Ann. 692.

52. Right of collecting bank to obtain preference for debt due itself.—United States Nat. Bank *v.* Westervelt, 55 Neb. 424, 75 N. W. 857.

53. Effect of customs and usages—In general.—*California.*—Davis *v.* First Nat. Bank, 118 Cal. 600, 50 Pac. 666.

Ohio.—Holder *v.* Western German Bank, 132 Fed. 187, affirmed in 136 Fed. 90, 68 C. C. A. 554.

Oregon.—Kershaw *v.* Ladd, 34 Ore. 375, 56 Pac. 402, 44 L. R. A. 236.

Tennessee.—Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373; Howard *v.* Walker, 92 Tenn. 452, 21 S. W. 897; Jefferson County Sav. Bank *v.* Commercial Nat. Bank, 98 Tenn. 337, 39 S. W. 338; Givan *v.* Bank (Tenn.), 52 S. W. 923, 47 L. R. A. 270.

Texas.—Merchants' Nat. Bank *v.* Dorchester (Tex. Civ. App.), 136 S. W. 551.

In an action against a bank for the loss of a draft given it for collection the bank should be allowed to show that it acted in the matter according to the usage of banks. Davis *v.* First Nat. Bank, 118 Cal. 600, 50 Pac. 666.

"The understanding which is assumed to be mutual and to enter into the contract of the parties is that the bank shall perform the various acts which are embraced in the business of collection in every respect according to the method which it is wont to pursue in accordance with the local law, rules and regulations." Givan *v.* Bank (Tenn.), 52 S. W. 923, 47 L. R. A. 270.

Custom of one bank alone.—"It would seem that if a custom could be established by the uniform course of business of several banks in a given locality, it might be done by one where

in the absence of special directions, whether he knows it or not,[54] unless

there was but one. The great weight of authority is that such a custom of banks, though not known to the party sending paper for collection, is binding upon the sender as a part of the contract of agency to which the sender impliedly assents by selecting the bank as agent without inquiry and without special instructions. Bank *v.* Triplett, 1 Pet. 25, 7 L. Ed. 37; Morse on Banks, vol. 1, § 221." Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

It is competent, upon the issue as to the bank's negligence, to prove the common usage of the banks of the particular locality, and, if there be no other, then of the defendant bank with regard to like collections; and this usage, if reasonable and lawful, affords very cogent, if not controlling, evidence affecting the question of the bank's negligence. Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

Illustrations of usage or custom held binding.—A person sending paper to a bank for collection without special instructions is bound by a custom of the bank to hold such paper for some days after presenting it and receiving a promise of payment. Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

One depositing in a bank for collection at his risk a draft on a person in a distant city is presumed to know that, in accordance with general usage, the draft will be forwarded to another bank at the place of the drawee's residence for collection, and that the proceeds will be remitted in bank exchange, and to have contracted with reference to such usage. Holder *v.* Western German Bank, 132 Fed. 187, judgment affirmed 68 C. C. A. 554, 136 Fed. 90.

It is not negligence for a bank, to whom has been sent an ordinary, unindorsed check for collection, to retain the proceeds as a deposit, to send the check to the drawee bank in another city, where it has no correspondent, for collection and return, where such is the custom and the usage among banks. Kershaw *v.* Ladd, 34 Ore. 375, 56 Pac. 402, 44 L. R. A. 236.

The usage is not an unreasonable one, at any event, as applied to the collection of a plain, unindorsed check. Kershaw *v.* Ladd, 34 Ore. 375, 56 Pac. 402, 44 L. R. A. 236.

One depositing a check in a bank for collection was bound by any reasonable usage which he knew existed among the bank of the city, such as the custom of collecting through the clearing house. Merchants' Nat. Bank *v.* Dorchester (Tex. Civ. App.), 136 S. W. 551.

The instruction of a bank, in sending to one bank for collection a check on another bank, "Remit New York exchange," authorizes the remittance only in accordance with custom, be that the sending of a draft drawn on a New York bank by the bank to which the check was sent, or a draft drawn by another. Judgment (C. C.), 132 Fed. 187, affirmed. Holder *v.* Western German Bank, 68 C. C. A. 554, 136 Fed. 90.

54. Jefferson County Sav. Bank *v.* Commercial Nat. Bank, 98 Tenn. 337, 39 S. W. 338; Howard *v.* Walker, 92 Tenn. 452, 21 S. W. 897; Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373; Hilsinger *v.* Trickett, 86 O. St. 286, 99 N. E. 305; San Francisco Nat Bank *v.* American Nat. Bank (Cal.), 99 Pac. 558.

Is the common usage of banks in the particular locality, though unknown to customer, absolutely binding upon him as an implied element in the contract of agency where claim is sent without instructions and without inquiry as to usual course of business? The court intimates an affirmative answer to this question, though not authoritatively deciding it. Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

When a distant party selects such bank as its agent for collection, and gives no special instructions, he is bound, on well-settled principles of the law of agency, by implied assent, to the method which such agent employs, according to the agent's usual course of business in like cases, unless that custom was unlawful or unreasonable. And such is the law. Morse on Banks, vol. 1, § 220. The usage was therefore admissible in evidence. Mr. Morse states the rule to be that 'usage often affects parties between whom there is no contract by determining the question of negligence.' 1 Morse on Banks, § 9, p. 26. Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

"If the principal select a bank as his collecting agent, he is presumed to understand the business methods by which such transactions are effected through usages of banks; actual ignorance of them is of no avail as an excuse, for, as said in the case cited by Mr. Morse on the last proposition

such custom be unreasonable.[55] A particular custom, in order to be binding on a customer sending to a bank a draft for collection, must have been actually known to him when he sent it.[56] No general custom will excuse a collecting bank from exercising all reasonable diligence in collecting a check, and a special usage will have no greater effect in excusing the bank than will a general custom.[57]

herein stated, in respect to the transaction as a question of custom, ignorance of the plaintiff as to the existence of such usage was of no moment. Every business man must be held to know the method by which nearly all the banks in the country transact business by checks, drafts, and certificates of deposit. British, etc., Mortg. Co. *v.* Tibballs, 63 Iowa 468, 19 N. W. 319." Howard *v.* Walker, 92 Tenn. 452, 21 S. W. 897.

"In the Triplett case the usage of the Washington banks to demand payment after the third day of grace on paper where grace was allowable, was upheld and declared binding on party who dealt with the bank in ignorance of this usage; and such is the holding in many other cases not necessary to cite. The doctrine may be assumed to be well established. This court doubted the wisdom of the doctrine, and refused to extend it in a case determined in 1849; and Judge Green, in an able opinion, sought to show that the case went too far, and said usage of the bank ought not to prevail where it was in opposition to or in disregard of a general law, as he thought the usage referred to in the Triplett case was. Dabney *v.* Campbell, 28 Tenn. (9 Humph.) 680." Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

55. Unreasonable custom of usage not binding.—Farley Nat. Bank *v.* Pollock, 145 Ala. 321, 39 So. 612, 2 L. R. A., N. S., 194, 117 Am. St. Rep. 44; National Bank *v.* American Exch. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527.

A custom authorizing a bank to which a check is sent for collection to send it to the drawee for collection is unreasonable and void, and the bank so sending it is liable for any damages to the payee resulting from such action. Farley Nat. Bank *v.* Pollock, 145 Ala. 321, 39 So. 612, 2 L. R. A., N. S., 194, 117 Am. St. Rep. 44.

A usage of banks, in collecting drafts, to surrender them to the drawees by taking checks for their payment, is unreasonable. National Bank *v.* American Exch. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527.

A depositor and a bank entered into an agreement whereby the bank agreed to collect the depositor's drafts for a compensation of 10 cents on each $100. The custom of the bank was to send collections to its correspondent, which placed the proceeds to the bank's credit, intermingling them with other funds on deposit subject to be drawn on not alone by the owners of the collections but by the bank in the usual course of business. Held, that the custom did not have the effect of making the correspondent the depositor's agent. Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770.

Burden of proof as to unreasonableness of custom.—Usage of banks prevalent in the vicinity, and generally followed, are presumed to be reasonable, and the burden of showing them unreasonable is upon the one who assails them; the question being, not is the custom reasonable, but has it been shown to be unreasonable. Hilsinger *v.* Trickett, 86 O. St. 286, 99 N. E. 305.

56. Necessity for knowledge of particular custom.—Bank *v.* Miller, 105 Ill. App. 224.

57. Effect of custom or usage as excusing want of diligence in collection.—Bank *v.* Miller, 105 Ill. App. 224; Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171; Dern *v.* Kellogg, 54 Neb. 560, 74 N. W. 844.

It being negligent for a collecting bank to send checks to the drawee bank, a custom of the banks at the place where the collecting bank is located to do so will not avoid the result of such negligent act, since custom can not justify negligence. Pinkney *v.* Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012.

The custom of a bank of not presenting for acceptance drafts on a certain company when forwarded for collection by plaintiff, but of holding the same until they were paid, will not excuse the bank for failure to present the same, as required by law. Citi-

§ 161 (3) Taking Things Other than Money in Payment.—In the absence of special authority or well-established custom to the contrary, a bank with which paper is deposited for collection has no authority to accept anything but money as payment.[58] It can only receive payment of the debt due the principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community.[59] Thus, for instance, a bank receiving paper for collection has no

zens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

A custom and usage among banks to send checks payable by other banks at distant points to the drawee directly and by mail, in case there is no other bank of good standing in the same town does not excuse the bank in case of a loss through the bad conduct of the drawee. Minneapolis Sash, etc., Co. *v.* Metropolitan Bank, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504, 77 Am. St. Rep. 609.

A custom of the two banks at a certain town to hold collections at the request of debtors, and unknown to parties drawing on them, is no defense to a bank in an action for negligently holding a draft unpaid. Dern *v.* Kellogg, 54 Neb. 560, 74 N. W. 844.

58. General rule as to taking things other than money in payment.—*United States.*—Cheney *v.* Libby, 134 U. S. 68, 33 L. Ed. 818, 10 S. Ct. 498; Essex County Nat. Bank *v.* Bank, Fed. Cas. No. 4,532, 7 Biss. 193; German-American Bank *v.* Third Nat. Bank, Fed. Cas. No. 5,359; Levi *v.* National Bank, Fed. Cas. No. 8,289, 5 Dill. 104.

California.—San Francisco Nat. Bank *v.* American Nat. Bank (Cal.), 90 Pac. 558.

Illinois.—National Life Ins. Co. *v.* Mather, 118 Ill. App. 491; Scott *v.* Gilkey, 153 Ill. 168, 39 N. E. 265; Bank *v.* Union Trust Co., 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611.

Iowa.—British, etc., Mortg. Co. *v.* Tibballs, 63 Iowa 468, 19 N. W. 319; Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351.

Missouri.—Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608; National Bank *v.* American Exch. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527.

New York.—Whipple *v.* Walker, 2 Thomp. & C. 456.

Ohio.—Dunn *v.* Dewey, 7 N. P. 334, 5 O. Dec. 149.

Tennessee.—Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Howard *v.* Walker, 92 Tenn. 452, 21 S. W. 897; Savings Bank *v.* National Bank, 98 Tenn. 337, 39 S. W. 338; King *v.* Fleece, 54 Tenn. (7 Heisk.) 273.

Texas.—Western Brass Mfg. Co. *v.* Maverick, 4 Tex. Civ. App. 535, 23 S. W. 728.

59. Cheney *v.* Libby, 134 U. S. 68, 33 L. Ed. 818, 10 S. Ct. 498; Ward *v.* Smith (U. S.), 7 Wall. 447, 19 L. Ed. 207; Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608.

The duty of a bank receiving a note or draft for collection is to present the note or draft for payment, and, unless a special authority is otherwise shown, to receive in payment nothing but money, or that which by common consent is considered and treated as money. Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608.

Notwithstanding the fact that the delivery of the note to the bank endorsed in blank passes the legal title, still, in fact, the bank only holds the note as agent of the owner. And, if the evidence charged the maker with notice of the character in which the bank holds this paper at the time he pays it, the payment not being such as an agent can lawfully receive in the absence of express authority, will not be good. King *v.* Fleece, 54 Tenn. (7 Heisk.) 273.

A bank, receiving a note for collection for a depositor, and accepting an acceptance of another bank, at which the maker had sufficient funds, must, to escape liability, establish a custom to accept in payment such acceptance, and knowledge thereof by the depositor. Albert *v.* State Bank, 78 Misc. Rep. 56, 138 N. Y. S. 237.

Liability where confederate money is received in payment.—Where a customer of a state bank, located within the Confederate States, deposited notes and drafts with it for collection at various dates during 1861 and 1862, when practically no circulating medium except Confederate notes existed there, giving no instructions as to the kind of funds to be received, and made no

authority to accept a check in payment thereof,[60] even though such check

demand for the proceeds until after the close of the war, he can recover not more than the value of the amount due in Confederate currency when the demand was made. Henry & Co. *v.* Northern Bank, 63 Ala. 527.

A bank acting as agent for collecting certain drafts took Confederate money on the ground that there was at the time no other currency to be had in Louisiana or in any other part of the Southern Confederacy. Held, that the bank should have collected the drafts in lawful currency, and that, if this was impossible, should have given notice thereof to the principal, or should show that the collection was in that currency and approved by him. Waterhouse, etc., Co. *v.* Citizens' Bank, 25 La. Ann. 77.

"The law will not presume authority to receive Confederate money. See Scruggs *v.* Luster, 48 Tenn. (1 Heisk.) 150, and other authorities." King *v.* Fleece, 54 Tenn. (7 Heisk.) 273.

60. Acceptance of check in payment unauthorized.—Dunn *v.* Dewey, 7 N. P. 334, 5 O. Dec. 149; Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Bank *v.* Union Trust Co., 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611.

Where a bank, receiving paper for collection, accepts in payment the check of the party bound to pay it, and surrenders the paper, whereby injury results to the owners of the paper, the bank is responsible for the loss. Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618.

Money collected by requiring the person for whom it was collected to pursue his remedy against some other person; and hence, where a bank with which notes have been deposited for collection, or uncurrent money has been deposited for sale, makes the collection or sale and accepts the proceeds in the shape of a check payable to itself, which check is attached as the bank's property before it has been collected, the bank can not escape liability to the depositor on the ground that the latter has a remedy against the party who attached the check. Spears, etc., Co. *v.* Ohio Life Ins., etc., Co., 3 O. Dec. 338.

"The conceded rule of law is that if a bank receives a draft for collection and takes in payment a check from the party bound to pay such draft and surrenders the same to him, such collecting bank is liable to its principal for the amount of the check, as an agent authorized to receive money has no implied power to receive a check in payment." Bank *v.* First Nat. Bank, 107 Mo. App. 665, 83 S. W. 537, quoted in Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770. See also, National Bank *v.* American Exch. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527; Fifth Nat. Bank *v.* Ashworth, 123 Pa. 212, 16 Atl. 596, 2 L. R. A. 491.

Where a bank accepts a check on another bank in payment of a draft in its hands for collection, and surrenders the draft, it makes the check its own, and its liability is the same as if cash had been received. National Bank *v.* American Exch. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527.

A bank may not excuse its acceptance of a worthless check in payment of a draft on the ground of a mistake of fact, as it has no right to act upon mere guesses and surmises. National Bank *v.* American Exch. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527.

That a bank receiving a worthless check in payment of a draft regarded the check as its own is shown by the commencement of attachment suits against the maker of the check; and this, though it notified the bank from which the check was forwarded, and to whom it had sent the proceeds shortly after the commencement of the attachment suits, that it would hold such bank liable for the amount. National Bank *v.* American Exch. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527.

The rule that money paid by one joint agent to another through mistake, which has not been forwarded by the latter to the principal at the time of notice, may be recovered back, has no application to a bank accepting a worthless check in payment of a draft, and remitting cash to its forwarding joint agent, where the collecting bank has treated the check as its own. National Bank *v.* American Exch. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527.

Defendant received from plaintiff, one of its depositors, an indorsed draft for collection, and forwarded it to its agent, where the drawee resided, and on November 3d received in payment a check of the drawee on a local bank, and immediately gave credit to plaintiff for the amount in his passbook.

be certified.[61]

It has been held, however, that a bank which has received a check for collection is not made liable to the payee for its amount by the fact that, upon protest of the check for nonpayment, it has accepted from the maker thereof a check upon another bank, payable to the order of its cashier—the payee of the first check being absent from the city—which latter check is also protested for nonpayment.[62] The collecting bank, with which a note is left for collection, can not accept a note running to itself in payment, unless it has been expressly authorized so to do by the owner of the note.[63] Nor can it accept in payment of notes belonging to its principal a claim against itself for deposit made by the maker.[64] A bank which sends a draft received for collection to subagents, who collect it, and remit a draft on third persons for the amount which the bank then sends to another bank for collection, is liable to the owner of the original draft, where the subagents' draft is not paid, and they in the meantime become insolvent.[65] It has been held, however, in a number of jurisdictions, that a collecting bank may properly accept payment other than money, by virtue of special au-

On November 5th payment was refused on the check, but defendant took no steps to revoke the credit given plaintiff until November 26th. Held, that defendant was precluded by its negligent conduct from denying its liability to plaintiff. Kirkham *v.* Bank, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714.

In an action to recover money collected by a banker, it appeared that plaintiff drew on one K., to defendant's order, and sent the draft to defendant for collection. Defendant's collector went to K. to collect the draft, and, receiving from K. a check on defendant for the amount of the draft, stamped the same "Paid," and delivered it to K. There were no funds in defendant's hands belonging to K., and the check was not paid, but K. refused to surrender plaintiff's draft. Held that, the check not having been accepted as payment, defendant was not liable. Western Brass Mfg. Co. *v.* Maverick, 4 Tex. Civ. App. 535, 23 S. W. 728.

61. **Acceptance of certified check.**—German-American Bank *v.* Third Nat. Bank, Fed. Cas. No. 5,359.

Where a collecting bank receives a draft "for collection and credit," it has no authority to receive anything but money in discharge of the draft, and where it receives a certified check in payment it does not bind the sender until such check is actually paid; and if, in the meantime, the collecting bank fails, the check is deemed as held in trust for such sender, and its proceeds do not pass to the receiver of the collecting bank for the benefit of creditors. German-American Bank *v.* Third Nat. Bank, Fed. Cas. No. 5,359.

If a bank to which a check is sent for collection instead of demanding immediate payment accepts a certification of it, it creates such a new relation between the parties as to discharge the drawer. Essex County Nat. Bank *v.* Bank, Fed. Cas. No. 4,532, 7 Biss. 193.

Where a bank holding a check for collection accepts the certification of the bank on which it is drawn in lieu of payment, it thereby assumes the risk of nonpayment by that bank, and becomes liable to the owner for the amount thereof, with interest from the date of the certification. Essex County Nat. Bank *v.* Bank, Fed. Cas. No. 4,532, 7 Biss. 193.

62. **Acceptance of second check on lien of one protested.**—Citizens' Bank *v.* Houston, 98 Ky. 139, 17 Ky. L. Rep. 701, 32 S. W. 397.

63. **Acceptance of note running to collecting bank.**—Scott *v.* Gilkey, 153 Ill. 168, 39 N. E. 265.

64. **Acceptance by collecting bank of claims against itself for deposit by maker of note.**—Bank *v.* Ingerson, 105 Iowa 349, 75 N. W. 351.

65. **Liability on nonpayment of draft accepted by subagent in payment of original draft.**—St. Nicholas Bank *v.* State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241.

thority from its principal, or custom known to such principal,[66] or obtaining so universally that the holder of the paper will not be allowed to plead ignorance of it.[67] So, also, the depositor may, by his subsequent action, be

66. Custom known to owner of note. —The custom of a bank to receive payment in "currency" of notes sent it for collection is not binding on the owner of a note so sent, unless the latter had knowledge thereof. Graydon, etc., Co. *v.* Patterson & Co., 13 Iowa 256, 81 Am. Dec. 432.

67. Custom of universal prevalence. —The rule that a bank, undertaking to collect a note for a depositor, must accept in payment only legal money, is subject to a contrary custom, known to the depositor, or so common as to raise the presumption of knowledge. Albert *v.* State Bank, 78 Misc. Rep. 56, 138 N. Y. S. 237.

"That an agent, in the absence of express authority, can not accept anything in discharge of the principal's debt except money, is well settled, and has been frequently announced in such cases as Walker *v.* Walker, 52 Tenn. (5 Heisk.) 425, but it does not control a case like the present. A principal who selects a bank as his collecting agent, thus availing himself of the facilities which it holds out, in the absence of special directions, is bound by any reasonable usage prevailing and established among the banks at the place where the collection is made, without regard to his knowledge or want of knowledge of its existence. Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373; Howard *v.* Walker, 92 Tenn. 452, 21 S. W. 897. This rule regulating the relation of collection banks to parties who take advantage of the means which they offer in this respect, is founded on sound reason. Every business man knows that in the constantly increasing volume and variety of banking transactions, the larger number of which are settled or disposed of by a simple exchange of credits, methods have been adopted by bankers to economize labor, reduce risks, and simplify dealings with one another, and with their customers. Some of these methods are of a general character, while others are dictated by local convenience or necessity. That these methods so prevail, is a fact of such public notoriety that no business can well affect to be ignorant, and least of all a banking institution." Savings Bank *v.* National Bank, 98 Tenn. 337, 39 S. W. 338.

One who sends a note to a bank for collection is bound by a usage of the bank to accept its certificates of deposit in lieu of cash, as that is a custom which obtains so universally that the court will take judicial notice of it, and the holder of the note will not be allowed to plead ignorance of it. British, etc., Mortg. Co. *v.* Tibballs, 63 Iowa 468, 19 N. W. 319.

It is a reasonable usage for local banks to accept, in payment of drafts sent them for collection, certified checks on one of their own number in good standing, to present these checks each day at 11 a. m., and to leave them for examination. Jefferson County Sav. Bank *v.* Commercial Nat. Bank, 98 Tenn. 337, 39 S. W. 338.

Where one delivers a certificate of deposit to a bank to be collected from a bank in another place, without any inquiry as to the methods of collection, there is an understanding that the established usage in making collections will be followed; and if the bank to which it is delivered, acting accordingly and in the exercise of due care, mails the certificate to the payor bank, and receives the latter's check on a bank in a third place, it will not be liable to the owner of the certificate if the payor bank becomes insolvent before presentation of the check. Farmers' Bank, etc., Co. *v.* Newland, 97 Ky. 464, 17 Ky. L. Rep. 329, 31 S. W. 38.

In accordance with custom, a bank to which a check is sent for collection in the city in which the drawee bank is located may accept the drawee's draft or check in payment, and is not negligent in failing to demand payment in money. First Nat. Bank *v.* First Nat. Bank (Tex. Civ. App.), 134 S. W. 831.

It is not negligence per se for a collecting bank, in the absence of instructions to the contrary, to accept in conditional payment of a certificate of deposit a draft or check of the issuing bank, where such is the custom of banks in the vicinity. Hilsinger *v.* Trickett, 86 O. St. 286, 99 N. E. 305.

While, ordinarily, an agent to collect a money demand can receive nothing but money in payment, where a bank is the agent, and one of its own certificates is offered in payment, it is sufficient payment as to the debtor, even though the bank fails to remit the amount to its principal. British, etc.,

held to have so condoned the defendant's negligence in accepting other than money in payment, as to be estopped from holding it liable.[68] While in a given case a bank may have had no authority to accept payment in anything but money, yet when it does accept other property such property becomes charged with the equitable rights and interests of the cestui que trust, if he chooses to follow it.[69]

§ 161 (4) Acceptance of Payment of Overdue Paper.—If a note deposited for collection in a bank where it is made payable, is not paid at maturity, but being protested, is permitted by the owner to remain in the bank, however long or from whatever motive he may permit it thus to remain there, it may, as a general rule, be safely paid to the bank by the debtor; provided he has no notice that the bank in fact has no authority to receive the money.[70]

§ 161 (5) Acceptance of Part Payment.—Where paper is placed in the custody of the bank for collection it would seem that there arises no implication of authority other than to obtain payment in full, and any implied authority to accept part payment is excluded,[71] and, of course, express instructions to receive nothing but the full amount of the paper can not be disregarded.[72]

§ 161 (6) Surrender of Collateral before Making Collection.—A bank to which another purchasing a draft with bill of lading attached sends it for collection, must obey instructions; and where its failure to do so re-

Mortg. Co. *v.* Tibballs, 63 Iowa 468, 19 N. W. 319.

Evidence insufficient to show general custom.—Evidence that the practice of accepting the uncertified check of the drawee of a draft in payment thereof varied with the drawee's credit, the condition of the money market, and other circumstances, and among different banks, is insufficient to show a general custom of that kind. First Nat. Bank *v.* Fourth Nat. Bank, 89 N. Y. 412.

68. **Facts held to show condonation of defendant's negligence.**—Plaintiff deposited with defendant, a bank, his own check on another bank. Defendant, instead of collecting the check, exchanged it for a bank draft, which was not paid, and then notified plaintiff that it held the draft subject to his order. Plaintiff thereupon, with knowledge of all the facts, directed defendant to hold the draft for a few days, and, if not paid, send it to him. Held, that plaintiff had condoned defendant's negligence, and could not hold it liable for not collecting his check. Hazlett *v.* Commercial Nat. Bank, 132 Pa. 118, 19 Atl. 55.

69. **Right of cestui que trust to follow property accepted in lieu of money.**—National Life Ins. Co. *v.* Mather, 118 Ill. App. 491.

70. **Authority to receive payment of overdue note.**—Alley *v.* Rogers, 60 Va. (19 Gratt.) 366.

71. **Acceptance of part payment.**—Curkeet *v.* Steinhoff, 130 Wis. 146, 109 N. W. 975; Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860.

72. Where purchasers at an auction tendered the seller a certain amount in payment of the claim, which the seller refused, and he placed a draft on the purchasers in a bank with instructions not to accept any amount less than the entire claim, the placing of an amount equal to the original tender in the bank and offering it to the seller did not constitute a part payment of the claim, the bank having no authority, as collecting agent, to accept part payment, even in the absence of the specific instructions. Curkett *v.* Steinhoff, 130 Wis. 146, 109 N. W. 975.

sults in loss to the owner, it is liable therefor.[73] In the absence of any special instructions, if a time bill of exchange with bill of lading attached be sent to an agent for collection, there is an implied obligation upon the agent to hold the bill of lading until the bill of exchange is either accepted or paid, according to circumstances.[74] It may be stated as a general rule that a bank receiving a sight draft for collection should not surrender the accompanying bill of lading until the draft has been paid.[75] In the case of a time draft, however, the bank may deliver up the accompanying bill of lading to the drawer upon the acceptance of the draft, in the absence of instructions, or circumstances indicating that the bill was to be held to secure both acceptance and payment of draft;[76] and the burden in such

73. Duties and liabilities as to bills of exchange with bills of lading attached.—Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214; National Bank *v.* Merchants' Nat. Bank, 91 U. S. 92, 23 L. Ed. 208; Milwaukee Nat. Bank *v.* City Bank, 103 U. S. 668, 26 L. Ed. 417.

A bank receiving a bill or draft for collection is liable for any loss occurring through its negligence or unauthorized acts, and, if contrary to instructions it surrenders a bill of lading attached to the draft, it is liable for the damages occasioned thereby. Second Nat. Bank *v.* Bank, 99 Ark. 386, 138 S. W. 472.

A bank receiving drafts with bills of lading attached for acceptance is liable for their value on surrendering them on acceptance, instead of holding them for payment. Merchants' Nat. Bank *v.* National Bank, Fed. Cas. No. 9,446, 7 Am. L. Review 572.

74. Oxford Lake Line *v.* First Nat. Bank, 40 Fla. 349, 24 So. 480.

75. Surrender of bill of lading before making collection—Sight draft.—Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618.

What constitutes "delivery" within meaning of prohibition.—If a sight draft attached to a sealed package addressed to the drawee of the draft is sent by mail to a bank for collection, with the instruction, "Papers to be delivered only on payment of draft," and the cashier of the bank hands the draft and package to the drawee, at his request, to allow him to open the package and examine its contents, after which he returns the draft and package to the cashier and declines to pay the draft, there is no delivery of the papers within the meaning of the prohibition in the instruction. People's Nat. Bank *v.* Freeman's Nat. Bank, 169 Mass. 129, 47 N. E. 588, 61 Am. St. Rep. 279.

76. Propriety of delivering bill of lading upon acceptance of time draft.—National Bank *v.* Merchants' Nat. Bank, 91 U. S. 92, 23 L. Ed. 208; Woolen *v.* New York, etc., Bank, Fed. Cas. No. 18,026, 12 Blatchf. 359; Moore *v.* Louisiana Nat. Bank, 44 La. Ann. 99, 10 So. 407, 32 Am. St. Rep. 332.

A collecting agent, who receives from his principal a bill of lading of merchandise, deliverable to order, and, attached to it, a time draft, may, in the absence of special instructions, surrender the bill of lading to the drawee of the draft, upon the latter's acceptance of the draft. It is not the duty of the agent to hold the bill of lading after the acceptance of the draft. National Bank *v.* Merchants' Nat. Bank, 91 U. S. 92, 23 L. Ed. 208.

The bank can be held liable to the owners of the drafts for a breach of duty in surrendering the bills of lading on acceptance of the drafts, only after special instructions to retain the bills until payment of the acceptances. National Bank *v.* Merchants' Nat. Bank, 91 U. S. 92, 23 L. Ed. 208.

By such a transmission to the bank, it is instructed to collect the money mentioned in the drafts, not to collect the bill of lading; and the first step in the collection is procuring acceptance of the draft. The bank is, therefore, authorized to do all which is necessary to obtaining such acceptance. If the drawee is not bound to accept without the surrender to him of the consigned property or of the bill of lading, it is the duty of the bank to make that surrender; and if it fails to perform this duty, and in consequence thereof acceptance be refused, the drawer and indorsers of the draft are discharged. National Bank

case is on the drawer to show that the bank was instructed to hold the bill of lading until the draft was paid.[77] The mere fact that one day's sight drafts for the price of goods sold, which, with warehouse receipts for the goods attached, are sent to the bank, are indorsed "for collection," does not require the bank to retain the receipts on acceptance of the drafts.[78] Where, however, bills of lading attached to time drafts left with a bank for collection are taken to the order of the vendor and drawer, instead of the vendee and drawee, such fact is, when not rebutted by evidence to the contrary, almost conclusive to show that the bills were not to be surrendered to the vendee until the drafts were paid, and is sufficient to require the bank to hold the bills until such payment.[79] A special agent authorized

v. Merchants' Nat. Bank, 91 U. S. 92, 23 L. Ed. 208.

Where a draft, payable in 15 days, is sent to a bank with instructions merely to collect it, and accompanying the draft is a bill of lading of goods shipped by the drawer to the drawee, the bank has a right to assume that its duty was to procure an acceptance, and thereupon deliver the bill of lading to the drawee; and for doing so, instead of holding the bill until the draft was paid, it will not be liable. Woolen v. New York, etc., Bank, Fed. Cas. No. 18,026, 12 Blatchf. 359.

Where drafts for the price of goods at one day's sight are sent to a bank "for collection," with warehouse receipts for the goods attached, it is the duty of the bank, in the absence of instructions to the contrary, to surrender the receipts to the drawees on their acceptance of the drafts. Moore v. Louisiana Nat. Bank, 44 La. Ann. 99, 10 So. 407, 32 Am. St. Rep. 332.

77. Burden of proof as to duty to hold for payment.—Second Nat. Bank v. Cummings, 89 Tenn. 609, 18 S. W. 119, 24 Am. St. Rep. 618.

Authority of agent to receive payment before maturity of debt.—Plaintiff discounted a draft drawn by B. on the defendant, and took as security for its acceptance and payment a bill of lading for a lot of flour belonging to B., which was shipped for and on account of the plaintiff, to be held subject to the order of the cashier of the P. Bank, which bank was the plaintiff's collecting agent. The plaintiff indorsed the draft to said bank, or order, and sent it, with the bill of lading, to the bank for collection. Defendant accepted the draft as an advance on the flour which they sold, before its arrival, as the factors of B. On its arrival defendant could not get possession of the flour without the order of the cashier, who claimed to hold it as security for the draft; and to get possession of the flour the defendant paid the draft before due, deducting the interest of the remaining time; and the cashier gave the order, and the flour was taken and sold by the defendant, and pay received. Before the draft fell due, the bank failed, and the plaintiff received no part of the proceeds of the draft. Held, that the plaintiff must bear the loss occasioned by the failure of the bank. Bliss v. Cutter (N. Y.), 19 Barb. 9.

78. Effect of indorsement "for collection."—Moore v. Louisiana Nat. Bank, 44 La. Ann. 99, 10 So. 407, 32 Am. St. Rep. 332.

79. Where bills of lading taken to order of vendor and drawer.—Second Nat. Bank v. Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Hobbs v. Chicago Packing, etc., Co., 98 Ga. 576, 25 S. E. 584, 58 Am. St. Rep. 320.

Where a shipper consigned goods to his own order, at the time drawing in favor of a bank, "for collection," a draft on the person to whom the goods were to be delivered on payment of the draft, and attached the draft to a bill of lading so indorsed as to give the bank control of the possession of the goods, a delivery of the goods by the bank to the drawee of the draft, without requiring its payment, was, as against the owner, a conversion. Hobbs v. Chicago Packing, etc., Co., 98 Ga. 576, 25 S. E. 584, 58 Am. St. Rep. 320.

It did not alter the case that the owner, not knowing that the goods had been delivered, agreed to make a like shipment of other goods on condition that the bank would guaranty payment of the former draft within a given time, where the real purpose of

to deliver a bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, can not bind his principal by a delivery without such payment.[80] The person thus acquiring a bill of lading indorsed in blank has been held not to acquire any title to the goods as against the principal,[81] and third persons dealing with property thus shipped, though acting in good faith, in the regular course of business, and paying value, are chargeable with constructive notice, and acquire no better title than the drawee.[82] Where a draft with a bill of lading attached is sent to a bank, with instructions to notify the shipper if the draft is unpaid, it can not sell the goods to a third party without notice to the owner; and, if it does, it is guilty of conversion.[83] It has been held, however, that a bank holding a draft with bill of lading attached, for collection, may deliver the property to the drawee, as bailee, without being liable to the owner

such agreement was to expedite the delivery of the goods first shipped, and collection of the price of the same. Hobbs *v.* Chicago Packing, etc., Co., 98 Ga. 576, 25 S. E. 584, 58 Am. St. Rep. 320.

80. Effect of unauthorized delivery of bill of lading.—Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618.

Where a bank purchases bills of exchange with bills of lading attached and forwards them to another bank for collection with directions not to deliver the property evidenced by the bills of lading until the bills of exchange are paid, and the latter bank delivers the property to an elevator company of which the consignees are the owners, this is evidence of negligence sufficient to take the case to the jury. Milwaukee Nat. Bank *v.* City Bank, 103 U. S. 668, 26 L. Ed. 417.

Where a bank receives from its correspondent bills of exchange with bills of lading attached, with directions as to the disposition of the property, and writes to the cashier of the remitting bank, "we prefer after this not to receive bills of lading when we have to look after the property," this is an implied admission that they were to look after the property in the case to which the letter related. Milwaukee Nat. Bank *v.* City Bank, 103 U. S. 668, 26 L. Ed. 417.

Where plaintiffs consigned a car load of oats to shipper's orders, attaching draft for the price to the bill of lading and making payment a prerequisite to the surrender of the bill or delivery of the oats, and a bank holding the draft for collection surrendered the bill of lading to the buyer and he, after examining the oats thus placed under his control, refused to take them, and it appeared that he would have paid the draft but for such unauthorized surrender of the bill of lading, the bank was liable to plaintiff for the amount of the draft, less the freight charges. Gulf, etc., R. Co. *v.* North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567.

Where the seller of a consignment of apples shipped to his order sent a draft attached to a bill of lading drawn on the buyer, who was insolvent, to defendant bank for collection, and, the apples proving defective, the bank, as a means of collecting the draft, accepted the buyer's draft on a third person, to whom the apples were resold, and thereupon delivered the bill of lading to the buyer to enable him to make delivery, the bank was not liable for the amount of the draft drawn by the seller, it never having been paid, but was only liable for the value of the apples at the time and place the buyer was enabled to convert the same by the bank's delivery of the bill of lading. People's Nat. Bank *v.* Brogden (Tex. Civ. App.), 84 S. W. 601. See, also, S. C., 98 Tex 360, 83 S. W. 1098.

81. Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618, citing Stollenwerck *v.* Thacher, 115 Mass. 224.

82. Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. S. 568; Heiskell *v.* Farmers', etc., Nat. Bank, 89 Pa. 155; Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214.

83. Gregg *v.* Bank, 72 S. C. 458, 52 S. E. 195, 110 Am. St. Rep. 633.

thereof, as such transfer does not pass title to the bailee[84] or authorize the bailee to transfer the property so as to divest the title of the true owner.[85] And on the refusal of the transferee of the bailee to deliver it to the owner, when requested, the latter is entitled to recover the value thereof, with interest from the date of such refusal.[86] Where bills of lading for goods are attached to drafts, and forwarded to a bank for collection, and paid, no liability attaches to the bank where the quality of the goods is found not to be as warranted.[87]

§ 161 (7) Right of Action upon Paper Deposited for Collection. —According to the decisions in some jurisdictions a bank can not recover upon negotiable paper assigned to it for collection only,[88] and it has been held that a bank bringing suit upon such paper in its own name will be considered to have assumed the property in the paper, and to be liable to the holder for the amount of it.[89] In other jurisdictions, however, it is held that when negotiable paper has been indorsed to a bank for collection the bank may maintain an action in its own name,[90] and in such case a payment

84. **Delivery to drawee as bailee.**—Where the agent directed the carrying vessels, on which the wheat was shipped, to deliver it to the Corn Exchange Elevator, the proprietor whereof accepted the wheat in bailment under express instructions that it was to "be held subject to and delivered only on the payment of the draft," held, that such proprietor, although the drawee of the draft, acknowledged, by the act of receiving the wheat, that it was not placed in his hands as the owner thereof, and that the title of the bailors was not transferred. Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214.

85. **Transfer by bailee does not carry title.**—Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214.

Right of owner to sue bailee's transferee.—Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214.

86. Where neither the evidence received nor offered tended to rebut the intent exhibited in the bills of lading, and confirmed throughout by the indorsement thereon and the written instructions, to retain the ownership of the wheat until the payment of the draft, held, that there was no necessity of submitting to the jury the question, whether there had been a change of ownership. Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214.

87. **Liability as for breach of warranty.**—Commerce Mill., etc., Co. *v.* Morris, 27 Tex. Civ. App. 553, 65 S. W. 1118.

88. **Bank held not entitled to sue on paper held for collection.**—First Nat. Bank *v.* Payne, 19 Ky. L. Rep. 839, 42 S. W. 736; Crow *v.* Mechanics', etc., Bank, 12 La. Ann. 692.

89. Where, by mistake, a bank carried a note, deposited for collection, to the depositor's credit on his bank book, and afterwards erased the credit from his book, on discovering the mistake, and he gave notice to the bank that he held it responsible for the amount, and the bank sued the maker of the note in its own name, and also sued his bail, both of which suits were fruitless, it was held that the bank had assumed the property in the note, and was liable to the holder for the amount of it. Wetherill *v.* Bank (Pa.), 1 Miles 399.

90. **Bank held entitled to sue on negotiable paper.**—King *v.* Fleece, 54 Tenn. (7 Heisk.) 273, citing Neely *v.* Morris, etc., Co., 39 Tenn. (2 Head) 595, 75 Am. Dec. 753; Gardner *v.* Bank, 31 Tenn. (1 Swan) 419.

Right to bid in property sold at execution sale.—A bank took from plaintiff for collection certain notes of a person against whom it itself had a claim, it agreeing to pay the proceeds, when collected, to plaintiff, deducting costs and expenses of collection. The bank obtained a judgment for the amount due it and that due plaintiff, and, on execution sale thereunder, bought in the property levied on to prevent a sacrifice thereof. Held, that the bank had, from the nature of its employment, authority to

to the bank would of course be good.[91] A bank to whom its own certificate of deposit has been presented for payment by another bank, to whom it had been forwarded for collection by a third holder thereof, can not, when it has refused payment, and declined to return the certificate to the agency bank, from whom it had obtained possession through presentation for payment, have dismissed an action brought by the latter to obtain either payment of the certificate or its return to the agent on an exception that the plaintiff has no right of action.[92] Where the holder of a bill of exchange, accepted for the accommodation of the drawer, sends it to a bank for collection, and the bank, at the maturity of the bill, passes the amount thereof to the credit of the holder, it succeeds to the rights of the holder, and may maintain an action on the bill against the acceptor.[93]

§ 161 (8) Liability of Bank to Maker of Note Left for Collection.—Where a note is payable at a bank, and the payee leaves it there for collection, in receiving the amount of the note the bank does not act as the agent of the maker of the note, and consequently no action will lie at his suit, or that of his assignee, to recover back the amount so paid, where it has been misapplied by the bank.[94] A bank, holding a note for collection, received the amount from an agent of the maker, and by mistake gave up to him a similar note of another person, and returned the first note to its owner, to whom the maker paid it on demand, and immediately, though four days after the payment to the bank, examined the note in his agent's hands, and, discovering the mistake, returned it to the bank, and demanded back his money. Held, that he was entitled to it, with interest from the time of the demand, although the bank had meanwhile paid the amount to the owner of the other note, the maker of which was insolvent, and the indorsers discharged for want of demand.[95]

§ 162. —— Agents and Correspondents—§ 162 (1) Authority to Appoint Agents to Make Collection—§ 162 (1a) In General.—It is a well-established rule that where paper payable at another place is delivered to a bank for collection, such bank is impliedly authorized to appoint other agents to make the collection,[96] and such authority to choose a

so bid in the property offered for sale. Marks *v.* Bodie Bank, 68 Cal. xix, 8 Pac. 807.

91. Sufficiency of payment to bank.—King *v.* Fleece, 54 Tenn. (7 Heisk.) 273.

92. People's State Bank *v.* St. Landry State Bank, 50 La. Ann. 528, 24 So. 14.

93. Right of bank as to paper passed to credit of holder.—Pacific Bank *v.* Mitchell (Mass.), 9 Metc. 297.

94. Liability to maker of note left for collection.—Smith *v.* Essex County Bank (N. Y.), 22 Barb. 627.

95. Andrews *v.* Suffolk Bank (Mass.), 12 Gray 461.

96. *United States.*—Hyde *v.* First Nat. Bank, Fed. Cas. No. 6,970, 7 Biss. 156.

Alabama.—Eufaula Grocery Co. *v.* Missouri Nat. Bank, 118 Ala. 408, 24 So. 389; Morris & Co. *v.* Alabama Carbon Co., 139 Ala. 620, 36 So. 764.

Illinois.—First Nat. Bank *v.* Bank, 221 Ill. 319, 77 N. W. 563, affirming 124 Ill. App. 102; Drovers' Nat. Bank *v.* Anglo-American, etc., Co., 18 Ill. App. 191.

Indiana.—Citizens' Nat. Bank *v.* Third

suitable bank or other agent at the place of payment for making the collection need not be shown by proof of general usage.[97]

§ 162 (1b) Propriety of Appointment of Drawee as Agent.—According to the decisions in many jurisdictions it would seem that, in the absence of instructions, the drawee bank is not a proper agent for selection by the transmitting or collecting bank,[98] and it has been held that if a bank

Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

Massachusetts.—Fabens *v.* Mercantile Bank, 23 Pick. 330, 34 Am. Dec. 59; Dorchester, etc., Bank *v.* New England Bank, 1 Cush. 177.

North Carolina.—Planters', etc., Nat. Bank *v.* First Nat. Bank, 75 N. C. 534.

Tennessee.—Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Bank *v.* First Nat. Bank, 67 Tenn. (8 Baxt.) 101, 35 Am. Rep. 691; Winchester Milling Co. *v.* Bank, 120 Tenn. 225, 111 S. W. 248.

Texas.—City Bank *v.* Weiss, 67 Tex. 331, 3 S. W. 299; State Nat. Bank *v.* Thomas Mfg. Co., 17 Tex. Civ. App. 214, 42 S. W. 1016; Schumacher *v.* Trent, 18 Tex. Civ. App. 17, 44 S. W. 460; First Nat. Bank *v.* Quinby (Tex. Civ. App.), 131 S. W. 429.

Wisconsin.—Blakeslee *v.* Hewett, 76 Wis. 341, 44 N. W. 1105.

By the great weight of authority a bank receiving a draft for collection, payable at a distant point, has implied authority to send it for collection to a suitable agent at the place of payment. Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618, citing Bank *v.* First Nat. Bank, 67 Tenn. (8 Baxt.) 101, 35 Am. Rep. 691.

Where a draft payable in one city is sent to a bank in another city, such bank has implied authority to delegate its power to collect to an agent in the town where the draft is payable. Planters', etc., Nat. Bank *v.* First Nat. Bank, 75 N. C. 534.

Where a draft left with a bank for collection is payable at a distant city, it must be presumed that it is intended for transmission to a subagent at that place, and not that the bank shall employ its own officers to proceed there and obtain payment. Dorchester, etc., Bank *v.* New England Bank (Mass.), 1 Cush. 177. See Fabens *v.* Mercantile Bank (Mass.), 23 Pick. 330, 34 Am. Dec. 59.

In an action to recover money paid by mistake of fact on a draft for the price of a car load of hay, where the draft, which was sent to a bank where the drawee resided for collection, was payable "on the arrival of car of hay," to the order of C., "cashier," and was indorsed, "For collection account of Missouri National Bank," the principle that when the owner of a security deposits it for collection, in a bank located remotely from the place of payment, he thereby impliedly authorizes such bank to employ another reputable bank located at or near the place of payment to make the collection, does not apply. Eufaula Grocery Co. *v.* Missouri Nat. Bank, 118 Ala. 408, 24 So. 389.

97. **Massachusetts.**—Dorchester, etc., Bank *v.* New England Bank (Mass.), 1 Cush. 177.

98. **Impropriety of selecting drawee as agent.**—*United States.*—First Nat. Bank *v.* Fourth Nat. Bank, 6 C. C. A. 183, 56 Fed. 967; Farwell *v.* Curtis, 7 Biss. 160, Fed. Cas. No. 4,690.

Alabama.—Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860; Farley Nat. Bank *v.* Pollock, 145 Ala. 321, 39 So. 612, 2 L. R. A., N. S., 194, 117 Am. St. Rep. 44; Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246.

Colorado.—German Nat. Bank *v.* Burns, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247.

Illinois.—Drovers' Nat. Bank *v.* Anglo-American, etc., Co., 117 Ill. 100, 7 N. E. 601, 57 Am. Rep. 855.

Kansas.—Anderson *v.* Rodgers, 53 Kan. 542, 36 Pac. 1067, 27 L. R. A. 248.

Michigan.—First Nat. Bank *v.* Citizens' Sav. Bank, 123 Mich. 336, 82 N. W. 66, 48 L. R. A. 583; Carson, etc., Co. *v.* Fincher, 129 Mich. 687, 89 N. W. 570, 95 Am. St. Rep. 449.

Minnesota.—Minneapolis Sash, etc., Co. *v.* Metropolitan Bank, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504, 77 Am. St. Rep. 609.

Missouri.—American Exch. Nat. Bank *v.* Metropolitan Nat. Bank, 71 Mo. App. 451.

Nebraska.—Western Wheeled Scra-

receiving paper for collection payable at a distant place sends it by mail to the payor for collection, he is guilty of negligence, and this, too, though the payor is the only bank in the place, and though it is customary thus to send

per Co. *v.* Sadilek, 50 Neb. 105, 69 N. W. 765, 61 Am. St. Rep. 550.

North Dakota.—National Bank *v.* Johnson, 6 N. Dak. 180, 69 N. W. 49.

North Carolina.—Bank *v.* Floyd, 142 N. C. 187, 55 S. E. 95.

Pennsylvania.—Merchants' Nat. Bank *v.* Goodman, 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728; Harvey *v.* Girard Nat. Bank, 119 Pa. 212, 13 Atl. 202; Hazlett *v.* Commercial Nat. Bank, 132 Pa. 118, 19 Atl. 55; Wagner *v.* Crook, 167 Pa. 259, 31 Atl. 576, 46 Am. St. Rep. 672; Harrington *v.* Merchants' Nat. Bank (Pa.), 17 Phila. 38.

Tennessee.—Winchester Milling Co. *v.* Bank, 120 Tenn. 225, 111 S. W. 248; Givan *v.* Bank, 52 S. W. 923, 47 L. R. A. 270.

Texas.—First Nat. Bank *v.* City Nat. Bank, 12 Tex. Civ. App. 318, 34 S. W. 458.

In the absence of instructions to do so, it is negligence for a bank to which a certificate has been intrusted for collection to send it direct to the drawer; and such negligence makes the sender liable for any loss resulting. First Nat. Bank *v.* Citizens' Sav. Bank, 123 Mich. 336, 82 N. W. 66, 48 L. R. A. 583.

It is negligence for a bank to send a certified check to the certifying bank itself for payment. Drovers' Nat. Bank *v.* Anglo-American, etc., Co., 117 Ill. 100, 7 N. E. 601, 57 Am. Rep. 855.

A bank receiving a draft from another bank for collection is liable for the amount thereof, where it transmitted the same directly to the drawee, its correspondent, and made no inquiry in regard thereto for one month, the drawee having failed in the meantime, and the draft having miscarried. First Nat. Bank *v.* First Nat. Bank, Fed. Cas. No. 4,810, 4 Dill. 290.

Plaintiff made a deposit in a Leadville bank, and received a certificate of deposit, which he indorsed and sent to defendant bank, where he had an account, with instructions to credit his account with the same. Defendant acknowledged receipt, and deposited a letter in the postoffice at Denver containing the certificate, duly addressed to the Leadville bank, and stating that the inclosure was for "collection and credit." Not receiving a response in due course of mail, defendant sent inquiry by telegram, and received answer: "No such remittance received." Whereupon defendant reported the same to plaintiff by letter, directing him to go to the Leadville bank and get a duplicate certificate, which letter was not received by plaintiff until after the Leadville bank had failed. Held, that defendant was liable to plaintiff for the amount of the deposit. German Nat. Bank *v.* Burns, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247.

Plaintiff sold a car load of grain to P., and shipped the same by defendant railroad; drawing on P. for the price, and making payment a prerequisite to the surrender of the bill of lading, or to the delivery of the oats. The bankers sent the draft and bill of lading to P., who surrendered the bill to the railroad, but, after examining the oats, refused to accept them, and the draft was returned to plaintiff. The railroad requested both plaintiff and P. to direct the disposition of the oats, which they refused to do, and the same were subsequently sold at a loss to pay freight and storage charges. Held, that the bankers were liable for the amount of the draft, less the freight charges. Gulf, etc., R. Co. *v.* North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567.

A notice to a depositor that the bank attempting a collection limits its liability, so that it acts as agent only for the depositor, and in forwarding the items for collection is only bound to select agents who are responsible according to its judgment and means of knowledge, and assumes no risk on account of the omission, negligence, or failure of such agents, does not authorize a bank to transmit a check deposited for collection to the bank on which it is drawn. Minneapolis Sash, etc., Co. *v.* Metropolitan Bank, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504, 77 Am. St. Rep. 609.

Where a collecting bank received items for collection only at the owner's risk until full actual payment was received, such limitation of liability was effective only to exonerate it from the negligence or misconduct of its subcollecting agents when properly selected, and did not relieve it from liability for its own negligence in selecting the drawee of a check as an

paper for collection, since the custom is unreasonable.[99] In order to exonerate the forwarding bank it must appear that if at the time it did send the paper it had been sent to a third party the result would have been the same.[1] According to some decisions, however, where one deposits in bank

agent to collect the same. Bank *v.* Floyd, 142 N. C. 187, 55 S. E. 95.

A check payable in another place was deposited with defendant bank for collection, and by it sent to its correspondent at the place of payment, which was the drawee bank. The check was received by the latter and marked "Paid," and the drawer's account was charged with the amount, which was not remitted, however, to defendant prior to the failure of the drawee bank, though at the time the check was paid the drawee had sufficient funds on hand to make payment. Held, that defendant bank was guilty of negligence in sending the check to the drawee bank for collection, and was therefore liable for the amount thereof. Bank *v.* Floyd, 142 N. C. 187, 55 S. E. 95.

99. American Exch. Nat. Bank *v.* Metropolitan Nat. Bank, 71 Mo. App. 451, in which it was further held that the forwarding bank was negligent though the bank payor failed within the time the forwarding bank had under the law to forward the paper, if the forwarding bank did in fact forward it in a shorter time.

A custom of banks to send checks to the drawee for payment by mail, where such drawee is the correspondent of the collecting bank at the place where the check is payable, is invalid, and does not relieve the sending bank from liability for negligence in so doing. Bank *v.* Floyd, 142 N. C. 187, 55 S. E. 95.

The defendant bank sent a check, drawn by W., and deposited with it by plaintiff for collection, to the bank upon which it was drawn, and accepted a cashier's check for it. The check was charged up by the drawee against W.'s account, but the cashier's check was not paid, owing to the subsequent insolvency of the drawee. Held, that defendant was liable to plaintiff for the amount of the check. Fifth Nat. Bank *v.* Ashworth, 123 Pa. 212, 16 Atl. 596, 2 L. R. A. 491.

Evidence in an action to recover for negligence in the collection of a certificate of deposit considered, and held to show that the bank holding the certificate authorized the sending of the certificate to the payor. Bank *v.* First Nat. Bank, 124 Ill. App. 102, judgment affirmed in First Nat. Bank *v.* Bank, 221 Ill. 319, 77 N. E. 563.

1. *Missouri.*—American Exch. Nat. Bank *v.* Metropolitan Nat. Bank, 71 Mo. App. 451.

A bank, which has a draft for collection, will not be excused for negligence in sending it direct to the drawee, instead of through a third person, if it would have been collected had it been sent, at the time it was sent, to a third person, though, had the bank delayed sending it as long as it might have without negligence, it would not have reached its destination in time to be collected. First Nat. Bank *v.* City Nat. Bank, 12 Tex. Civ. App. 318, 34 S. W. 458.

Where a bank having a draft for collection, sent it direct to the drawer instead of sending it to a third person, it was held, that the failure of a collecting bank to use ordinary care will not render it liable where, had the draft been sent for collection to a third person, its fate would have been the same, the drawers having become insolvent. First Nat. Bank *v.* City Nat. Bank, 12 Tex. Civ. App. 318, 34 S. W. 458, affirmed in 93 Tex. 705, no op. See, also, Diamond Mill Co. *v.* Groesbeeck Nat. Bank, 9 Tex. Civ. App. 31, 29 S. W. 169; People's Nat. Bank *v.* Progden (Tex. Civ. App.), 84 S. W. 601; S. C., 98 Tex. 360, 83 S. W. 1098.

A bank, having a draft of $2,000 for collection, will not be held liable for negligence in sending it direct to the drawee bank, instead of through a third person, where, at 1 o'clock on the day on which it reached its destination, the drawee bank required $1,000 to insure its ability to meet local checks which might be presented that day after the hour, and was furnished that amount by another bank for that purpose, to prevent a general run on local banks. First Nat. Bank *v.* City Nat. Bank, 12 Tex. Civ. App. 318, 34 S. W. 458.

In New York it has been held that a bank sending a check through the mail to the bank on which it was drawn does not thereby constitute that bank its agent to receive the proceeds. So, also, as to a note payable

a check for collection, drawn by a third person on another bank, which, as the depositor knows, is the only one at the place where it is located, and it is the custom of banks, as he also knows, in collecting checks, to transmit them directly to the drawee where no other bank exists at the particular point, such depositor, after thus knowingly availing himself of the collection facilities afforded by the bank, can not be heard to say that its selection of a correspondent bank, which it knew forwarded the check directly to the drawee, was negligence rendering it responsible for the loss of the amount of the check.[2] So, also, the selection of the drawee bank as agent may be authorized by the instructions of the depositor of the paper for collection.[3] The remitting of a check to the drawee for collection does not amount to an extinguishment or payment but devolves on him the duty and liability of an agent in addition to the duty of payment, if he has funds of the drawer in his hands.[4]

§ 162 (1c) Authority of Bank to Employ Notary or Attorney.—A bank holding a bill for collection may employ a notary to protest the bill and give notice of dishonor.[5] A bank with whom a draft is deposited for collection has no general agency to employ an attorney to sue thereon, or compromise the claim; and, in absence of special authority, is not liable for

at the bank where the maker keeps his account. Indig *v.* National City Bank, 80 N. Y. 100, 59 How. Prac. 10. See, also, People *v.* Merchants', etc., Bank, 78 N. Y. 269, 34 Am. Rep. 532.

2. Wilson *v.* Carlinville Nat. Bank, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632; Hilsinger *v.* Trickett, 86 O. St. 286, 99 N. E. 305. See ante, "Effect of Customs and Usages," § 161 (2).

An out of town note or draft deposited with a bank for collection may be sent by mail to the bank on which it is drawn or made payable, provided that be the ordinary method of transacting such business. Nidig *v.* National City Bank, 80 N. Y. 100, 59 How. Prac. 10.

A bank sent a certificate of deposit issued by a bank in B. to a bank in D. for collection, with a statement, "We note you have a correspondent at B.," and requesting the lowest rate of exchange. The only bank at B. with which the D. bank could have corresponded was the one which drew the certificate, which fact was known to the forwarding bank. In order to secure the lowest rate of exchange, the D. bank must send the certificate direct to the B. bank, which was regarded entirely safe. Held, that the D. bank was not negligent in sending the certificate direct to the B. bank. First Nat. Bank *v.* Citizens' Sav. Bank, 123 Mich. 336, 82 N. W. 66, 48 L. R. A. 583.

3. *Michigan.*—First Nat. Bank *v.* Citizens' Sav. Bank, 123 Mich. 336, 82 N. W. 66, 48 L. R. A. 583.

Defendant, a Chicago bank, received a certificate of deposit issued by the only banker doing business at Budd Oak, Mich., for collection. Defendant sent the draft to the C. Bank in Detroit, which was not defendant's usual correspondent there, knowing that the maker of the certificate was the C. Bank's correspondent at Burr Oak. The certificate was accompanied by a letter stating that it was sent to the C. Bank because it knew that the latter had a correspondent at Burr Oak and requested collection at the C. Bank's best rate of exchange, and asked that the ticket of advice be detached before "forwarding to Burr Oak." Held, that such instructions constituted an implied direction to the C. Bank to forward the certificate to the payor for collection. First Nat. Bank *v.* Bank, 221 Ill. 319, 77 N. E. 563, affirming judgment in Bank *v.* First Nat. Bank, 124 Ill. App. 102.

4. Effect of remitting check to drawer for collection.—Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. 860.

5. Authority to employ notary or attorney.—Warren *v.* Gilman, 17 Me. 360.

the president's representations therein unless benefited by his acts.[6]

§ 162 (2) Nature of Agency Created by Such Appointment.—When one places negotiable paper with a bank for collection, and such bank sends it to another for the same purpose, whether the second bank is to be considered the agent of the owner or merely the agent of the bank is a vexed question, upon the determination of which depend important legal consequences. Thus, if the second bank be held agent of the owner, then it would be responsible for any negligence which resulted in a loss of the debt.[7] So, also, if the collecting bank failed after receiving the money, being in good credit at the time the paper was transmitted for collection, the bank which had sent it would not be liable to the owner of the amount collected.[8] If, however, as is held by many authorities, the second indorser should be considered merely the agent of his immediate indorser, and not of the first indorser, these consequences do not follow, and, in case of negligence or default, the first indorser is liable to the owner of the paper, and not the second.[9] In New York, Ohio, and a number of other jurisdictions, and in England the rule is laid down that the collecting agent, in the absence of any understanding or agreement to the contrary, or instructions as to how or through whom the collection is to be made, is deemed to employ the subagent on his own account,[10] and is chargeable to his principal for the conduct

6. *New York.*—Ryan *v.* Manufacturers', etc., Bank, 9 Daly 308.

7. City Bank *v.* Weiss, 67 Tex. 331, 3 S. W. 299.

8. *Texas.*—City Bank *v.* Weiss, 67 Tex. 331, 3 S. W. 299.

9. *Texas.*—City Bank *v.* Weiss, 67 Tex. 331, 3 S. W. 299. And see post, "Liability of Transmitting Bank on Insolvency of Correspondent Bank," § 166 (4); "Negligence or Default of Agents or Correspondents," § 170; "Liability of Transmitting Bank for Default of Correspondent," § 171 (6).

10. **Collecting bank deemed agent of transmitting bank and not of owner of paper.**—*United States.*—Hoover *v.* Wise, 91 U. S. 308, 23 L. Ed. 392; Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722, 5 S. Ct. 141; Hyde *v.* First Nat. Bank, Fed. Cas. No. 6,970, 7 Biss. 156; Kent *v.* Dawson Bank, Fed. Cas. No. 7,714, Blackf. 225, 38 Am. Dec. 139.

Indiana.—Tyson *v.* State Bank, 6 Blackf. 225, 38 Am. Dec. 139.

New Jersey.—Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. 588.

New York.—Bank *v.* Gilman, 81 Hun 486, 30 N. Y. S. 1111, 63 N. Y. St. Rep. 299; Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Bank *v.* Smith, 3 Hill 560; Commercial Bank *v.* Union Bank, 11 N. Y. 203; Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459; Allen *v.* Merchants' Bank, 22 Wend. 215, 34 Am. Dec. 289.

Ohio.—Reeves, etc., Co. *v.* State Bank, 8 O. St. 465.

Pennsylvania.—Wingate *v.* Mechanics' Bank, 10 Pa. 104.

Texas.—City Bank *v.* Weiss, 67 Tex. 331, 3 S. W. 299; Wootters *v.* Kauffman, 67 Tex. 488, 3 S. W. 465; State Nat. Bank *v.* Thomas Mfg. Co., 17 Tex. Civ. App. 214, 42 S. W. 1016; Schumacher *v.* Trent, 18 Tex. Civ. App. 17, 44 S. W. 460; First Nat. Bank *v.* Quinby (Tex. Civ. App.), 131 S. W. 429.

England.—Van Whart *v.* Woolley, 3 Barn. & C. 439; MacKersey *v.* Ramsays, 9 Clark & F. 818.

A bank receiving notes for collection is responsible for all subsequent agents employed in their collection. State Nat. Bank *v.* Thomas Mfg. Co., 17 Tex. Civ. App. 214, 42 S. W. 1016.

The New York and Ohio cases show that where a bank, as a collection agency, receives a note for the purposes of collection, its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated are its agents, and not the subagents of the owner of the note. Hoover *v.*

of the bank or individual to whom he transmits the paper for collection.[11] In other jurisdictions, however, it is held that where a claim is sent for collection to one bank, which forwards it to another for the same purpose, the latter is the agent of the owner, and not of the transmitting bank,[12] and that the liability of the transmitting bank extends merely to the exercise of due care in the selection of proper and competent agents, and to the transmission of the paper to such agents with proper instructions.[13] The authorities which support this latter rule rest on the proposition that since what is to be done by a bank employed to collect paper payable at another place can not be done by any of its ordinary officers or servants, but must be entrusted to a subagent, the risk of the neglect of the subagent is upon the

Wise, 91 U. S. 308, 313, 23 L. Ed. 392. See, also, Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722, 5 S. Ct. 141.

11. Bank *v.* Gilman, 81 Hun 486, 30 N. Y. S. 1111, 63 N. Y. St. Rep. 299.

In Sherman *v.* Port Huron Engine, etc., Co., 8 S. Dak. 343, 66 N. W. 1077, it was held that where the note is payable at the bank to which it was sent, without any express authority to employ a subagent, such bank can not delegate its power; and, if the collection is entrusted to another bank, the latter is the agent of the former bank, and has no connection with the owner.

Variation of rule by consent.—"While the rule of law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent, and thus make a different contract, and become responsible only for good faith and due discretion in the choice of an agent. If this is not done, or there is no implied understanding to that effect, the same responsibility is assumed in the undertaking to collect foreign paper and in that to collect paper payable at home." Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722, 5 S. Ct. 141; Tradesman's Nat. Bank *v.* Third Nat. Bank, 112 U. S. 293, 28 L. Ed. 728, 5 S. Ct. 149; Britton *v.* Niccolls, 104 U. S. 757, 26 L. Ed. 917.

12. Collecting bank held agent of owner.—Britton *v.* Niccolls, 104 U. S. 757, 26 L. Ed. 917; Tradesman's Nat. Bank *v.* Third Nat. Bank, 112 U. S. 293, 28 L. Ed. 728, 5 S. Ct. 149.

Connecticut.—Lawrence *v.* Stonington Bank, 6 Conn. 521; East Haddam Bank *v.* Scovil, 12 Conn. 303.

Illinois.—Ætna Ins. Co. *v.* Alton City Bank, 25 Ill. 243, 79 Am. Dec. 328.

Iowa.—Guelich *v.* National State Bank, 56 Iowa 434, 9 N. W. 328, 41 Am. Rep. 110.

Maryland.—Jackson *v.* Union Bank, 6 Har. & J. 146.

Massachusetts.—Dorchester, etc., Bank *v.* New England Bank, 1 Cush. 177; Fabens *v.* Mercantile Bank, 23 Pick. 330, 34 Am. Dec. 59.

Missouri.—Daly *v.* Butchers', etc., Bank, 56 Mo. 94, 17 Am. Rep. 663.

Pennsylvania.—Mechanics' Bank *v.* Earp, 4 Rawle 384.

Tennessee.—Bank *v.* First Nat. Bank, 67 Tenn. (8 Baxt.) 101, 35 Am. Rep. 691; Winchester Milling Co. *v.* Bank, 120 Tenn. 225, 111 S. W. 248; Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618.

Wisconsin.—Stacy *v.* Dane County Bank, 12 Wis. 702; Blakeslee *v.* Hewett, 76 Wis. 341, 44 N. W. 1105.

If a bank holding a note for collection sends it to the bank where the note is payable, the bank to which the note is sent becomes the payee's agent for the purpose of demanding payment and giving notice of dishonor. Blakeslee *v.* Hewett, 76 Wis. 341, 44 N. W. 1105.

13. Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722, 5 S. Ct. 141; Winchester Milling Co. *v.* Bank, 120 Tenn. 225, 111 S. W. 248.

Each successive bank handling an item for collection is agent of the owner and liable to him for the discharge of the duties incumbent upon collecting agents, and the several banks in the course of the chain of transmission are held responsible only for the selection of proper agents and for their own diligence and propriety of action in respect to the collection. Winchester Milling Co. *v.* Bank, 120 Tenn. 225, 111 S. W. 248.

party employing the bank, on the view that he has impliedly authorized the employment of the subagent; and that the incidental benefit which the bank may receive from collecting the paper, in the absence of an express or implied agreement for compensation, is not a sufficient consideration from which to legally infer a contract to warrant against loss from the negligence of the subagent.[14] If paper be deposited with a bank, not for collection, but for the purpose of transmitting it to some bank for collection, the bank to which it is sent is the agent of the depositor.[15]

§ 162 (3) Continuance and Termination of Agency.—The fact that one bank forwards to another bank for collection, at frequent intervals, drafts on a certain firm, in the absence of an express agreement, constitutes no continuing agency for the collection of such drafts; and hence the agency for the collection of each draft is an independent transaction.[16] Where a forwarding bank made an assignment and ceased to do business prior to the collection of a draft sent to defendant for collection, such assignment terminates defendant's agency for the forwarding bank.[17]

§ 162 (4) Duties, Powers and Liabilities of Agents and Correspondents.—In General.—The deposit of negotiable paper in one bank, to be transmitted to another for collection, is a solemn usage, of great public convenience, the effect of which is well understood; and the duty of the bank receiving such paper for collection is precisely the same, whoever may be the owner thereof; and if it is unwilling to undertake the collection, without precise information on the subject, the duty should be declined.[18] The correspondent bank takes such paper from the forwarding bank, as a cus-

14. Basis of doctrine.—Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722, 5 S. Ct. 141; Sherman *v.* Port Huron Engine, etc., Co., 8 S. Dak. 343, 66 N. W. 1077.

15. Where paper deposited for transmission.—Schumacher *v.* Trent, 18 Tex. Civ. App. 17, 44 S. W. 460; Bank *v.* Triplett, 1 Pet. 25, 7 L. Ed. 37.

Where a customer of a bank, on depositing a draft for collection, stated that the drawee desires that the draft be sent to a particular bank at the place of payment for collection, and, without giving positive directions to send the draft to the bank desired, made statements that were calculated to, and did, cause the bank to change its course of business from the bank it had previously used in making such collections to the bank desired by the drawee of the bill, the customer on a loss being sustained by the failure of the bank so selected would be estopped to deny that such bank was his agent, and to claim that the failing bank was solely the agent of the bank with whom the draft was deposited for collection. First Nat. Bank *v.* Quinby (Tex. Civ. App.), 131 S. W. 429.

When a note is deposited with one bank, to be collected at a point where it has no agent, and it transmits the same to another bank for collection, in the absence of any special agreement or custom of bankers, which fixes another measure of liability, the bank to which the note is sent is the agent of the bank with which the deposit was made, and it is responsible to the depositor for the defaults of such agent. Schumacher *v.* Tent, 18 Tex. Civ. App. 17, 44 S. W. 460.

16. Facts held not to show continuing agency for collection.—Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

17. Termination of agency by assignment of forwarding bank.—Morris & Co. *v.* Alabama Carbon Co., 139 Ala. 620, 36 So. 764.

18. Duty of correspondent bank.—Bank *v.* Triplett (U. S.), 1 Pet. 25, 7 L. Ed. 37.

tomer in the usual course of business.[19]

§ 163. What Constitutes Collection.—In General.—As has been already seen, the deposit of negotiable paper with a bank for collection creates the relation between the depositor and the bank of principal and agent,[20] and this relation continues until the revocation of the agency by the depositor, or until the collection has been fully completed by the payment of the money to the collecting bank.[21] The question as to whether a collection has actually been made before or after the insolvency of the collecting bank is of great importance in determining whether the relation of the bank to the depositor of the paper is merely that of a debtor, or whether it holds the proceeds of the collection in trust for him.[22]

When Collecting Bank Chargeable with Proceeds.—The mere fact that a bank credits a check deposited as cash does not render the bank liable to the depositor for the amount of the check, if the check is worthless or subsequently dishonored, as the usual custom in such cases is to credit such collections as cash, unless the customer making the deposit is in weak credit, and in case the check is unpaid to charge it off again and return the check to the depositor.[23] The agency of a bank to collect a draft sent to it by the holder is not terminated so as to fix its liability for the proceeds to the drawer by its acceptance of a certified check from the drawer of the draft, though such act may be considered as a breach of its contract of agency for which it would be liable.[24] Where a check indorsed "For deposit" is deposited by a customer of a bank, and the amount is entered in his passbook to his credit, against which he draws checks, the bank becomes more

19. Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722, 5 S. Ct. 141.

Where one bank sends to another a third person's draft for collection, the fact that under the arrangement between them the collecting bank allows the sender interest on daily balances is not material. The relation between them is to be treated as the ordinary one of banker and customer. Armstrong *v.* National Bank, 11 Ky. L. Rep. 90.

20. See ante, "Relation between Bank and Depositor for Collection," § 156.

21. Completion of collection by payment to bank.—Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533; Garrison *v.* Union Trust Co., 139 Mich. 392, 102 N. W. 978, 70 L. R. A. 615, 111 Am. St. Rep. 407; Wallace *v.* Stone, 107 Mich. 190, 65 N. W. 113.

When the money is received, and not before, the agency of the defending bank to collect terminated, and its authority to credit the amount to the plaintiffs and to make itself an absolute debtor therefor will then arise, providing it is still a going concern. Levi *v.* National Bank, Fed. Cas. No. 8,289, 5 Dill. 104; Jones *v.* Kilbreth, 49 O. St. 401, 31 N. E. 346.

Where a draft is sent by the holder to a bank for collection and credit, the bank remains the agent of the holder until the money is actually received by it, the import of the transaction being that the credit is not to be given until that time. German-American Bank *v.* Third Nat. Bank, Fed. Cas. No. 5,359; Levi *v.* National Bank, Fed. Cas. No. 8,289, 5 Dill. 104.

22. Time of actual collection as determining relation of depositor and bank.—See post, "Insolvency of Collecting Bank," § 166.

23. Effect of crediting paper as cash.—Winchester Milling Co. *v.* Bank, 120 Tenn. 225, 111 S. W. 248. See ante, "Relation between Bank and Depositor for Collection," § 156.

24. Effect of acceptance of certified check from drawer of draft.—German-American Bank *v.* Third Nat. Bank, Fed. Cas. No. 5,359; Levi *v.* National Bank, Fed. Cas. No. 8,289, 5 Dill. 104.

than the mere agent for collection; and where, instead of collecting, the bank has the check certified by the drawee, such certification is a payment, as between the depositor and the bank, and therefore the deposit is subject to garnishment for the depositor's debt.[25] Where paper is deposited with one bank for collection, and is by it forwarded to another bank, it is sufficient if the collection is made according to their custom by a settlement between the two banks on balancing accounts. This is a money settlement, and the receipt of money is payment in the actual business sense that the law requires, under the reasonable customs adopted by banks as a necessity and recognized as such throughout the world.[26] It has been held, however, that the exchange of checks at a clearing house pursuant to the rules is not necessarily such a settlement between the bank, with which a check is deposited for collection, and the drawee bank, as to amount to the payment of the check.[27] The general rule is that if a collecting bank forwards a

25. Certification of check as payment.—National Commercial Bank v. Miller & Co., 77 Ala. 168, 54 Am. Rep. 50.

26. Settlement between the collecting bank and correspondent as collection.—Howard v. Walker, 92 Tenn. 452, 21 S. W. 897. And see Daniel v. St. Louis Nat. Bank, 67 Ark. 223, 54 S. W. 214.

The payee of a draft deposited it in his bank, which immediately forwarded it, "for collection," to its correspondent bank, at the residence of the drawee, who directed that the draft be taken to his bank for payment. The drawee's bank took the draft, and charged it to the account, and canceled it, but no money was passed in the transaction. In the customary settlement of that day between these two banks, the correspondent was charged by the drawee's bank with the amount of checks and drafts held by it in excess of the amount held against it by the correspondent, and the correspondent credited the payee's bank with the amount of the draft, but never remitted or otherwise paid it. Both banks failed. Held, that the transaction in which the draft was settled was a collection, and was binding on the payee, as against the drawee. Howard v. Walker, 92 Tenn. 452, 21 S. W. 897.

A New Jersey bank acted for many years as collecting agent for the C., a New York bank, under an arrangement whereby all the collections, including those of paper drawn on it, were credited to it in a collection account which was settled once a week. Held, that on receiving from the C. for collection a check so drawn, and charging it to the C. in said account, the drawee bank discharged the drawer, and substituted itself as debtor to the C. for the amount; hence the C., accepting the responsibility of the drawee on its credit in the collection account as payment of the check, was liable to the holder for the amount, as for a collection effected. Briggs v. Central Nat. Bank, 89 N. Y. 182, 63 How. Prac. 309, 42 Am. Rep. 285.

27. Exchange of check at clearing house.—Plaintiff deposited her check with defendant bank for collection from the drawee bank, knowing that it was the custom of the banks to collect through the clearing house, and that the check must be presented at the clearing house by 2:30 p. m. in order to go through that day. Under the clearing house rules, all checks drawn in favor of a bank were balanced against those drawn against it, and, if the latter exceeded the former, the bank became indebted to the clearing house to the extent of the excess, and the accounts between the banks were settled by the clearing house drawing checks upon the debtor bank in favor of the creditor bank on that day. Defendant's indebtedness to the clearing house on the day that the check in question was presented exceeded that of the drawee bank by a considerable amount. The check, which was drawn on the drawee bank by the clearing house on the day plaintiff's check was presented for payment, was refused payment; the bank having become insolvent. Held, that the exchange of checks at the clearing house pursuant to the rules

check directly to the drawee bank, and by custom or agreement it is authorized to credit the collecting bank and remit, or settle at stated periods, its receipt of the check, debiting it to drawer and crediting it to the collecting bank, constitutes payment and renders the forwarding bank liable to its principal for the amount stated,[28] whether there was sufficient cash in the bank at the moment to pay the check or it was afterwards discovered that the check was an overdraft, and the drawee insolvent.[29]

Effect of Charging Amount of Note to Maker and Crediting to Sender.—Where a bank sent a note to a correspondent for collection, and the latter, which had the maker's money on deposit, with instructions to pay it on the note, charged the amount to the maker, and credited it to the sender of the note in the regular course of business, it constitutes a payment, though the bank failed the next day, and returned the note without indorsing anything thereon, or accounting for the collection.[30] Where a debtor gave his

was not a settlement between defendant and the drawee bank, so as to amount to a payment of the check deposited with defendant for collection. Merchants' Nat. Bank *v.* Dorchester (Tex. Civ. App.), 136 S. W. 551.

28. General rule as to crediting collecting bank and debiting check to drawer.—Pinkney *v.* Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012, citing Briggs *v.* Central Nat. Bank, 89 N. Y. 182, 63 How. Prac. 309, 42 Am. Rep. 285; Smith Roofing, etc., Co. *v.* Mitchell, 117 Ga. 772, 45 S. E. 47, 91 Am. St. Rep. 217; Merchants' Nat. Bank *v.* Goodman, 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728; Montgomery *v.* Cochran, 62 C. C. A. 70, 126 Fed. 456.

Plaintiff deposited with defendant bank for collection a check drawn by a depositor in another bank, which for more than fifteen years had been defendant's collecting agent in another state. Defendant, on receipt of the check, forwarded the same to the bank on which it was drawn. The latter bank, on receiving the check, charged it against the account of the drawer, and credited the defendant with the amount of the check in the collection account kept between the two banks. Held, that the act of charging the drawer on the check and crediting defendant therewith was a payment thereof to defendant bank, rendering it liable to plaintiff on failure of the bank on which the check was drawn subsequent to the time of the charging and crediting. Briggs *v.* Central Nat. Bank (N. Y.), 10 Daly 179, 61 How. Prac. 250.

29. Pinkney *v.* Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012.

A bank at which a promissory note was made payable received it from the holder for collection, and, having an account with the maker, which was not, however, good for the amount, charged it to him, and paid it to the holder, at the same time marking it "Cancelled"—a practice which, under the rules of the bank, only denoted that it had been charged to the maker. Held, that though the note was made for the accommodation of an indorser thereon, who was cashier of the bank at which it was payable, and who had promised to provide for it, it was a subsisting obligation. Watervliet Bank *v.* White (N. Y.), 1 Denio 608.

30. Charging amount of note to maker and crediting same to sender.—Daniel *v.* St. Louis Nat. Bank, 67 Ark. 223, 54 S. W. 214.

Plaintiff sent to defendant bank for collection and remittance a properly indorsed note of a depositor of defendant, who had directed it to pay his notes. On the day for payment, defendant's cashier, as such, drew his check to plaintiff's order for the amount of the proceeds, made a memorandum thereof on a block, wrote on the face of the note, in defendant's name, that it was paid, and perforated it and put it in the files. He was then notified of the depositor's insolvency. Held, that the note was already paid, nothing remaining, besides entries of records on the books, but to remit the proceeds. Nineteenth Ward Bank *v.* First Nat. Bank of South Weymouth, 184 Mass. 49, 67 N. E. 670.

check on a certain bank in payment of his debt, which check was by another bank, acting as collector of the creditor, forwarded to the drawee bank, in which enough money was, at the time the check was forwarded, deposited to the debtor's credit to pay the check, and the drawee's draft for the amount of the check forwarded to the collecting bank, and the check canceled and surrendered, the debtor was discharged from liability.[31] Where a bank receives for collection a check drawn upon it, and the drawer has funds with which to pay, it is such bank's duty to charge the check to the drawer, and by omitting to do so it will be held to have assumed payment thereof.[32] Where a bank receiving a note for collection charges the amount of such note to the maker, a customer of the bank, who at the time had no money to his credit but was indebted to the bank, and the collecting bank draws its check in favor of the bank through which the note was sent, and mails the same to such bank, this transaction does not constitute a payment of the note, where on the same day the maker of the note makes an assignment, and immediately upon ascertaining such fact the collecting bank takes the letter to the postoffice, cancels the check and returns the note by mail to the transmitting bank.[33]

§ 164. Rights and Liabilities as to Proceeds—§ 165. —— In General.—Ownership of Proceeds on Collection.—The doctrine is well settled that, where a bank or an individual receives a check for collection the proceeds are the property of the owner of the check and do not pass either to the original collecting agent or to its correspondent bank.[34] A bank re-

31. Winchester Milling Co. *v.* Bank, 120 Tenn. 225, 111 S. W. 248.

32. Check drawn upon collecting bank.—Minier *v.* Second Nat. Bank, 47 Hun 632, 13 N. Y. St. Rep. 222.

33. Right of bank to rescind its action in charging to maker's account on knowledge of his insolvency.—In an action against defendant bank to recover the amount of a note, it appeared that defendant received the note from the payee for collection; that the maker was a customer of defendant, and that, the next morning, defendant's clerk presented the note for payment; that the maker wrote across its face, "Please charge the same to my account;" and that the clerk thereupon wrote on the back of the note, "Charged account," and then stamped thereon the date and name of defendant. The stamp mark meant "Canceled." The clerk charged the amount of the note in the maker's passbook, and also in his account in defendant's journal. The same day defendant drew its check in favor of the bank through which plaintiffs sent the note, and after business hours mailed the check and a letter of advice to such bank. At the time the note was presented for payment, the maker was insolvent, but defendant had no knowledge of that fact. The afternoon of the same day, the maker made an assignment, and immediately after ascertaining the fact defendant procured the letter from the postoffice, and canceled the check, and returned the note by mail to plaintiffs' bank. There were no indorsers on the note, and neither plaintiffs nor their bank had any knowledge of the transactions between defendant and the maker until the check had been canceled. When the note was presented to the maker, he had no money to his credit with defendant, but was indebted to it in a considerable sum. Held, that such transaction did not constitute payment of the note. Steinhart *v.* National Bank, 94 Cal. 362, 29 Pac. 717, 28 Am. St. Rep. 132.

34. Proceeds of collection property of owner of check.—Blair *v.* Hill, 50 App. Div. 33, 63 N. Y. S. 670. See ante, "Title to Paper Received for Collection," § 159. And see post, "Insolvency of Collecting Bank," § 166.

Where a banker receives a check

ceiving from the drawer a draft for collection is not the owner of the proceeds of its collection, but they belong to the drawer, and are subject to garnishment.[35]

Relation between Bank and Depositor after Collection.—As a general rule, after the collection of negotiable paper entrusted to it for that purpose, has been made, the bank becomes a simple contract debtor for the amount, less any commissions which may be charged,[36] and does not hold the proceeds as agent in trust for the depositor.[37] If the party for whom the collection is made was a regular depositor the sum will be placed to his credit upon his regular deposit account, unless some peculiar usage or special instruction should demand a different course of dealing.[38] If the party has

for a collection merely, the fact that he causes it to be deposited in a correspondent bank, to the credit of his bank, does not make the original owner a creditor of the latter bank, but the proceeds of the check are her property. Judgment, 50 App. Div. 33, 63 N. Y. S. 670, affirmed. Blair *v.* Hill, 165 N. Y. 672, 59 N. E. 1119.

35. Hobart Nat. Bank *v.* Fordtran (Tex. Civ. App.), 122 S. W. 413.

A. delivered a draft, drawn payable to the order of A., to C., with the following special indorsement: "Pay to [C.] or order for collection, and credit account of [A.]." C. deposited the draft for collection and credit on his own account to B., a bank, and subsequently failed. The draft was paid, but the bank refused to pay the proceeds to A., and credited the proceeds to B., who was indebted to it, claiming that such was the arrangement with B. In an action by A. against B. to recover the proceeds of the draft, B. filed an affidavit of defense, setting forth the foregoing facts. On a rule to enter judgment for want of a sufficient affidavit of defense, the court made the rule absolute. Held no error. Producers', etc., Bank *v.* Ricketts (Pa.), 1 Wkly. Notes Cas. 48.

36. Relation between bank and depositor after collection.—Jockusch *v.* Towsey, 51 Tex. 129; Duncan *v.* Magette, 25 Tex. 245; Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977; Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; In re Bank, Fed. Cas. No. 890, 5 Biss. 515, 9 N. B. R. 184.

A. drew a draft on B. The draft was given to C.'s bank, which transmitted it to D.'s bank for collection. B. paid it, and attached the proceeds in the hands of D.'s bank as A.'s. Held, that this could be done, D.'s bank being A.'s debtor, and not the debtor of C.'s bank. Naser *v.* First Nat. Bank (N. Y.), 36 Hun 343.

Defendant had $1,000 on deposit in plaintiff bank, and, at the request of the cashier, consented that it be loaned through the bank to another of its customers, on condition that the bank would guaranty the loan and collect it for defendant. On such consent being given, defendant was debited in his account with the bank with said sum, and afterwards the cashier arranged with two other customers to continue a loan to them on the payment of a portion thereof, and a note for the balance ($1,000) was given, payable to the bank. The cashier then represented to defendant that he had made the loan consented to, and had taken said note for it, and, at the suggestion of the cashier, it was left, with other notes of defendant, in the bank for collection, and the cashier gave defendant a receipt for it, which recited that it was held for collection and credit of defendant. Several installments of interest on the note were paid to the bank, and credited to defendant in his account with it. The bank afterwards collected the note. Held, that the proceeds of the note belong to defendant. First Nat. Bank *v.* Brown, 20 Utah 85, 57 Pac. 877.

37. In re Bank, Fed. Cas. No. 890, 5 Biss. 515, 9 N. B. R. 184.

A bank receiving money on notes sent to it for collection, which it does not keep separate, does not hold such money in trust for the owner of the notes, but sustains simply the relation of debtor and creditor. Bank *v.* Russell, Fed. Cas. No. 884, 2 Dill. 215. And see post, "Insolvency of Collecting Bank," § 166.

38. Practice where person for whom collected a regular depositor.—Jockusch *v.* Towsey, 51 Tex. 129; Duncan *v.* Magette, 25 Tex. 245.

no deposit account, the bank simply owes him the amount on demand.[39] One who collects commercial paper through the agency of banks must be held to contract impliedly that the business may be done according to their well-known usages, so far as to permit the money collected to be mingled with the funds of the collecting bank.[40] When a payment is made to his agent and the money is put with the money of the collecting bank he has a right to receive a corresponding sum, but he loses his right to the specific sum.[41]

§ 166. —— Insolvency of Collecting Bank—§ 166 (1) Holding Bank as Trustee.—In General.—The rule is well settled that after a bank which holds paper for collection has suspended and ceased to be a going concern, the general power which it had before its suspension to collect the paper and mingle the proceeds thereof with its own funds, and thereby create the relation of debtor and creditor between it and the person whom it served as collector, terminates, and the proceeds of any collection made, under such circumstances, must be held by the collecting bank as trustee of the owner.[42] So, also, it is a well-established general rule that a bank

39. **Where such person has no deposit account.**—Jockusch *v.* Towsey, 51 Tex. 129; Duncan *v.* Magette, 25 Tex. 245.

40. **Mingling of money collected with funds of collecting bank.**—Freeman's Nat. Bank *v.* National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461; Dorchester, etc., Bank *v.* New England Bank (Mass.), 1 Cuch. 177.

41. Freeman's Nat. Bank *v.* National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461.

"When the funds are collected and in the collecting bank, whether or not those funds become a general deposit of the bank depends upon the course of dealing to the parties, if there has been one, or if there has been no course of dealing, and no express contract, except to collect, has been made, the funds after collection belong to the bank and the relation of debtor and creditor exists between the bank and its depositor." Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977, citing Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

42. **General rule as to collections made after insolvency of collecting bank.** — *United States.* — In re Armstrong, 33 Fed. 405; First Nat. Bank *v.* Bank, 33 Fed. 408; Richardson *v.* Louisville Banking Co., 36 C. C. A. 307, 94 Fed. 442; Western German Bank *v.* Norvell, 69 C. C. A. 330, 134 Fed. 724; St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390; German-American Bank *v.* Third Nat. Bank, Fed. Cas. No. 5,359; Levi *v.* National Bank, Fed. Cas. No. 8,289, 5 Dill. 104; Commercial Nat. Bank *v.* Armstrong, 39 Fed. 684, affirming 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533; First Nat. Bank *v.* Armstrong, 42 Fed. 193.

Indiana.—Union Nat. Bank *v.* Citizen's Bank, 153 Ind. 44, 54 N. E. 97; First Nat. Bank *v.* First Nat. Bank, 76 Ind. 561, 40 Am. Rep. 261.

Louisiana.—Louisiana Ice Co. *v.* State Nat. Bank, 1 McGloin 181.

New York.—National Butchers', etc., Bank *v.* Hubbell, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515; Warren-Scharf Asphalt Pav. Co. *v.* Dunn, 8 App. Div. 205, 40 N. Y. S. 209; People *v.* Merchants' Bank, 92 Hun 159, 36 N. Y. S. 989, 72 N. Y. St. Rep. 93.

Ohio.—Jones *v.* Kilbreth, 49 O. St. 401, 31 N. E. 346; In re Assignment, 4 O. Dec. 108, 2 N. P. 170.

Tennessee.—Aiken *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523; Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940; Bruner *v.* First Nat. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532; Williams *v.* Cox, 99 Tenn. 403, 42 S. W. 3.

Texas.—Jockusch *v.* Towsey, 51 Tex. 129; Parker *v.* Crawford, 3 Tex. App. Civ. Cases, § 365.

Virginia.—First Nat. Bank *v.* Payne

entrusted with the collection of a claim can not hold the proceeds thereof against the owner if, at the time of receiving the claim for collection, the bank, was insolvent, and its officers or agents were aware of, or had notice

& Co., 85 Va. 890, 9 S. E. 153, 3 L. R. A. 284.

When a bank receives a draft for collection, its relation to the owner is that of agent, until it credits him with the proceeds, and so becomes the principal debtor; and this change of relation can not be effected after the bank has failed. First Nat. Bank *v.* Bank, 33 Fed. 408.

In Levi *v.* National Bank, Fed. Cas. No. 8,289, 5 Dill. 104, it is said by the court, "when the money is received, and not before, the agency of the defending bank to collect terminated, and its authority to credit the amount to the plaintiffs and to make itself an absolute debtor thereof would then arise, provided it was still a going concern; but inasmuch as before it received the money it had failed, its agency to constitute itself a general creditor for the amount had ceased to exist. It would hold the amount as the agent of the plaintiff, or in trust for it, subject to any balance due it from the plaintiff." Quoted in Jones *v.* Kilbreth, 49 O. St. 401, 31 N. E. 346.

Plaintiff sent to defendant bank a draft "for collection in credit," which defendant presented, and received therefor the drawee's check, which was presented, and certified as "good" by the bank on which it was drawn. On the same day defendant suspended payment, and on the next day received payment of the check; the proceeds of which were passed to its receiver. Held, that the defendant was plaintiff's agent to collect a draft, which agency continued until the money was received on the check, and that, since the money was not received until after it had suspended, it held it in trust for plaintiff. German-American Bank *v.* Third Nat. Bank, Fed. Cas. No. 5,359; Levi *v.* National Bank, Fed. Cas. No. 8,289, 5 Dill. 104.

Where a collecting bank receives a draft for collection, it has no authority to receive in payment anything but money; and if such bank receives a certified check in payment, and procures its certification, it does not bind the sender until such check is actually paid; and if in the meantime the collecting bank suspends payment, such check is deemed as held in trust for the sender, and he is entitled to the proceeds, and it does not enter into the general fund for distribution by the receiver. Levi *v.* National Bank, Fed. Cas. No. 8,289, 5 Dill. 104.

Where the proceeds of a draft sent to a national bank for collection and remittance were paid to the receiver of the bank on its insolvency, the owner of the draft is entitled to recover the amount thereof. American Can Co. *v.* Williams, 176 Fed. 816, judgment affirmed in 101 C. C. A. 634, 178 Fed. 420.

A bank which, upon a draft being deposited with it for collection, refuses to accept it as a deposit, but advances a small amount to the payee on her check, and charges her therewith on its books as an overdraft, and sends it for collection to its correspondent, and, upon receiving notice of its collection, credits the payee's account therewith, is the payee's agent, and the proceeds constitute a trust fund, which the payee is entitled to recover from the receiver. Henderson *v.* O'Connor, 106 Cal. 385, 39 Pac. 786.

An assignee for creditors of a bank acquires no title to paper that had been sent to the bank for collection, though the bank would not have been required to remit to the sender for a week, during which time it could have used the proceeds of the paper, if it had collected them. National Butchers', etc., Bank *v.* Wilkinson, 10 N. Y. St. Rep. 290.

A. sent a draft on B. to a bank for collection. The bank collected, and drew its own draft on another bank in A.'s favor. The draft was dishonored, the bank which drew it failing. Held, that A. was entitled from its assets to a preference over its general creditors. People *v.* Dansville Bank, 39 Hun 187.

A foreign draft was deposited in a bank on the day it suspended, and the proceeds of the draft, after its collection, came into the hands of the assignee. Held, that the owner of the draft was entitled to such proceeds. In re Assignment, 4 O. Dec. 108, 2 N. P. 170.

When paper is deposited for collection, the relation between the depositor and bank is that of principal and agent. If an agent, for that special purpose, collects or sells the paper of his prin-

of, its insolvency.[43] The acceptance of the paper for collection, under such circumstances, is held to be such fraud as will entitle the owner of the proceeds to reclaim them.[44] A bank which has received a draft for collection

cipal, he becomes a fiduciary, and will hold the proceeds in trust for the principal; and if the agent fails, there will be no reason why his general creditors should invade such proceeds to satisfy their claims, if the principal can trace or ascertain his property in the substituted form. Whether, in a given case, the proceeds have been sufficiently traced and identified must rest in the judgment of the chancellor, who is called upon to declare the proceeds subject to a distinct trust. Jones *v.* Kilbreth, 49 O. St. 401, 31 N. E. 346.

Plaintiff, a banking corporation, sent a number of checks to its correspondent, a banking firm at A., for collection; the checks being drawn on the latter. Afterwards, but before the checks were received, the firm was dissolved by the death of one of its members. The surviving partner paid the checks by charging them to the accounts of the drawers, and gave credit for their amount to the plaintiff on the books. Held, that he had no such authority, but should have either sent back the checks or remitted the proceeds. First Nat. Bank *v.* Payne & Co., 85 Va. 890, 9 S. E. 153, 3 L. R. A. 284.

43. Acceptance of paper for collection with knowledge of insolvency.— Union Nat. Bank *v.* Citizens' Bank, 153 Ind. 44, 54 N. E. 97; Bruner *v.* First Nat. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532; Friberg *v.* Cox, 97 Tenn. 550, 37 S. W. 283; Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977; St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390.

44. Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977; Parker *v.* Crawford, 3 Tex. App. Civ. Cases, § 365; St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390; Importers, etc., Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319; Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9.

Where a bank, knowing its insolvency, receives a check, which it credits to the depositor as cash, and then sends to a correspondent, who, after the failure of said bank, but without notice thereof, credits the check to it as cash, and subsequently pays over the proceeds to the receiver, the depositor may recover such proceeds as a preferred claim. Bruner *v.* First Nat. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532.

Where a banker knew that he was hopelessly insolvent when he received for collection a check which he caused to be credited to him at a correspondent bank, his failure to apprise the owner of his condition made the acquisition of the check fraudulent, even if the latter knew he was to use it as a debt. Blair *v.* Hill, 50 App. Div. 33, 63 N. Y. S. 670, affirmed in 165 N. Y. 672, 59 N. E. 1119.

A customer of a bank known by its officers to be hopelessly insolvent sent it a check, which he directed to be placed to his credit. The check was received and credited, and the customer so advised, and on the same day the bank sent it to a correspondent for collection, and then closed its doors; but the check was not received and collected by the correspondent till after that event. At the time of the failure, said correspondent had funds belonging to the insolvent bank, which he thereafter remitted to the receiver, with the exception of a sum which he retained to indemnify him against certain rediscounts he had indorsed for said bank. Held, that the depositor could recover the proceeds of the checks from the receiver as a preferred claim, the presumption being that they were included in said remittance. Williams *v.* Cox, 99 Tenn. 403, 42 S. W. 3.

Plaintiffs sent to a certain bank a bill of exchange indorsed for collection. When the bank received the bill of exchange it was insolvent, to the knowledge of the managing officer, and on that day, or following morning, it failed. Prior to the failure it indorsed the bill of exchange to defendant bank, which collected it, and kept the proceeds, crediting the insolvent bank, which was indebted to it, with the amount thereof. Held, that the first bank acquired no title because of its fraud in not disclosing its insolvency, and defendant had no better title, as plaintiff's indorsement showed that the bank was merely plaintiff's agent to collect the proceeds. Peck *v.* First Nat. Bank, 43 Fed. 357.

The drawers of a draft deposited with a bank for collection, and by it forwarded to a correspondent bank,

can not, by crediting the amount thereof to the owner on the day of its (the bank's) failure, and before the maturity and payment of the draft, place him in the position of a general creditor, upon the bank's making an assignment for the benefit of its creditors, so as to entitle him only to dividends out of the assets in the trustee's hands;[45] but the relation between the owner of the draft and the bank being that of principal and agent, the owner of the draft may recover the proceeds, on its being paid, from the trustee.[46]

Where a Collection Made before Assignment.—The decisions in a few jurisdictions apparently hold that money collected by a bank for another on notes or drafts is held in trust for the owner, who is a preferred creditor in case the bank goes into liquidation, and such money does not become a part of the assets of the bank or pass to the receiver of such bank.[47]

which collects it, and credits the proceeds to the forwarding bank, are entitled to recover the amount from the collecting bank (it being still in the hands of that bank) as against the receiver of the forwarding bank, which was insolvent, and known to be so by its officers, when it received the draft, and suspended payment before the proceeds were withdrawn from the collecting bank. Importers', etc., Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319, affirming 51 Hun 640, 4 N. Y. S. 599, 21 N. Y. St. Rep. 98.

That the drawers of the draft included it in their claim against the insolvent bank, presented to and allowed by the receiver, does not affect their right to recover the proceeds of the draft from the collecting bank, as against the receiver, when it appears that, on discovering the facts constituting the fraud on the part of the officers of the insolvent bank, they paid back to the receiver the dividends already received on the draft, and refused to accept any further dividends on it. Importers', etc., Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319, affirming 51 Hun 640, 4 N. Y. S. 599, 21 N. Y. St. Rep. 98.

That the collecting bank collected a number of other drafts, forwarded by the insolvent bank at the same time, and credited all the proceeds to its account, does not prevent plaintiffs from recovering the proceeds of their draft, as against the receiver, the owners of the other drafts not claiming the fund. Importers', etc., Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319, affirming 51 Hun 640, 4 N. Y. S. 599, 21 N. Y. St. Rep. 98.

Estoppel of owner by receiving dividend from insolvent bank.—The owner of a draft deposited the same in a bank for collection, and it was forwarded to the bank's correspondent, who made the collection. Part of the proceeds remained in the correspondent's hands when the bank failed. The owner of the draft filed his claim thereon, and received a dividend. Afterwards, upon discovering that the bank was hopelessly insolvent, and about to suspend, to the knowledge of its officers, at the time it received the draft from him, he repudiated his claim filed with the receiver, and claimed the balance of the fund in the correspondent's hands. Held, that he was not estopped from making such claim by his act in retaining the dividend, where such dividend did not exceed the amount he was entitled to on the balance of his claim against the bank. Importers', etc., Bank *v.* Peters, 51 Hun 640, 4 N. Y. S. 599, 21 N. Y. St. Rep. 98, affirmed in 123 N. Y. 272, 25 N. E. 319.

45. Effect of crediting in advance of collection, etc.—Jones *v.* Kilbreth, 49 O. St. 401, 31 N. E. 346.

46. Jones *v.* Kilbreth, 49 O. St. 401, 31 N. E. 346.

47. Doctrine that proceeds held in trust and do not pass to receiver of bank.—State *v.* Bank, 61 Neb. 181, 85 N. W. 43; Capital Nat. Bank *v.* Coldwater Nat. Bank, 49 Neb. 786, 69 N. W. 115; Anheuser-Busch Brewing Ass'n *v.* Morris, 36 Neb. 31, 53 N. W. 1037; State *v.* Midland State Bank, 52 Neb. 1, 71 N. W. 1011, 66 Am. St. Rep. 484; Griffin *v.* Chase, 36 Neb. 328, 54 N. W. 572; McLeod *v.* Evans, 66 Wis. 401, 28 N. W. 173, 57 Am. Rep. 287; Francis *v.* Evans, 69 Wis. 115, 33 N. W. 93; Bowers *v.* Evans, 71 Wis. 133, 36 N. W. 629.

Where a bank collects money for another, it holds the same as trustee of the owner, and on an assignment by the bank for the benefit of its creditors the trust character still adheres to

The general rule, however, would seem to be well-established that, if a bank to which paper is entrusted for collection makes collection before it makes an assignment, even though it be in fact insolvent,[48] such bank simply becomes an ordinary contract debtor of the owner of the paper, and it can not impress any trust character upon the proceeds.[49] Though there may be spe-

the fund in the hands of the assignee, and the owner is entitled to have his claim allowed by the county court as a preferred claim. Anheuser-Busch Brewing Ass'n *v.* Morris, 36 Neb. 31, 53 N. W. 1037.

A national bank received certain real-estate mortgages and notes for collection, the proceeds to be remitted to the owner when collected. The bank failed before all the proceeds had been remitted, though after their collection. Held, that the bank was the agent of the owner of the securities, and that the money derived therefrom was a trust fund, which did not become a part of the assets of the bank. Griffin *v.* Chase, 36 Neb. 328, 54 N. W. 572.

In the later Wisconsin case of Nonotuck Silk Co. *v.* Flanders, 87 Wis. 237, 58 N. W. 383, however the earlier cases in that jurisdiction are expressly overruled and it is held that one for whom a bank has collected paper before it failed is not entitled to a preference over other creditors, if the bank had disposed of the proceeds before the assignee came into possession.

48. In the absence of a knowledge upon the part of the officers or agents of a bank of its being hopelessly insolvent at the time the note is received and collected, its right or power to mingle the proceeds of the note, when collected, as its own, with other funds of the bank, can not be deemed to have been terminated. Union Nat. Bank *v.* Citizens Bank, 153 Ind. 44, 54 N. E. 97.

49. Effect of collection before assignment of collecting bank.—*United States.*—Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533; Philadelphia Nat. Bank *v.* Dowd, 38 Fed. 172, 2 L. R. A. 480; First Nat. Bank *v.* Armstrong, 39 Fed. 231; Anheuser-Busch Brewing Ass'n *v.* Clayton, 6 C. C. A. 108, 56 Fed. 759; In re Bank, Fed. Cas. No. 890, 5 Biss. 515, 9 N. B. R. 184; Merchants', etc., Bank *v.* Austin, 48 Fed. 25.

Indiana.—Union Nat. Bank *v.* Citizens' Bank, 153 Ind. 44, 54 N. E. 97.

Michigan.—Sherwood *v.* Milford State Bank, 94 Mich. 78, 53 N. W. 924.

Minnesota.—In re Seven Corners Bank, 58 Minn. 5, 59 N. W. 633.

Mississippi.—Billingsley *v.* Pollock, 69 Miss. 759, 13 So. 828, 30 Am. St. Rep. 585; Romanski *v.* Thompson (Miss.), 11 So. 828.

New York.—Gordon *v.* Rasines, 5 Misc. Rep. 192, 25 N. Y. S. 767.

North Carolina.—Commercial, etc., Nat. Bank *v.* Davis, 115 N. C. 226, 20 S. E. 370; First Nat. Bank *v.* Davis, 114 N. C. 343, 19 S. E. 280, 41 Am. St. Rep. 795.

Ohio.—Reeves, etc., Co. *v.* State Bank, 8 O. St. 465; In re Assignment, 4 O. Dec. 108, 2 N. P. 170.

South Dakota.—McCormick Harvesting Mach. Co. *v.* Yankton Sav. Bank, 15 Dak. 196, 87 N. W. 974.

Texas.—Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977; Farmers, etc., Bank *v.* First Nat. Bank (Tex. Civ. App.), 46 S. W. 271.

Washington.—Bowman *v.* First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870; Hallam *v.* Tillinghast, 19 Wash. 20, 52 Pac. 329.

"According to an invariable rule, money deposited by a general customer, or collected for him upon a note, with the understanding that the same shall be passed to his account, kept subject to check, the entire amount belongs to the bank, and the relation of debtor and creditor thus voluntarily created precludes him, in case the bank becomes insolvent, from participating in the distribution of funds acquired by the bank in violation of the trust which adheres to the relation of principal and agent." McCormick Harvesting Mach. Co. *v.* Yankton Sav. Bank, 15 S. Dak. 196, 87 N. W. 974, quoting from Plano Mfg. Co. *v.* Auld, 14 S. Dak. 512, 86 N. W. 21, 86 Am. St. Rep. 769.

Where defendant, a banker, under an agreement with plaintiffs to receive deposits, collect bills, pay their drafts on him when presented, use the money in his hands, and pay interest on the same, received a draft from plaintiffs to be collected and collected it and used the money, when he knew the day before the collection that he was insolvent, and suspended payment

cial facts which will take the case out of the general rule, and create a trust

on the same day he made the collection, he did not convert the money to his own use wrongfully within the meaning of that word as used in the Code, and was not guilty of a fraud in using the money or incurring the obligation to the plaintiffs. Bussing *v.* Thompson, 15 How. Prac. 97, 13 N. Y. Super. Ct. 696.

Where a draft is sent to a bank for collection, and it is so restricted by indorsement, the bank is authorized to carry the proceeds of the draft, when collected, into its general assets; and when it does so the relationship between the drawer or forwarder of the draft and the bank becomes that of creditor and debtor, so that, on assignment of the bank by reason of insolvency, such drawer or forwarder can only share in the assets pro rata with the general creditors. North Carolina Corp. Comm. *v.* Merchants', etc., Bank, 137 N. C. 697, 50 S. E. 308.

A Cincinnati bank wrote to a Philadelphia bank: "Will collect at par all points west of Pennsylvania, and remit the 1st, 11th, and 21st of each month." The latter accepted this proposition, and thereafter, from time to time, forwarded paper indorsed "For collection." Business was carried on under this arrangement for several months, when the Cincinnati bank failed, having in its hands, or in the hands of its subagent banks, the proceeds of paper thus forwarded. Held, that the relation between the banks was that of principal and agent until the collection of the paper and the receipt of the money by the Cincinnati bank, after which time the relation was that of debtor and creditor; and hence that the receiver of the Cincinnati bank could not be charged, as trustee, with any moneys which were collected, and passed into the general funds, before the failure, or which before that time were collected by subagents, and credited to it on a debt which it owed them, but that he could be so charged with moneys collected by a subagent before the failure, and afterwards paid to the receiver. Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533.

A customer deposited a note in a bank for collection, and it was discounted by the bank, and the proceeds placed to his credit in his account with the bank, which was overdrawn to an amount exceeding the proceeds of the note, but the overdraft was afterwards paid by the customer. Held, that the customer could not, after insolvency of the bank, claim that the bank received the note merely as his agent, for collection, and that the money received by the bank in payment of the note belonged to him. In re Bank, Fed. Cas. No. 890, 5 Biss. 515, 9 N. B. R. 184.

Where a general depositor obtained a note to be discounted by his bank, which credited the amount to the depositor, who at the time was indebted to the bank on an overdrawn account, the depositor can not claim the proceeds of the note as a preference over other creditors, on the ground that the bank held them as agent in trust for him, though, when the note was deposited, he agreed not to draw on the fund until the note was collected, and he afterwards made up his account so as to leave the bank indebted to him, exclusive of the proceeds of the note. In re Bank, Fed. Cas. No. 890, 5 Biss. 515, 9 N. B. R. 184.

Right to proceeds on insolvency of collecting bank.—When a bank holding a draft for "collection and returns" becomes insolvent after the draft has been paid to it, the drawer is not entitled to priority under Const. Ala., art. 14, § 17, providing that "depositors who have not stipulated for interest shall for such deposits be entitled, in case of insolvency, to preference of payment over all other creditors." Anheuser-Busch Brewing Ass'n *v.* Clayton, 6 C. C. A. 108, 56 Fed. 759.

Bankrupts operated the C. bank, and for several years prior to bankruptcy the C. and S. banks had collected paper for each other without credit or charge, no account of their mutual dealings being kept and no balances struck. The C. bank prior to its insolvency had collected a draft on P. for $1,170.29 for the S. bank, but had failed to remit the proceeds or notify the S. bank of the collection until after its assignment, prior to which the S. bank had in its hands $796.23, the proceeds of drafts collected for the C. bank, and on the day of the assignment, but before the C. bank's assignment had been actually executed, the S. bank mailed its draft to the C. bank to cover such collections. After the assignment one of the bankrupts said to the other that the amount in the hands of the S. bank would offset its claim against the bankrupts. Held

in the funds collected,[50] the rule undoubtedly is that, unless there is some agreement on course of dealing whereby the funds are to be held separate and the identical proceeds remitted, the owner of the paper stands upon no higher ground than the other creditors of the bank in a case where the bank collects the paper prior to making a general assignment.[51] The col-

that, the S. bank not having been informed of such declaration until long after the assignment, it was insufficient either to vest it with any title to the collection for which it remitted to the bankrupts or to constitute a declaration of trust. Judgment (D. C. 1907) 152 Fed. 763, reversed. In re Northrup, 86 C. C. A. 554, 159 Fed. 686.

Effect of remitting check or draft for proceeds by collecting bank.—The C. N. Bank cashed a check on M. & N. Bank, and sent it for payment; the latter bank sent the former its draft for the amount, charged the check to the drawer's account, which was good, and returned him the check as paid. Two days afterwards the M. &. N. Bank failed, and was placed in the hands of a receiver. On an application by the C. N. Bank to have the receiver pay the amount of the draft to it, held, that the transaction was a simple shifting of indebtedness by the M. & N. Bank, and did not impress any trust on the drawer's funds in its hands. People *v.* Merchants', etc., Bank, 78 N. Y. 269, 34 Am. Rep. 532, in which it was held that it was no actual setting apart or appropriation of any specific fund or property of the bank or of the drawer, for the payment of the check.

Plaintiffs sent a draft to the defendant bank for collection. The bank collected it, and issued its own New York draft, payable to plaintiffs, for the amounts so collected, less exchange, and sent it to plaintiffs, who accepted it, and forwarded it for collection. The latter draft, however, was not paid, owing to the defendant bank's suspension. Held, that the bank was a debtor, and not a trustee, of plaintiffs. Bowman *v.* First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870.

Effect of taking new note instead of collecting original.—When a bank to which a note is sent for collection, instead of collecting it, takes from the maker a new note, payable to itself, which note comes to the hands of the assignee for the creditors of the bank, the equitable owner of the note can not hold the assignee as trustee for him to its amount. Harrison Nat. Bank *v.* Ellicott, 31 Kan. 173, 1 Pac. 593.

50. General rule modified by special facts of the case.—Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940; Aiken *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523; Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802 5 Am. St. Rep. 85.

"When the funds are collected and in the collecting bank, whether or not those funds become a general deposit in the bank depends upon the course of dealing between the parties, if there has been one, or if there has been no course of dealing, and no express contract, except to collect, has been made, the funds after collection belong to the bank, and the relation of debtor and creditor exists between the bank and its depositor." Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977, citing Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

51. Owner of paper stands on same ground with other creditors of bank.—Aiken *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523; Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940.

Where a draft was sent to a bank for collection, and it made the collection, and thereafter made an assignment for the benefit of its creditors, turning over to the assignee more cash than the amount of such collection, the drawer was not entitled to follow the funds in the hands of the assignee as a trust fund, there being no proof that the owner of the bank knew of its insolvency at the time the collection was made, and no evidence of the course of dealing between the drawer and the bank, or of any instructions given by the drawer, or of any facts such as would establish between the drawer and the bank any relation other than that of ordinary debtor and creditor. Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977.

Where, for two years, the general agent of a corporation had been accustomed to send notes due the corporation to a bank for collection, and

lecting bank, generally speaking, in the absence of any agreement to the contrary, becomes the owner of the money collected, and is under an obligation to pay or remit, not the very money received, but an amount of equal value; and, while a collecting bank, it is true, receives the paper or claim for collection as the agent of the holder, still, when the money is collected, and the proper credit given to such holder or owner, then, as a general rule, the relation of debtor and creditor is created between the parties and the relation of trustee and cestui que trust does not arise.[52] Any agreement or course of dealing upon the part of a collecting bank, whereby it appears that the latter was at liberty to use the money collected as its own, or substitute its own obligation instead thereof, must necessarily destroy all features or elements of a trust in any particular case.[53] One who sends a note and mortgage to a bank for collection with the direction to the bank to "forward draft to me for balance," less its fee, is not entitled to a preferential claim on the funds of the bank upon its failure a few days after the collection is made, although it is hopelessly insolvent, and its officers knew the fact, when it received the note for collection. The bank becomes a debtor, not a trustee in such case.[54] A customer, for whom a bank makes a collection and remits the fund collected by check upon another bank, which is not

the bank, as it collected the notes at different times, gave the agent credit on its books, sometimes retaining the collections as long as two months before remitting the balance due the corporation, the corporation was merely a creditor of the bank, and the proceeds of collections made by it could not be regarded as trust funds. McCormick Harvesting Mach. Co. *v.* Yankton Sav. Bank, 15 S. Dak. 196, 87 N. W. 974.

The A. Bank sent to the B. Bank of New Orleans three checks on other New Orleans banks for collection. The collections were made and the proceeds placed to the credit of the A. Bank in its general account, the A. Bank having given no instructions for any special disposition of the money, but, on the contrary, having drawn against the proceeds of the checks, as an ordinary depositor. On the day on which the checks were collected, the assets of the B. Bank were seized by the sheriff, and receivers were appointed. Held, that the claim of the A. Bank was only that of an ordinary creditor. State *v.* Southern Bank, 33 La. Ann. 957.

52. Union Nat. Bank *v.* Citizens' Bank, 153 Ind. 44, 54 N. E. 97.

Two banks kept a running account with one another, each acting as collecting agent for the other. Each week a balance was struck and paid, the avails of collections not being kept separate or in any way distinguished from other funds. Held, that the relation between the banks was simply that of debtor and creditor, and that on the failure of one bank the other acquired no lien on any specific fund, nor any preference over creditors generally. People *v.* City Bank, 93 N. Y. 582.

Under an agreement between plaintiff bank and the H. bank that the latter should collect notes and checks forwarded it by plaintiff for a commission, and remit daily, the relation of principal and agent as to any paper ceased on collection, and the relation of creditor and debtor as to the cash immediately arose. First Nat. Bank *v.* Davis, 114 N. C. 343, 19 S. E. 280, 41 Am. St. Rep. 795.

53. Effect of agreement or custom allowing use of money by bank.— Union Nat. Bank *v.* Citizens' Bank, 153 Ind. 44, 54 N. E. 97; Aiken *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523.

54. Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940, in which case it was held that the directions to "forward draft to me for balance, less your fee," clearly implied that the bank, after collection, should retain its charges, and forward the balance in its own draft, to the sender of the note.

paid on presentation, becomes a mere creditor of the collecting bank for the amount of such fund, and entitled to share only pro tanto with other general creditors under the general assignment subsequently made by the bank, unless, by special contract, express or implied, the bank was constituted the trustee of such fund for its customer and the fund remained susceptible of identification.[55] Collection by a bank to which a note is sent for collection, in a check upon itself, is equivalent to collection in cash, even if the bank failed on the same day, and the owner of the paper becomes a mere creditor of the collecting bank.[56] It is a well-settled doctrine in a number of states in this country that where a special agency is created, and the bank has no authority to hold and credit proceeds of paper, but is bound by the agreement to remit them immediately to its correspondent, the relation of trustee and beneficiary is created, and the money collected, or its equivalent, can be recovered from the assignee of the insolvent bank.[57] Where a per-

55. Aiken *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523.

Where a bank after collecting a draft for the plaintiff, the proceeds of which it failed to remit, became insolvent and went into the hands of a receiver with $1,000 in cash on hand, it was held, that the fact that the fund on hand was composed mostly of nickels and dimes, collected several months previous to the collection of the plaintiff's draft, and that the bank had other debts in the same condition, aggregating a large sum, arising in the same way, from collections made before and after this collection was made, overcame the presumption that the bank had kept plaintiff's money intact or was so scrupulously careful as to have kept its representative in cash in its vaults, and that the plaintiff was entitled to no preference in payment by the receiver. Farmers', etc., Bank *v.* First Nat. Bank (Tex. Civ. App.), 46 S. W. 271.

56. Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 45 Am. St. Rep. 940.

57. Where special agency created. —*United States.*—American Can Co. *v.* Williams, 101 C. C. A. 634, 178 Fed. 420, affirming 176 Fed. 816; Boone County Nat. Bank *v.* Latimer, 67 Fed. 27; Holder *v.* Western German Bank, 136 Fed. 90, 68 C. C. A. 554, affirming 132 Fed. 187.

Alabama.—Hutchinson *v.* National Bank, 145 Ala. 196, 41 So. 143.

Indiana.—Windstanley *v.* Second Nat. Bank, 13 Ind. App. 544, 41 N. E. 956.

Iowa.—Nurse *v.* Satterlee, 81 Iowa 491, 46 N. W. 1102.

Michigan.—Wallace *v.* Stone, 107 Mich. 190, 65 N. W. 113.

Missouri.—German Fire Ins. Co. *v.* Kimble, 66 Mo. App. 370.

New York.—National Butchers', etc., Bank *v.* Wilkinson, 10 N. Y. St. Rep. 290.

Texas.—Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977; Hunt *v.* Townsend (Tex. Civ. App.), 26 S. W. 310; Parker *v.* Crawford, 3 Tex. App. Civ. Cases, § 365.

A bank which collects a letter of credit, left with it for that purpose only, holds the proceeds as a trust fund, though it credits the amount to the owner on its books, and notifies him of the collection, and he does not at once demand his money, and where the bank deposits the proceeds with another bank, and afterwards makes an assignment for benefit of creditors, the owner of the letter of credit is entitled to be paid in full. Nurse *v.* Satterlee, 81 Iowa 491, 46 N. W. 1102.

Where a mortgage is sent to a bank for collection, with direction to remit, the relation of creditor and debtor is not established between the sender and the bank, where the latter fails to remit, and therefore, on the insolvency of the bank, a trust will be imposed on its assets in favor of the sender, as against general creditors of the bank. Wallace *v.* Stone, 107 Mich. 190, 65 N. W. 113.

Plaintiff left with a bank certain mortgages, with instructions that the money received thereon was not to be credited to his account, but that the bank should immediately notify him, so that he could withdraw the same.

son who sends paper to a bank for collection has no general deposit in the bank, it has been held that the money collected upon such paper can not become even a special deposit, and the relation of debtor and creditor between the bank and the one transmitting the note for collection and return was never contemplated. The character of such transaction and the nature of

Checks were given in payment, and the money, when received, was credited to a fictitious account. Held, that the bank received the money as plaintiff's agent; and not in such way as to create the relation of debtor and creditor between them. In re Johnson, 103 Mich. 109, 61 N. W. 352.

Where a bank collected a certificate of deposit left with it for collection, and subsequently, without paying over the proceeds, made an assignment for the benefit of creditors, the assigned property is impressed with a trust in favor of the owner of the collection, entitling him, in equity, to a priority over general creditors. First Nat. Bank *v.* Sanford, 62 Mo. App. 394.

Plaintiff sent paper to a bank for collection under an agreement permitting the bank to make weekly remittances, and to use the proceeds when collected. Held, that money received by the assignee of the bank for creditors from plaintiff's paper after the assignment belonged to plaintiff. National Butchers', etc., Bank *v.* Wilkinson, 10 N. Y. St. Rep. 290.

Plaintiff sent a draft to a bank for collection. The bank collected it, and then passed into the hands of a receiver without remitting. The bank had previously made similar collections for plaintiff, the proceeds of which were always remitted to him promptly, and never credited to him as a deposit. Held, that plaintiff was entitled to be paid the entire proceeds of the draft out of the bank assets in the receiver's hands, since the bank was his trustee, and not his debtor. Hunt *v.* Townsend (Tex. Civ. App.), 26 S. W. 310.

In the course of dealings between a New York and Texas bank, the New York bank was in the habit of discounting notes for the latter, and of forwarding the same, on maturity, to the latter, "for collection and returns," with the understanding that the proceeds of such discount notes should be preserved by the Texas bank as the property of the New York bank, and should be returned to it as such. Such being the habit of business between the banks, the Texas bank received notes from its New York bank correspondent "for collection and return of proceeds." Held, the Texas bank became as to such collection, when made by it, a trustee for the New York bank. After their collection was made the relation of creditor and debtor as between the banks did not exist. The Texas bank had no authority to credit on its books the amount collected, but was legally bound to remit the money to its correspondent. The trust fund collected was credited by the Texas bank to its New York correspondent and mingled with other money of the Texas bank; thereafter, and before an adjustment of accounts, the Texas bank became insolvent, and was placed in the hands of a receiver. Held, that the trust attached to whatever money remained, when the receiver was appointed, in the bank vaults. Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85, citing City Bank *v.* Weiss, 67 Tex. 331, 3 S. W. 299.

Certain bankers, having collected a draft for plaintiff, remitted to him on March 17th by exchange drawn by them on New York. This was presented on March 22d, and payment refused, as these bankers had failed on the 18th. It was shown that it would have been paid if presented on the 18th. Held that, as plaintiff did not receive it until March 19th, the delay in presenting it does not prejudice his right to recover against the receiver of such bankers. Kinney *v.* Paine, 68 Miss. 258, 8 So. 747.

Plaintiff deposited a check with defendant bank for collection as plaintiff's agent. Defendant forwarded it to the F. bank for collection, with the instruction, "Remit New York exchange." The F. bank remitted the proceeds of the collection by its own draft on a New York bank, which the New York bank, at direction of the receiver of the F. bank, who in the meantime had been appointed, refused to pay. Held, that the F. bank was liable as trustee for the money collected, there being no authorization by defendant that its relation should be changed to that of debtor, so that de-

the services required place the collecting bank and owner of the paper in the attitude of principal and agent, and the money collected does not belong to the bank, nor does its retention create, in a legal sense, the relation of debtor and creditor.[58] The relation of bailor and bailee continues after the mingling of the funds, and, as the money never became assets of the bank, the general creditors are entitled to no share in its distribution.[59] Where a check is sent to a bank for collection, and such bank, after collection retains and uses the proceeds of the check in its general business, it will be

fendant was not liable. Judgment (C. C.), 132 Fed. 187, affirmed. Holder *v.* Western German Bank, 68 C. C. A. 554, 136 Fed. 90.

A bank forwarding a draft for a customer for collection by another bank did not, by giving directions that the proceeds be remitted in New York exchange, change the relation between the two banks from that of principal and agent to one of creditor and debtor, with respect to the money collected, so as to render it liable to the owner of the draft for the proceeds on the failure of the receiving bank after making the collection, but before remittance, on the theory that it had by such direction deprived him of the right to recover the proceeds from the receiver of the insolvent bank, as a trust fund. (C. C.), Holder *v.* Western German Bank, 132 Fed. 187, judgment affirmed in 68 C. C. A. 554, 136 Fed. 90.

Defendant bank collected a note forwarded to it for collection and remittance, and sent its draft in payment therefor. A few days later defendant assigned for the benefit of creditors, and the proceeds of the note passed into the hands of the assignee. Plaintiff presented the draft for payment, which was refused. Held, that the proceeds of the note were impressed with a trust in plaintiff's favor. Mad River Nat. Bank *v.* Melhorn, 8 O. C. C. 191, 4 O. C. D. 401.

Where sight drafts attached to bills of lading were delivered to a bank for collection and remission of proceeds, the relation of trustee and cestui que trust was established between the bank and the owner of such proceeds, which might be followed, on the bank's insolvency, into the hands of its receiver, if they could be traced. American Can Co. *v.* Williams, 178 Fed. 429, 101 C. C. A. 634, affirming judgment in 176 Fed. 816.

Checks were deposited in a bank, indorsed "For deposit," and were immediately credited to the indorser in his passbook, but under no agreement that checks should be treated as cash, or that the depositor could draw against them before collection. Held, that since the bank took the checks merely as bailee, the depositor was entitled to the proceeds thereof after the insolvency of the bank and the appointment of a receiver. Beal *v.* Somerville, 1 C. C. A. 598, 50 Fed. 647, 17 L. R. A. 291.

An agreement between two banks, by which one agrees to "handle" the items of exchange and commercial paper of the other within a certain territory, crediting the amount of such items to the account of the other on receipt, and under which the sending bank transmits such items as collections, indorsed payable to "any national or state bank," with directions to protest and return if unpaid, is an agreement for the making of collections only, and not of purchase and sale of the paper, and does not create the relation of debtor and creditor between the two banks as to items received and credited, but uncollected, at the time of the failure of the receiving bank; and any such items, or their proceeds, which can be identified as having come into the hands of its receiver, may be recovered by the sending bank. Richardson *v.* Continental Nat. Bank, 36 C. C. A. 315, 94 Fed. 450.

58. **Where owner of paper has no general deposit in collecting bank.**—Plano Mfg. Co. *v.* Auld, 14 S. Dak. 512, 86 N. W. 21, 86 Am. St. Rep. 769.

Where the owner of a check deposits it for collection with the expectation the bank is to pay him the avails in cash, the general rule that one who deposits in a bank becomes its creditor has no application. Blair *v.* Hill, 50 App. Div. 33, 63 N. Y. S. 670, affirmed in 165 N. Y. 672, 59 N. E. 1119.

59. Plano Mfg. Co. *v.* Auld, 14 S. Dak. 512, 86 N. W. 21, 86 Am. St. Rep. 769.

deemed to be an agent and trustee of the owner of the check, and the money so wrongfully retained and used to be a trust fund, which the owner may follow and reclaim,[60] if it can be identified,[61] and the rights of no innocent third parties have intervened.[62]

Necessity That Proceeds Be Shown to Have Passed into Assets of Bank.—It would seem to be the general rule that to entitle a claimant to a priority over other creditors of an insolvent bank on the ground that he is a cestui que trust, and not a creditor, as to the proceeds of papers sent by him to the bank for collection, and collected by the bank, but not remitted, he must show that such proceeds, in some form, have gone into the assets of the bank; and, if he fails to do so, he must share ratably with other creditors in the distribution of the assets.[63] Where a bank receives a note

60. Retention of proceeds and use thereof by collecting bank.—Kansas State Bank *v.* First State Bank, 62 Kan. 788, 64 Pac. 634, reversing 9 Kan. App. 839, 61 Pac. 868.

61. Necessity for identification.—Kansas State Bank *v.* First State Bank, 62 Kan. 788, 64 Pac. 634.

"The right of the principal owner of the fund derived from the collection of the check, to follow and reclaim it is determinable by rules frequently applied in this state. In Peak *v.* Ellicott, 30 Kan. 156, 1 Pac. 499, it was held that money so obtained by a bank constitutes a trust fund, which the owner may follow and reclaim from the bank, from an assignee of the bank. In that case the manner of identifying and tracing the trust fund received but little attention, but it was said that 'if the trust fund has been mixed with other funds of the bank, this can not prevent the plaintiff from following and reclaiming the fund, because, if a trust fund is mixed with other funds, the person equitably entitled thereto may follow it, and has a charge on the whole fund for the amount due.'" Kansas State Bank *v.* First State Bank, 62 Kan. 788, 64 Pac. 634.

62. In absence of intervention of rights of third parties.—Kansas State Bank *v.* First State Bank, 62 Kan. 788, 64 Pac. 634.

63. Necessity that proceeds shall have gone into assets of bank.—White *v.* Commercial, etc., Bank, 60 S. C. 122, 38 S. E. 453. See also, Windstanley *v.* Second Nat. Bank, 13 Ind. App. 544, 41 N. E. 956; In re Assignment, 4 O. Dec. 108, 2 N. P. 170; Boone County Nat. Bank *v.* Latimer, 67 Fed. 27; Kansas State Bank *v.* First State Bank, 9 Kan. App. 839, 61 Pac. 868; Commercial Nat. Bank *v.* Armstrong, 39 Fed. 684; Anheuser-Busch Brewing Ass'n *v.* Clayton, 6 C. C. A. 108, 56 Fed. 759; Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608; Sherwood *v.* Milford State Bank, 94 Mich. 78, 53 N. W. 923; Emigh *v.* Earling, 134 Wis. 565, 115 N. W. 128.

Where the F. Bank collected all paper sent to it by complainant under an arrangement which constituted the F. Bank the agent of complainant, the latter can recover on the ground of a trust, from a receiver of the F. Bank, such portion only of the proceeds of its paper sent to the F. Bank as it shows has passed into the receiver's hands, either in its original or some substituted form. Commercial Nat. Bank *v.* Armstrong, 39 Fed. 684.

Where complainant sent a draft to a bank for collection, charged with a trust to pay the proceeds thereof, when collected, to complainant, the bank being insolvent at the time, and its officers knew of its insolvency, and that the bank would be obliged to suspend within a day or two, and the bank received the draft of an agent of the owner to remit the proceeds thereof, when converted into a draft on another bank to the credit of complainant, but instead of so remitting the proceeds thereof it kept the same, and mingled the proceeds of such draft with its own funds, held, that such conversion by the bank was fraudulent, but that in an action by complainant for the recovery of such proceeds, it is incumbent upon the complainant to trace the fund misappropriated into the hands of the receiver subsequently appointed for the insolvent bank, before the latter can be charged with recognizing complainant's equitable title thereto. Illinois,

for collection and remittance, and does not remit, and fails with cash on hand less than the amount of the collection, the lien for trust funds converted is limited to the amount on hand, and does not extend to their assets, where there was no proof that they were obtained with the money con-

etc., Sav. Bank *v.* First Nat. Bank, 15 Fed. 858, 21 Blatchf. 275.

Plaintiff claimed a preference against the assets of an insolvent bank for moneys collected by the bank for the plaintiff, but there was nothing in the findings to show what was done with the moneys so collected. Held, that while there was a presumption that the moneys were deposited, or became a part of the assets, this was not conclusive, and plaintiff could not recover in the absence of evidence on that issue. Windstanley *v.* Second Nat. Bank, 13 Ind. App. 544, 41 N. E. 956.

Where one deposits a check with a bank for collection, and it is sent to the clearing house, and the same day the bank assigned, and neither the check nor the proceeds come to the assignee, the depositor is not entitled to preference over other creditors of the bank. In re Seven Corners Bank, 58 Minn. 5, 59 N. W. 633.

A bank sent to another items for collection, which it received and collected, partly by accepting a draft of another bank, and by charging the accounts of its depositors. Such drafts, together with one of its own, were forwarded in settlement, but were not paid, as both banks made assignments. Held, that the first bank did not have a preference over general creditors of the insolvent collecting bank on account of such collections, since, as it received no money, and there was no augmentation of its assets by such collection, no trust fund was created in its favor. Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608.

In an action to recover the avails of commercial paper sent by plaintiffs to defendant's assignor, an insolvent bank, for collection and remittance, it appeared that on August 16th plaintiffs sent to the bank four checks drawn on it, and a note, aggregating more than $500. The paper was received on the next day, and the checks were charged to the account of the drawers, which were good for the amounts, and a draft for the proceeds was sent to plaintiffs. The note was paid in cash on August 18th, and a draft for the amount was sent to plaintiffs. The money was mingled with other cash on hand, about $2,000, and much more than the amount of the note was paid out on the same day. Similar transactions were had up to August 22d, and on the next day the bank closed its doors. From August 17th to August 23d the bank received and paid out money in the usual course of business, and when it closed its doors it had on hand only $189 in cash. The drafts remitted to plaintiffs were not paid. Held, that a trust could not be impressed on the avails of the several collections, and followed into the hands of defendant. Frank *v.* Bingham, 58 Hun 580, 12 N. Y. S. 767, 35 N. Y. St. Rep. 714.

Where it is not shown that a certain collection made by a receiver of an insolvent national bank was forwarded by a correspondent of the bank, nor included in the list of items sent, it is not sufficiently traced; and this though the receiver testified that the item was collected for the forwarding bank. Richardson *v.* Louisville Banking Co., 36 C. C. A. 307, 94 Fed. 442.

Where drafts sent to a national bank were upon depositors in the bank, and the amount thereof was debited to their accounts, no money coming into the possession of the bank by reason thereof, the owner of the draft can not recover the amount thereof out of the general assets from the receiver of the bank on its insolvency. American Can Co. *v.* Williams, 176 Fed. 816, judgment affirmed in 101 C. C. A. 634, 178 Fed. 420.

Where a draft sent to a national bank for collection and remittance was paid by a check in favor of the bank, and was indorsed and transmitted to another bank, which credited the amount to the collecting bank, and the check was collected through the clearing house after the appointment of a receiver of the collecting bank on its insolvency, the draft not having been credited to the collecting bank to make good its overdraft until after the appointment of the receiver, though the receiver may institute proceedings to recover such amount, the owner of the draft is not entitled to recover it out of the general assets of the collecting bank where it has

verted.[64] Where a bank collects a note for a stranger, and intermingles the

not actually been collected. American Can Co. *v.* Williams, 176 Fed. 816, judgment affirmed in 101 C. C. A. 634, 178 Fed. 420.

A Texas bank, after receiving some notes from its New York Correspondent "for collection and returns," procured renewals of the same, after which the Texas bank endorsed them and deposited them as collateral with other banking houses in New York, to which they were paid, and were by them applied to the debts due them from the Texas bank. Held, that the New York bank, as to the amount thus collected on said notes, had no lien on the general assets of the Texas bank in the receiver's hands. One who receives the money of another in a fiduciary capacity and expends it in paying his own debts, does not thereby create a lien on the mass of his property for its repayment. The trust estate must ordinarily be clearly traced into specific property in order that the cestui que trust may be entitled either to the specific property or to a lien thereon. Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

The mere fact that a bank has, as agent, collected money which it failed to account for, is not sufficient, on the bank becoming insolvent, to impress the general assets with a trust for the payment of the money. Bank *v.* United States Sav., etc., Co., 104 Ala. 297, 16 So. 110.

The mere fact that a bank, to which a note was sent for collection, with instructions to immediately remit proceeds to the owner, collected the money and used it in its business, is insufficient, upon its insolvency, to impress a fund realized by the receiver on converting all its assets into cash with a trust for the payment of such collection. Ober & Sons Co. *v.* Cochran, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118.

Plaintiff sent to defendant's bank paper indorsed "For collection and immediate return" to plaintiff, and the paper was collected, and the proceeds mingled with other moneys of the bank, instead of forwarded to plaintiff. The bill contained an uncontroverted allegation that defendant's bank, at all times subsequent to the collection and at the time of defendant's appointment as receiver, had on hand cash to a greater amount than that due plaintiff. The bill asked to have the balance due plaintiff paid in full on the ground that the bank by receiving the paper for collection and immediate return became a trustee, and that either its entire property or the money in its vaults became impressed with the trust. Held that, if the mingling of the funds was a breach of trust, it was a conversion; and plaintiff became a simple contract creditor, with no preference at law. Philadelphia Nat. Bank *v.* Dowd, 38 Fed. 172, 2 L. R. A. 480.

It was immaterial whether or not the bank stood in a fiduciary capacity to plaintiff, as the facts stated in the bill showed that the money collected could not be traced into any specific investment or fund, but had been indistinguishably mingled with the general assets. Philadelphia Nat. Bank *v.* Dowd, 38 Fed. 172, 2 L. R. A. 480.

Where a check is sent to a bank for collection, and the collection is made by the check being included in a daily settlement made with another bank under a plan of exchanging checks and making clearances substantially as if the cash had been paid for the check, such plan of exchanging checks and making a settlement of the day's business can not be regarded as a mere payment of indebtedness by the bank receiving the check for collection; and hence the amount collected on such check went into and enlarged the assets of the bank, and was a part of the estate which passed to its receiver on its becoming insolvent just after the collection of the check, and was a charge on it. Kansas State Bank *v.* First State Bank, 62 Kan. 788, 64 Pac. 634.

A holder of a draft sent it to a bank for collection, with instruction to collect and remit the proceeds to a banker for the holder's credit. The drawee of the draft paid it by his draft on a third person, which was sent by the bank to its correspondent. The correspondent collected the money from the third person, and afterwards paid the proceeds to the assignee of the bank, which was insolvent at the time it received the draft for collection. Held, that the holder traced the proceeds into the hands of the assignee, and showed that such proceeds constituted trust property for his benefit. Hutchinson *v.* National Bank, 145 Ala. 196, 41 So. 143.

64. Boone County Nat. Bank *v.* Latimer, 67 Fed. 27.

Where customers' notes are trans-

money received with its own moneys, and afterwards becomes insolvent, a trust attaches to the money in possession of the bank to pay such note, though no trust attaches to the general assets of the bank, since it is presumed that the bank paid out its own money before embezzling the money of others.[65] When a bank, known by its officers to be insolvent, collects money for a customer and mingles the same with its own funds, which to an amount larger than the sum so received go into the hands of its receiver, it is not essential to the right of the customer to recover from the receiver that he should be able to trace the identical money into the receiver's hands; but it is sufficient to show that the sum which went into the receiver's hands was increased by the amount so collected.[66] A suit by one for whom a bank

ferred by A. bank to P. bank as collateral, under an agreement that said A. bank shall collect said notes, and account to P. bank in such Portland and Eastern exchange as it might receive in course of business, and said notes are collected, and the proceeds mingled with the other assets of the bank, and the funds of the said bank are not increased thereby, after which the said A. bank assigns, having no part of the proceeds of said securities on hand, and the assignee pays the amount of said securities to P. bank as cestui que trust, if the facts created a trust, the fact that there was no fund on which the trust could operate would defeat it. In re Assignment, 32 Ore. 84, 51 Pac. 87.

An insolvent bank, which held two city warrants for collection as agent for plaintiff, surrendered the warrants to the city treasurer, and received therefor his check on another bank for part of the amount and in satisfaction of taxes due from the bank to the city. The check was paid in part by the bank on which it was drawn, and the balance by checks on R. & Sons, and a draft on the N. P. Bank. The checks on R. & Sons were in the possession of the insolvent bank at the time of its failure, and passed to the receiver. The draft on the N. P. Bank was deposited to the credit of the insolvent bank, and the account was intact when the receiver was appointed. Held, that the funds in the receiver's hands were impressed with a trust in favor of plaintiff to the amount of the check on the N. P. Bank, and also to the amount of the checks on R. & Sons, when anything should be realized thereon, but not as to the amount of taxes satisfied by the city treasurer, or as to the amount of checks drawn on it and received in exchange in payment of the city treasurer's check. Warren-Scharf Asphalt Pav. Co. v. Dunn, 8 App. Div. 205, 40 N. Y. S. 209.

65. To what trust attaches.—Plano Mfg. Co. v. Auld, 14 S. Dak. 512, 86 N. W. 21, 86 Am. St. Rep. 769; Peters Shoe Co. v. Murray, 31 Tex. Civ. App. 259, 71 S. W. 977.

A draft sent to a bank indorsed for collection was paid by the drawee by check, which the bank collected through the clearing house. A memorandum was placed with the bank's cash to indicate that the proceeds of the draft were the property of the sender. The bank was closed the next morning, and the receiver credited such proceeds to the sender of the draft on the books of the bank. Held, that the fund was not so mingled that it could not be traced and identified, and that the sender could recover it. First Nat. Bank v. Armstrong, 36 Fed. 59.

Where the money collected for various strangers by a bank and intermingled with its own funds exceeds the amount of money in possession of the bank, on its becoming insolvent the latter money is to be ratably distributed between the creditors for whom the money was collected. Plano Mfg. Co. v. Auld, 14 S. Dak. 512, 86 N. W. 21, 86 Am. St. Rep. 769. And see Emigh v. Earling, 134 Wis. 565, 115 N. W. 128.

66. Identical money need not be traced into receiver's hands.—Western German Bank v. Norvell, 69 C. C. A. 330, 134 Fed. 724.

A bank which, although known by its officers to be insolvent, received a draft for collection without disclosing its insolvency to the owner, collected the same and mingled the proceeds with its own funds, remitting to the owner its own draft, which was not received until after the bank

collects a note and intermingles the proceeds with its own money against the receiver of the bank, after its insolvency, to impress a trust upon money in possession of the bank, and a partial satisfaction from such source, does not prevent such creditor from making application as a general creditor to be allowed to participate in the distribution of the general assets of the bank to the extent of the balance due.[67]

§ 166 (2) Title of Bank to Paper and Collections Made after Insolvency.—In General.—As has been already seen, when negotiable paper is deposited in a bank for collection, in the absence of special agreement to the contrary, the relation of principal and agent is thereby created between the depositor of the paper and the bank.[68] The property in such paper vests in the banker only when he has become absolutely responsible for the amount to depositor, and such an obligation, previous to the collection of the paper, can only be established by a contract to be expressly proved, or inferred from an unequivocal course of dealing.[69] It follows from this,

was placed in the hands of a receiver, was guilty of fraud, and the proceeds of the draft, when collected, remained the property of the sender, and may be recovered from the receiver, where they can be traced into his hands; and such right is not affected by the fact that the sender gave directions that the remittance should be made in New York exchange, which was done, the exchange being protested and never paid. Western German Bank *v.* Norvell, 69 C. C. A. 330, 134 Fed. 724.

A bank which receives for collection a draft or promissory note, and collects the money thereon, holds the same as trustee of the owner; and, in the event of insolvency, the trust character still adheres to the fund in the hands of the receiver, irrespective of other creditors, even though the owner had credit therefor in the bank books, and the money can not be traced into any specific property. Thompson *v.* Gloucester City Sav. Inst. (N. J.), 8 Atl. 97.

67 **Right to participation in assets as affected by suit to impress trust.**—Plano Mfg. Co. *v.* Auld, 14 S. Dak. 512, 86 N. W. 21, 86 Am. St. Rep. 769.

68. **Relation between depositor and bank that of principal and agent.**—See ante, "Title to Paper Received for Collection," § 159.

69. St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390, quoting Scott *v.* Ocean Bank, 23 N. Y. 289; Arnot *v.* Bingham, 55 Hun 553, 9 N. Y. S. 68, 29 N. Y. St. Rep. 878.

"If there be no bargain that the property should be changed the relation resembles that of principal and agent. Mere liberty to draw does not make out such a bargain, particularly where interest is allowed by the banker upon the bills only from the time when their amount is received." St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390.

Complainant sent a sight draft to a bank in New York, drawn on a debtor in Boston, and payable to the bank's order. In the accompanying deposit ticket, it was named under the head of "Checks," but it was credited on the bank's books as if it were a deposit of money. It was forwarded for collection, but before it was collected the bank closed its doors. There was no express agreement with the bank that out of town paper should be deposited as cash, nor was complainant indebted to the bank. During its five years of business with the bank, complainant had never drawn against out of town paper before it was actually collected; and, although complainant was allowed interest on its daily balance, it appeared that the bank reserved the right to charge exchange and interest for the average time taken in collection on such paper. Held, that the bank did not become owner of the draft. St Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390.

A principal consigned goods to a factor with authority to sell or reconsign. A company of which the factor was president reconsigned the goods and transferred the draft drawn

that when a contract is one for collection, and not of purchase, the depositor or bank forwarding paper for collection is entitled to all items not collected before the suspension of the collecting bank,[70] and afterwards collected by subagents, and traced to the possession of the receiver appointed to wind it up.[71] If, before the subagent parts with the money, or credits it upon the indebtedness of the agent bank to it, the insolvency of the latter is disclosed, it ought not to place the funds which it has collected, and which it knows belong to a third party, in the hands of that insolvent agent or its assignee;[72] and, on the other hand, such insolvent agent has no equity in claiming that this money, which it has not yet received, and which belongs to its principal, should be transferred to, and mixed with, its general funds in the hands of its assignee, for the benefit of its general creditors, and to the exclusion of the principal for whom it was collected.[73]

Title to Paper Deposited in Bank for Collection and Credit.—If paper be deposited in or forwarded to a bank for collection, and in pursuance of a prearranged mode of dealing, the bank immediately places the amount to the credit of the depositor and the depositor thereupon draws or is entitled to draw against the same as cash, this works a transfer of title, so that the depositor can not afterwards claim the paper; and it is immaterial that if the paper is not paid the bank has the right to charge it back.[74] This is in effect the purchase of the paper by the bank, and the

against them to a bank. Evidence examined, and held to show that the draft was not taken by the bank for collection, but was bought by it. Smith *v.* Jefferson Bank, 120 Mo. App. 527, 97 S. W. 247.

70. Title of depositor or forwarding bank to items uncollected at time of suspension.—Richardson *v.* Louisville Banking Co., 36 C. C. A. 307, 94 Fed. 442; Richardson *v.* Continental Nat. Bank, 36 C. C. A. 315, 94 Fed. 450.

71. Richardson *v.* Louisville Banking Co., 36 C. C. A. 307, 94 Fed. 442; Richardson *v.* Continental Nat. Bank, 36 C. C. A. 315, 94 Fed. 450; Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533.

The F. Bank offered to "collect at par" all paper sent it by complainant, "and remit" on specified dates. Complainant accepted the offer on a letter head containing the printed words: "For collection, ——; for credit, ——." All paper sent under this agreement was, at the suggestion of the F. Bank, indorsed, "Pay F. Bank for collection ——, for" complainant. The F. Bank thereafter wrote to complainant that "we collect at par, and include in our remittances everything collected to date." All paper sent by complainant was charged on its books to the F. Bank, "cash items" on transmission, and "time items" on their collection by the F. Bank, on whose books like credit entries to complainant were made. While complainant's cashier testified that in making such charges he understood that the F. Bank became indebted to complainant, he also stated that it was not intended to transfer the paper to or open a deposit account with the F. Bank. Held, that the relation between the F. Bank and complainant as to paper sent by the latter was that of principal and agent, and not that of creditor and debtor. Commercial Nat. Bank *v.* Armstrong, 39 Fed. 684, affirmed in 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533.

Such relation also continued as to proceeds of such paper collected by the F. Bank. Commercial Nat. Bank *v.* Armstrong, 39 Fed. 684, affirmed in 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533.

72. Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533.

73. Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533.

74. Title to paper deposited for collection and credit.—Ayres *v.* Farmers', etc., Bank, 79 Mo. 421; Bullene *v.*

fact that on default of payment by the drawee the bank has recourse upon indorser does not prevent title from passing. Such is the right of every indorsee for value but he is none the less the owner of the paper.[75]

§ 166 (3) Liability Where Collection Is Made by Charging to Account of Depositor.—According to the decisions in a number of juris-

Coates, 79 Mo. 426, 49 Am. Rep. 235; Flannery *v.* Coates, 80 Mo. 444.

"The rule which prevails and is generally recognized in regard to bank deposits is that, where a deposit is made in a bank in the ordinary course of business, either of money, or of drafts or checks received and credited as money, the title to the money or to the drafts and checks deposited, in the absence of any special agreement or direction, passes to the bank, and the relation of debtor and creditor arises between the depositor and the bank, without any element of a trust entering into the case. The bank, in such cases, acquires title to the money, checks, or drafts deposited, upon the implied agreement upon its part to pay full consideration for the same when called upon by the depositor in the usual course of business. Wasson *v.* Lamb, 120 Ind. 514, 22 N. E. 729, 6 L. R. A. 191, 16 Am. St. Rep. 342; Bedford Bank *v.* Acoam, 125 Ind. 584, 25 N. E. 713; Harrison *v.* Wright, 100 Ind. 515, 58 Am. Rep. 805; McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911; Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9." Union Nat. Bank *v.* Citizens' Bank, 153 Ind. 44, 54 N. E. 97.

By agreement and custom the Fidelity Bank received drafts from its correspondent bank at E., and credited them to it as cash, with the understanding that any draft which was unpaid should be charged back to the correspondent. The latter forwarded drafts which were credited to it, but were not collected before the Fidelity Bank failed. The drafts were paid after the appointment of a receiver, and the moneys actually came into his hands. The drafts were indorsed payable to the Fidelity Bank "for collection for the" bank at E. Held that, as the drafts were, when received, credited as cash to the bank at E., which had the right at once to draw against them, the indorsement for collection did not affect the result, and the bank had only the rights of a general creditor. First Nat. Bank *v.* Armstrong, 39 Fed. 231.

Plaintiff and defendant banks for several years had acted as agents for each other in the collection of checks, notes, and drafts, the practice being for each to credit the other for checks when received, and for drafts and notes when advised of their payment. When a check was returned unpaid after being credited, the amount thereof was charged back again. The amounts thus collected were mingled with the general funds of the bank. Plaintiff sent defendant a note for "collection and credit," which, on maturity, was paid by a check, and credit was immediately given on the books. But defendant failed, and the check passed into the hands of the receiver. Held that, in view of the course of dealing, the two banks stood in the relation of debtor and creditor with respect to the amount of the check, and it became a part of the assets of the bank. Franklin County Nat. Bank *v.* Beal, 49 Fed. 606.

75. Ayres *v.* Farmers', etc., Bank, 79 Mo. 421.

"Where the owner of a bill sends it to his correspondent to be collected, with directions to place it to his credit, and at the same time draws at sight against the fund, the title to the bill passes so that the proceeds can not be followed into the hands of third persons receiving them in good faith." Clarke *v.* Merchants' Bank, 2 N. Y. 380, quoted in Ayres *v.* Farmers', etc., Bank, 79 Mo. 421.

A. sent to B., for collection, a bill due at sight, and drew sight drafts against the anticipated collection. B. received for the bill the check of the drawee, credited the amount to A., and deposited the check in the bank in which he kept his account, where it was passed to his credit as cash. B. stopped payment the same day, without paying A.'s drafts, and being indebted to the bank for checks charged to his account more than the amount of the remitted bill. The bank had not paid anything, or given any credit, because of the deposit of the check. Held, that the title to the check passed when deposited, and that A. could not recover its amount from the bank. Clark *v.* Merchants' Bank, 2 N. Y. 380, reversing 3 N. Y. Super. Ct. 498.

dictions, a bank holding a draft or note for collection, which accepts a check of the drawee or maker, who is one of its depositors, having a sufficient balance to his credit, and, without actually separating the amount from the general mass of its moneys, charges the same to the depositor's account, does not hold the money thus collected as trustees, and if the bank becomes insolvent the drawer of the draft or the owner of the note is a mere general creditor and not entitled to priority of payment out of the bank's assets.[76] Accepting such check in payment of the depositor's debt to the drawer, and

76. **Liability where collection made by charging to account of depositor.**—Anheuser-Busch Brewing Ass'n *v.* Clayton, 6 C. C. A. 108, 56 Fed. 759; Sherwood *v.* Milford State Bank, 94 Mich. 78, 53 N. W. 923; Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977.

A bank holding a draft for collection and returns, which accepts a check of the drawee, one of its depositors, and, without separating the amount from the general mass of its moneys, charges the same to the drawee, and credits the drawer on its books, holds the money as agent for the drawer, and not as trustee; and after the bank becomes insolvent the drawer is a mere general creditor, and not entitled to priority of payment out of the bank's assets. Anheuser-Busch Brewing Ass'n *v.* Clayton, 6 C. C. A. 108, 56 Fed. 759.

A general depositor of a bank, who had a balance equal to the amount of his note held by the bank for collection, drew his check on the bank for the amount of his note, which was accepted by the cashier, and charged against his balance, and he received his note as paid. Shortly afterwards the bank failed for a large amount, due principally to its depositors, most of which was owing at the time of this transaction. No money was realized from the check, and no use was made of it to pay off the debts or increase the assets of the bank. Held, that the facts were not sufficient to create a trust in favor of the owners of the note. Sherwood *v.* Milford State Bank, 94 Mich. 78, 53 N. W. 923.

Plaintiff bank sent a note to defendant bank for collection, which was paid by the maker by a check drawn on defendant, and the note delivered to him, the amount collected being entered as a credit on the collection register in favor of plaintiff. The next day the defendant sent plaintiff a draft on another bank, wherein it had sufficient funds on deposit to meet it, in payment of the amount collected on the note, which plaintiff deposited and had forwarded for payment, but before it was paid defendant suspended, and payment was refused. The transaction was in accordance with the custom of the defendant as well as a general custom among banks. Held that, in the absence of knowledge on the part of the officers of the defendant of its insolvency, it had a right to mingle the funds collected with its own, and that it was the intention of both the parties that when the note was collected plaintiff was to receive a credit with defendant, and that defendant might treat the funds in the same manner as funds deposited by its customers, and hence the relation of debtor and creditor existed, and plaintiff was not entitled to a preferential payment of the amount of the collection out of funds coming into the hands of a receiver for defendant as being impressed with a trust in its favor. Union Nat. Bank *v.* Citizens Bank, 153 Ind. 44, 54 N. E. 97.

Where a bank collects a note by taking a check on itself, of one having a sufficient deposit, and sends a draft therefor, which is not paid, by reason of its suspension, the bank will not be held to be a trustee as to the amount collected, but such creditor will stand on the same footing as other creditors of the bank. Billingsley *v.* Pollock, 69 Miss. 759, 13 So. 828, 30 Am. St. Rep. 585.

A bank received two drafts, indorsed to it for collection, on account of the drawers, against two of its depositors. After acceptance by the latter the bank charged to each depositor's account the amount of the draft accepted by him. Before remitting to the drawers, the bank assigned, having on hand cash sufficient to pay such drafts. Held, that the drawers were not entitled to a preference as to the funds on hand at the time the bank failed, where the assignee holds nothing which he or such drawers can identify with the

charging amount of it on the depositor's account by the bank, is but a shifting of its liability, whereby it becomes the drawer's debtor, and assumes the obligation to pay to the latter the amount of the check, less exchange.[77] In other jurisdictions, however, it is held, that where the owner of a note sends it to a bank for collection only, and the maker's check is drawn on that bank for the amount thereof, and is delivered to it, and the note is thereupon canceled and surrendered, and the check is charged to the amount of the maker, which is good for the amount, it is in fact a collection of the amount from the general fund in the hands of the bank, and a specific appropriation of that amount to the payment of the note; and, as between the owner of the note and the receiver of the bank, the title to the money dedicated to the payment of the note remains in the owner.[78]

drafts, or trace as a payment of them. Freiberg *v.* Stoddard, 161 Pa. 259, 28 Atl. 111.

A draft drawn on a debtor was sent for collection to a bank in which the debtor was a depositor. With the depositor's consent, the bank issued a draft to the creditor on a bank in another city and charged the amount thereof to the depositor. Before such charge was made, the money was remitted to pay the draft. Held that, on failure of the first bank, the creditor can not claim that the money sent to the second bank was so separated from the general funds of the first bank that it should be applied to his draft. Commonwealth *v.* State Bank, 216 Pa. 124, 64 Atl. 923.

Where plaintiff sent a note and mortgage to a bank, with directions to collect the same, and "forward draft" for the amount less its collection fee, the money received by the bank in payment thereof was not impressed with a trust in plaintiff's favor, so as to entitle her to recover the whole amount as a preferred claim from a receiver appointed for the bank after the collection was made, though said bank was insolvent at the time it received said note and mortgage, and though payment was made by the mortgagor with a check drawn on the bank. Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940.

Plaintiff drew a draft on its debtor, and sent it to defendant's assignor, a banker, for collection. The drawee paid it with a check on the bank of such banker, where the drawee had sufficient funds to meet it, and the amount was charged to the account of such drawee, and a draft issued on another bank, and mailed to plaintiff. Before such draft reached plaintiff, the banker assigned to defendant, and the bank on which the draft was drawn refused to pay it. When the bank failed, money more than sufficient to pay such draft passed to the assignee. There was no evidence of the course of dealing between plaintiff and defendant's assignor, or of any instructions given by plaintiff. Held, that the relation between plaintiff and defendant's assignor was merely that of debtor and creditor, and plaintiff had no claim to the money received by defendant as assignee as a trust fund. Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977.

77. Anheuser-Busch Brewing Ass'n *v.* Clayton, 6 C. C. A. 108, 56 Fed. 759.

"Accepting Morris's check in payment of his debt to appellant, and charging the amount of it to Morris's account by the bank, was but a shifting of its liability, whereby it became appellant's debtor, and assumed the obligation paid to it the amount of the check less exchange. There is nothing to indicate that this amount was separated and kept unmingled with the bank's own money; but, on the contrary, it is conceded that it is undistinguishable from the mass of the bank's own money, and can not be traced to and identified in the hands of the receiver. This being so, appellant has no better equity than the other creditors of the bank, and is entitled to no priority over them." Anheuser-Busch Brewing Ass'n *v.* Clayton, 6 C. C. A. 108, 56 Fed. 759.

78. Arnot *v.* Bingham, 55 Hun 553, 9 N. Y. 68, 29 N. Y. St. Rep. 878.

A bank holding a note for collection from one not a depositor, and which receives payment thereof by charging to the account of a depositor having sufficient to his credit to meet

§ 166 (4) Liability of Transmitting Bank on Insolvency of Correspondent Bank.—In those jurisdictions where the bank receiving paper for collection is considered to be the agent of the owner, and correspondent banks or other subagents employed to make the collection are considered as the agents of the transmitting bank, such transmitting bank would seem to be liable to the owner of the paper upon the insolvency of the correspondent bank.[79] Where, however, as is the case in some states, the bank to which paper is entrusted for collection is held only to the duty of exercising good faith and due discretion in the choice of subagents for making the collection, and the latter are deemed to be the agents of the owner of the paper, the transmitting bank which delivers such paper to its correspondent bank for collection will not be liable for a loss of the collection occasioned by the subsequent failure of the bank so chosen.[80]

it, does not become thereby a debtor of the owner of the note, but holds the amount of the collection in trust for him; such trust being impressed on all the funds of the bank, which may be followed though they pass into the hands of a receiver. People *v.* Merchants' Bank, 92 Hun 159, 36 N. Y. S. 989, 72 N. Y. St. Rep. 93.

79. Transmitting bank held liable to owner of paper on insolvency of correspondent bank.—Kent *v.* Dawson Bank, Fed. Cas. No. 7,714, 13 Blatchf. 237.

Defendants received from the owner a bill of exchange on an agreement that they would send it to the place where it was payable for collection, and pay to the owner the proceeds when collected. The bill was paid to the bank to which it was sent, and by direction of defendants the proceeds were placed to their general account; but before the money was drawn out by defendants the bank failed. Held, that the depositary became by the deposit of the bill the agent of defendants, and the proceeds were, for all legal purposes, in defendants' hands, so as to make them liable to the owner for the proceeds of the bill. Young *v.* Noble, 2 Disn. 485, 13 O. Dec. 297.

Plaintiff bank forwarded to defendant bank for collection, and so indorsed, a note payable at a third bank. Defendant indorsed the note for collection, and forwarded it to the third bank, with a letter instructing the latter bank, after making the collection, to credit the same to defendant, with whom said third bank had a running account. The note was collected, the proceeds credited to defendant, and on the same day the collecting bank failed, being at the time overdrawn with defendant. Held, that defendant was liable to plaintiff for the amount of the note. First Nat. Bank *v.* First Nat. Bank, 55 Neb. 303, 75 N. W. 843.

80. Transmitting bank held not liable on due care exercised in selection of subagent.—Dorchester, etc., Bank *v.* New England Bank (Mass.), 1 Cush. 177.

For a statement of the two conflicting views as to the liability of banks receiving paper for collection for the acts or omissions of subagents chosen by them, see ante, "Nature of Agency Created by Such Appointment," § 162 (2).

As to the liability, or freedom from liability, of the transmitting bank for the negligence or default of agents or correspondents in the payment of proceeds of collections, or failure to collect, see post, "Negligence or Default of Agents or Correspondents," § 170; "Failure to Collect," § 171.

Where F. & Co., who were bankers at Ottawa, on being applied to by S. to collect a draft on N., L. & Co., of Chicago, agreed to send the draft to B. & Co., of Chicago, for presentation, the proceeds when paid, on account of the unsettled state of the currency, to be sent by express to F. & Co., who were to incur no liability, and by them to be delivered to S. in the package, and the draft which was made payable to F. & Co. was by them indorsed and sent to their correspondents, B. & Co., with said instructions, and B. & Co. failed three days after collecting the money, and before remitting the same, the money having been by mistake and against their instructions, passed by B. & Co. to the credit of F. & Co., it was held,

§ 167. —— Insolvency of Transmitting Bank—§ 167 (1) General Rule as to Liability of Collecting Bank to Owner of Paper.—It is a well-established general rule that, wherever it appears on the face of a paper that it was in the possession of a bank for collection, the proceeds of the paper are the property of the owner, and the actual collecting bank is liable to the owner in case of the insolvency of any intermediary bank which has received it for collection,[81] as for money had and received,[82] unless the

that when the draft was sent forward to B. & Co., they became the agents of S. for the collection of the money, and not of F. & Co.; that nothing could be inferred against F. & Co., from the fact that the money was by mistake and without their consent passed to their credit; that, it appearing that the character of B. & Co. for solvency was good in Chicago, where they did business, there was no negligence in F. & Co. in sending the draft to an irresponsible firm for collection, nothing more than suspicions as to their solvency, not based on facts, having been communicated to them, and they having confidence in their solvency, that F. & Co. were not guilty of negligence in taking no steps to correct the mistake in passing the money to their credit, it not appearing that they had any notice of the mistake till they heard of the failure; nor of negligence in not writing to learn the reason why the money was not sent by express as directed, there being only two days intervening between its collection and the failure; and that therefore F. & Co. were not liable to S. for the proceeds of such draft. Fay *v.* Strawn, Fed. Cas. No. 7,714, 32 Ill. 295.

81. General rule as to liability of collecting bank to owner of paper on insolvency of transmitting bank.—*United States.*—Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533; Evansville Bank *v.* German-American Bank, 155 U. S. 566, 39 L. Ed. 259, 15 S. Ct. 221; First Nat. Bank *v.* Reno County Bank, 3 Fed. 257, 1 McCrary 491, 1 Ky. L. Rep. 241; Commercial Nat. Bank *v.* Hamilton Nat. Bank, 42 Fed. 880; Beal *v.* National Exch. Bank, 5 C. C. A. 304, 55 Fed. 894, affirming 50 Fed. 355; Wilson & Co. *v.* Smith, 3 How. 763, 11 L. Ed. 820.

Alabama.—Peoples' Bank *v.* Jefferson County Sav. Bank, 106 Ala. 524, 17 So. 728, 54 Am. St. Rep. 59; Morris & Co. *v.* Alabama Carbon Co., 139 Ala. 620, 36 So. 764.

Indiana.—First Nat. Bank *v.* First Nat. Bank, 76 Ind. 561, 40 Am. Rep. 261.

Kentucky.—Armstrong *v.* National Bank, 90 Ky. 431, 12 Ky. L. Rep. 393, 14 S. W. 411, 9 L. R. A. 553.

Maryland.—Tyson *v.* Western Nat. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161.

Massachusetts. — Manufacturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553, 20 N. E. 193, 2 L. R. A. 699, 12 Am. St. Rep. 598; Freeman's Nat. Bank *v.* National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42.

Missouri.—Bury *v.* Woods, 17 Mo. App. 245; Millikin *v.* Shapleigh, 36 Mo. 596, 88 Am. Dec. 171.

Montana.—Guignon *v.* First Nat. Bank, 22 Mont. 140, 55 Pac. 1051.

Nebraska.—Branch *v.* United States Nat. Bank, 50 Neb. 470, 70 N. W. 34.

New Jersey.—Nash *v.* Second Nat. Bank, 67 N. J. L. 265, 51 Atl. 727.

New York.—Importers', etc., Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319, affirming 51 Hun 640, 4 N. Y. S. 599; Arnold & Co. *v.* Clark, 3 N. Y. Super. Ct. 491.

North Carolina.—Boykin *v.* Bank, 118 N. C. 566, 24 S. E. 357; National Citizens' Bank *v.* Citizens' Nat. Bank, 119 N. C. 307, 25 S. E. 971; Stevenson *v.* Fidelity Bank, 113 N. C. 485, 18 S. E. 695.

Pennsylvania.—Hackett *v.* Reynolds, 44 Leg. Int. 93.

Wyoming.—Foster *v.* Rincker, 4 Wyo. 484, 35 Pac. 470.

Where a bank received a draft as agent for plaintiff, of which fact the indorsement was a notice to other banks, it did not thereby become in-

82. Liability as for money had and received.—Morris & Co. *v.* Alabama Carbon Co., 139 Ala. 620, 36 So. 764.

A party, having sent a draft through a bank for collection, may maintain an action against the bank having possession of the paper or money, where the transmitting bank has become bankrupt. Armstrong *v.* National Bank, 90 Ky. 431, 12 Ky. L. Rep. 393, 14 S. W. 411, 9 L. R. A. 553.

collecting bank has remitted the proceeds, or its equivalent to the transmit-

debted to plaintiff for the amount thereof till after collection and possession of the proceeds, either actually or by settlement with the parties; and defendant bank, to which the draft had been sent by the first bank for collection, could not escape liability to plaintiff by making payment to the first bank, or giving the credit to it on the account between the banks after the first bank had stopped payment. Old Nat. Bank *v.* German-American Nat. Bank, 155 U. S. 556, 39 L. Ed. 259, 15 S. Ct. 221.

Where a bank sends commercial paper to another bank for collection and credit on general account, the custom between them being to enter the credit only when the paper is collected, the relation between the banks is that of principal and agent until the collection is made and the money received by the second bank; and if the latter sends it to another bank, which collects the paper, but does not remit the proceeds until after the agent bank has failed, the principal can recover the proceeds from the receiver thereof. Beal *v.* National Exch. Bank, 5 C. C. A. 304, 55 Fed. 894, following Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533.

Where, prior to the collection of a draft, the forwarding bank made an assignment, the drawer of the draft was entitled to recover the amount subsequently collected from the collecting bank as money had and received. Morris & Co. *v.* Alabama Carbon Co., 139 Ala. 620, 36 So. 764.

Plaintiff, being the owner of an acceptance on a firm of Louisville, Ky., sent it to the Fidelity Bank of Cincinnati for "collection and credit," though the draft itself was indorsed in blank. The Fidelity Bank sent it to a Louisville bank, which collected it on June 17th, and mailed to the Fidelity Bank a notice of the collection, which was received on the 18th. No credit to plaintiff for the draft was entered by the Fidelity Bank until the 20th. At the close of banking hours on that day, the bank was seized by the federal bank examiner, the proceeds of the draft remaining in the Louisville bank. Held, that the Fidelity Bank, by a mere entry on its books, could not change its position as agent to that of a debtor, in fraud of plaintiff's rights. Armstrong *v.* National Bank, 11 Ky. L. Rep. 90.

The owner of a note deposited it with a bank for collection. The bank indorsed it to a correspondent, and the latter collected the note, and credited the proceeds upon a balance due from the forwarding bank. The forwarding bank and said correspondent had for many years kept a running account with each other, and it did not appear that the remittance of the note had increased the credit of the forwarding bank. Held, the forwarding bank having failed, that the collecting bank was liable to the owner of the note for the amount collected. Hackett *v.* Reynolds, etc., Co. (Pa.), 44 Leg. Int. 93.

Plaintiffs sent a draft on the defendant bank to the K. Bank for collection, and it was presented to defendant through the clearing house, and paid for in the settlement made by defendant with the clearing house. The K. Bank then became insolvent, and defendant, instead of paying the money to the K. Bank, paid it to the clearing house, which applied it to a debt owed the house by the K. Bank. Held, that such payment by defendant was not an acquittance of the debt due plaintiffs. Crane, etc., Co. *v.* Fourth St. Nat. Bank, 4 Pa. 131.

The fact that a negotiable promissory note was indorsed by the payee (as owner), and deposited in a bank for collection, and by that bank transferred in the usual course of exchange to another bank for the same purpose, does not create, by lien or otherwise, any title in the latter bank to the note or the avails, as against the payee, though the former bank fails before the maturity of the note, owing the latter a large balance. Van Amee *v.* Bank (N. Y.), 8 Barb. 312, 5 How. Prac. 161.

A check, which had been indorsed by plaintiff to N., a banker, "For collection and credit," and sent by N. to defendant for collection, was credited by defendant to N. before payment, according to an agreement between them, and checks drawn on such credit were paid. It was the custom of defendant, in case checks so sent were not paid, to charge them back to N. Held, that the payment of the checks drawn by N. on defendant against such credit did not give defendant title to plaintiff's check; so as to prevent him from recovery therefor, where N. became insolvent before the check was

ting bank, before it had knowledge of such transmitting bank's insolvency.[83] Simply entering credits on mutual accounts between the ac-

paid. Bank *v.* Gilman, 81 Hun 486, 30 N. Y. S. 1111, 63 N. Y. St. Rep. 299, affirmed in 152 N. Y. 634, 46 N. E. 1145.

Plaintiff deposited a draft with the Bank of H. for collection, which forwarded it for collection to defendant bank, and defendant collected it after the Bank of H. failed. The arrangement between the banks was that each should daily remit to the other every collection as made, but this was not strictly complied with by the Bank of H., and the final drafts sent by it to defendant in payment of balance were dishonored. Held, that defendant was liable to plaintiff for the collection, defendant not being a purchaser of the draft, but merely a subagent for its collection. Stevenson *v.* Fidelity Bank, 113 N. C. 485, 18 S. E. 695.

A national bank collected a note for plaintiff by accepting a draft for the amount on another party, which it forwarded to its correspondent for collection, and at the same time sent plaintiff a draft on the same correspondent as a remittance of the proceeds of his note. The correspondent received the money on the draft sent it for collection, but before plaintiff's draft was paid by the correspondent the bank failed. Held, that the bank was only agent for plaintiff, and that the money derived from his note was a trust fund, which did not become a part of the bank's assets. Foster *v.* Rincker, 4 Wyo. 484, 35 Pac. 470.

Agency terminated by insolvency of forwarding bank.—Where a forwarding bank makes an assignment, and ceases to do business prior to the collection of a draft sent to another bank for collection, such assignment terminates the collector's agency for the forwarding bank. Morris & Co. *v.* Alabama Carbon Co., 139 Ala. 620, 36 So. 764.

The A. Bank received from the B. Bank, which was its creditor to a large amount, a check drawn in favor of the latter, and indorsed to the A. Bank "for collection for account of" the B. Bank, accompanied by a letter stating that the same was inclosed "for collection and credit." The A. Bank indorsed the check to the C. Bank, also one of its creditors, "for collection for" the A. Bank, accompanied by a letter stating that it was inclosed "for collection and credit." The C. Bank collected the money, having knowledge by its cashier and teller (derived from newspaper reports) that the A. Bank had become insolvent two days before. In suit by the B. Bank against the C. Bank for the amount of the check, held, that the insolvency of the A. Bank revoked the authority given to it by the B. Bank to credit to it the proceeds of the check, of which the C. Bank was bound to take notice, and that plaintiff was entitled to recover. First Nat. Bank *v.* First Nat. Bank, 76 Ind. 561, 40 Am. Rep. 261.

A national bank became the agent of plaintiff bank to collect its checks and drafts, under an arrangement by which no debt was created from the agent to the principal on account of checks received for collection until such checks were paid. Held, that a right which the agent had, when such checks were collected, of mingling the proceeds with its own money, and making itself the debtor of plaintiff therefor, terminated when it became insolvent; and that where a check belonging to plaintiff, and indorsed "for collection" for plaintiff, was sent by the agent to defendant bank, which collected it after the agent had closed its doors, defendant was liable to plaintiff for the proceeds of such check. Manufacturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553, 20 N. E. 193, 12 Am. St. Rep. 598, 2 L. R. A. 699, followed in Freeman's Nat. Bank *v.* National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42.

A bank in Ohio forwarded a draft payable in New York, which was placed in its hands for collection, to its correspondent in New York for collection there. Held, that if, before such draft is collected, the Ohio bank becomes insolvent, the owner of the draft may, by proper notice, revoke its agency, and made such correspondent its agent for the collection, so as to make it directly liable to said owner for the proceeds of the draft when collected. Reeves, etc., Co. *v.* State Bank, 8 O. St. 465.

83. Unless proceeds remitted before knowledge of insolvency of transmitting bank.—National Citizens' Bank *v.* Citizens' Nat. Bank, 119 N. C. 307, 25 S. E. 971; Boykin *v.* Bank, 118 N. C. 566, 24 S. E. 357.

In an action by the drawer to recover the proceeds of a draft collected by a bank, the fact that the bank has credited such proceeds to the account

tual collecting banks and their intermediaries will not protect the actual collector of such drafts and checks from the demands of the owner.[84] Of course, a bank which has received the check or draft from an agent of the principal will be protected, if it has sent to the agent, before the agent's known insolvency or the principal's demand, the funds, or their equivalent, collected on the paper.[85] Where a collection made by a bank's correspondent and paid to a receiver subsequently appointed for the bank is followed into the receiver's hands as a trust fund, the owner is not entitled to interest thereon.[86]

of another bank, from which the draft was received, is no defense, where the indorsement thereon showed that the sending bank held it for collection only; the money being subject to the order of the real owner, unless actually paid over to the sending bank before notice of the revocation of its agency. Boykin *v.* Bank, 118 N. C. 566, 24 S. E. 357.

Where the payee of a check deposited it with a bank for collection, and the bank forwarded it to defendant bank, its correspondent, for credit, which received a draft from the bank on which the check was drawn in payment thereof, defendant is not liable to the payee of the check for the conversion of the draft, on the insolvency of the bank in which he deposited it, in the absence of a demand; and neither a telegram from the drawer of the check demanding that the draft be held, nor an inquiry by the bank on which the check was drawn as to whether defendant could not hold the draft, is a sufficient demand on behalf of the payee. Castle *v.* Corn Exch. Bank, 148 N. Y. 122, 42 N. E. 518.

84. Liability to owner notwithstanding proceeds credited to remitting bank.—Branch *v.* United States Nat. Bank, 50 Neb. 470, 70 N. W. 34; Arnold & Co. *v.* Clark, 3 N. Y. Super. Ct. 491; Boykin *v.* Bank, 118 N. C. 566, 24 S. E. 357.

Where a bank receives a draft, with directions to collect, and notify the owner, and its correspondent collects the fund, the mere crediting to the principal bank by the correspondent upon its own books, of the proceeds, the principal bank not being at the time indebted to the correspondent, does not change the relation of the principal bank to the owner from that of agent to that of debtor. Hence, the bank having failed, and the fund having been paid by the correspondent to the receiver, the owner might follow the fund. Guignon *v.* First Nat. Bank, 22 Mont. 140, 55 Pac. 1051.

Where plaintiff drew a draft on the buyer of certain oats, payable to the order of M. Bank, and the next day delivered the draft to such bank for collection, and it indorsed the draft and sent it to defendant bank for collection, and on the afternoon of such day the M. Bank, being insolvent, was closed, and the next day the defendant bank presented the draft to the drawee and received payment therefor, and the plaintiff was not credited with the amount by the M. Bank, nor was that bank credited with it by defendant, until after the draft was paid, when defendant credited the account current between the banks, having no notice of the insolvency of the first bank, plaintiff was entitled to recover the proceeds from the defendant. Nash *v.* Second Nat. Bank, 67 N. J. L. 265, 51 Atl. 727.

An indorsee for collection for account of a prior indorsee for collection is liable to the owner of the draft for the amount collected, and not remitted to the owner or the prior indorsee, though credit for the amount was given the latter, and he charged the collector, and credited the owner, and was charged for the same by the owner, and though the collector, by virtue of an agreement with its indorser, whereby the amount due from one to the other for collections was to be placed to the latter's credit with a certain bank, wrote to that bank to place the amount to the credit of the prior indorsee, which order it could have countermanded after notice of the latter's failure. Commercial Nat. Bank *v.* Hamilton Nat. Bank, 42 Fed. 880.

85. National Citizens' Bank *v.* Citizens' Nat. Bank, 119 N. C. 307, 25 S. E. 971.

86. Owner not entitled to interest on funds recovered.—Guignon *v.* First Nat. Bank, 22 Mont. 140, 55 Pac. 1051.

§ 167 (2) Right of Correspondent to Retain Proceeds on Account of Debt Due from Remitting Bank.—The courts in most of the states of this country seem to have followed the rule laid down by the United States supreme court to the effect that if negotiable paper, not at maturity, be indorsed and delivered to a bank merely for collection, and be sent by such bank to another bank for collection, without notice that it does not belong to the former, the latter may retain the paper and its proceeds to satisfy a claim for a general balance against the former, if that balance has been allowed to arise and remain on the faith of receiving payment from such collection, pursuant to a usage between the two banks.[87] This

87. **General rule as to retention of proceeds where balance allowed on faith of receiving payment from the proceeds of paper transmitted.**—*United States.*—Bank *v.* New England Bank, 1 How. 234, 11 L. Ed. 115, reaffirmed in 6 How. 212, 12 L. Ed. 409; Sweeny *v.* Easter, 1 Wall. 166, 17 L. Ed. 681; Vickrey *v.* State Sav. Ass'n, 21 Fed. 773.

Colorado.—Wyman *v.* Colorado Nat. Bank, 5 Colo. 30, 40 Am. Rep. 133.

Illinois.—American Exch. Nat. Bank *v.* Theummler, 195 Ill. 90, 62 N. E. 932, 58 L. R. A. 51, 88 Am. St. Rep. 177.

Indiana.—Rathbone *v.* Sanders, 9 Ind. 217.

Maryland.—Cecil Bank *v.* Farmers' Bank, 22 Md. 148.

Massachusetts.—Wood *v.* Boylston Nat. Bank, 129 Mass. 359, 37 Am. Rep. 366.

Michigan.—Garrison *v.* Union Trust Co., 139 Mich. 392, 102 N. W. 978, 70 L. R. A. 615, 111 Am. St. Rep. 407.

Mississippi.—Continental Nat. Bank *v.* First Nat. Bank, 84 Miss. 103, 36 So. 189.

Missouri.—Millikin *v.* Shapleigh, 36 Mo. 596, 88 Am. Dec. 171; Bury *v.* Woods, 17 Mo. App. 245.

Oklahoma.—Winfield Bank *v.* McWilliams, 9 Okl. 493, 60 Pac. 229.

Pennsylvania.—Jones & Co. *v.* Milliken & Son, 41 Pa. (5 Wright) 252; First Nat. Bank *v.* Gregg & Co., 79 Pa. 384; Hackett *v.* Reynolds, 114 Pa. 328, 6 Atl. 689.

West Virginia.—Carroll *v.* Exchange Bank, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101.

Where there have been, for several years, mutual and extensive dealings between two banks, and an account current kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection when received, and charged all costs of protests, postage, etc., accounts regularly transmitted from the one to the other, and settled upon these principles; and upon the face of the paper transmitted, it always appeared to be the property of the respective banks, and to be remitted by each of them upon its own account, there is a lien for a general balance of account upon the paper thus transmitted, no matter who may be its real owner. Bank *v.* New England Bank, 1 How. 234, 11 L. Ed. 115.

The Fidelity Bank, when it failed, owed $5,361.40 to the bank at E., which had collected $1,873.97 on drafts of other banks sent to it by the Fidelity Bank for collection, and had credited the proceeds to the Fidelity Bank. The proceeds were claimed both by the banks which had sent them and by the receiver of the Fidelity Bank. Held, that the bank at E. should be allowed to prove up its claim before the receiver for whatever amount it saw fit, and the receiver should be allowed to accept the proof and pay a dividend thereon, without prejudice as to any claim he might have on the proceeds of the drafts collected by the bank at E. First Nat. Bank *v.* Armstrong, 39 Fed. 231.

Plaintiff, holding a personal draft payable to her order, and drawn on a bank in St. Louis, left it for collection with a bank in Milwaukee, indorsed in blank. The Milwaukee bank sent the draft to defendant, its regular Chicago correspondent, which sent it to a bank in St. Louis, collected the amount from the drawee, and credited it to the account of the Milwaukee bank, which was overdrawn. The last-named bank had meanwhile suspended payment, but defendant had no knowledge of this fact when it made the credit, and had at no time notice that the Milwaukee bank merely held the draft for collection, and was not its owner. Held, that defendant was entitled to apply the proceeds of the draft to the overdrawn account of the Milwaukee

doctrine has, however, been repudiated in a few states, where it is held that every bank through which a check, note, or draft is deposited for collection,

bank, and was not liable therefor to plaintiff. Judgment, American Exch. Nat. Bank *v.* Theummler, 94 Ill. App. 622, reversed. American Exch. Nat. Bank *v.* Theummler, 195 Ill. 90, 62 N. E. 932, 58 L. R. A. 51, 88 Am. St. Rep. 177.

Where there have been for a long time mutual dealings and an account current between two banks, in which they mutually credited each other with the proceeds of all paper remitted for collection, when received, and charged all costs of protest, postage, etc., the respective accounts being regularly transmitted from one to the other, and settled as accounts of the respective banks, and upon the face of the paper transmitted it always appeared to be the property of the banks, respectively, remitted on their own account, and balances were generally suffered to remain until reduced by the proceeds of bills transmitted from one to the other in the usual course of business, there is a lien for a general balance of account upon the paper thus transmitted, no matter who may be its real owner. Rathbone *v.* Sanders, 9 Ind. 217.

A state bank sent to a savings bank a draft for collection, indorsing it generally, "Pay City Savings Bank or order." The savings bank stamped on the face of the draft, "Collection No. 4627," indorsed it on the back, "Pay to any state or national bank," and sent it to a private bank, accompanied by a letter stating that it was sent for collection and credit, and directing the private bank to return the draft at once, if it was not paid, and to give reason for nonpayment. The draft was drawn against a car of grain, which did not arrive for several days; and the private bank, according to its custom, held the draft, awaiting the arrival of the car, at which time the draft was paid. The private bank carried a balance with the savings bank, and it was its custom, when making collections for that bank, to credit it with the amount of the collections. Upon receiving payment of the draft, the private bank notified the savings bank that it had been paid, and its account credited; the notification reaching the savings bank after it had ceased to do business and was insolvent. Held, that the private bank was entitled to a lien on the proceeds of the draft, as against the state bank, which was the owner thereof, and that its failure to return the draft when it was not paid immediately did not deprive it of its right to the lien. Garrison *v.* Union Trust Co., 139 Mich. 392, 102 N. W. 978, 70 L. R. A. 615, 111 Am. St. Rep. 407.

The Penn Bank and Exchange Bank had mutual and extensive dealings for years; each transmitting paper to the other for collection, collecting and crediting the sending bank with proceeds, and from time to time settlements were made between them. On the 24th day of May, 1884, the Penn Bank inclosed in a letter to the Exchange Bank, "for collection," marked "No prin.," the following draft: "At sight pay to the order of Penn Bank fifteen hundred dollars, value received, and charge to account of D. W. C. Carroll. To the Riverside Iron Works, Wheeling, W. Va." The draft was indorsed: "Pay Exchange Bank, or order, for account of Penn Bank, Pittsburg, Pa. G. L. Reiber, Cashier." This draft was received by the Exchange Bank on Monday morning, May 26th, at once placed to the credit of the Penn Bank, sent out by messenger for collection, and paid by the drawee at 9:30 a. m. At that time, after giving the Penn Bank credit for the $1,500 draft, it still owed the Exchange Bank $205.43. At 12:05 p. m. on that day the Penn Bank failed. The Exchange Bank had no other notice than as above set forth that the Penn Bank did not own the paper. D. W. C. Carroll, the real owner of the paper, brought an action of assumpsit against the Exchange Bank for amount of draft, and interest, and recovered in the court below. Held, that the judgment must be reversed and judgment entered for defendant. Carroll *v.* Exchange Bank, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101.

Where paper is indorsed in blank and delivered to a bank for collection, and the bank forwards it to another bank for collection, receiving a cash credit therefor and also being allowed to draw against the same, the lien of the correspondent bank is superior to the rights of the owner of the paper. Cornwell *v.* Kinney, 1 Handy 496, 12 O. Dec. 255.

A general indorsement on a draft sent for collection conveys an appar-

even though it be indorsed in blank, acts as the agent of the real owner of the check, and in no event acquires a lien on it for a balance due from the bank from which it was received, unless the collecting bank part with a present consideration in good faith.[88] If the collecting bank has notice that the

ent title to the bank to which it is sent, and on that bank's sending it to another, which actually makes the collection, entitles the last-named bank to a lien on the proceeds for its general balance with the intermediate bank, though the first-named bank is in fact the owner. Garrison *v.* Union Trust Co., 139 Mich. 392, 102 N. W. 978, 70 L. R. A. 615, 111 Am. St. Rep. 407.

Where a bank, in the due course of business, receives from a correspondent bank a check indorsed in blank, and in good faith parts with value, or permits an existing indebtedness to remain unpaid by reason thereof, it is entitled to the proceeds of such check against the real owner who placed it in the hands of the correspondent bank for collection, though the check is not actually collected until after failure of the correspondent bank. Winfield Nat. Bank *v.* McWilliams, 9 Okl. 493, 60 Pac. 229.

Plaintiff indorsed in blank a check of which he was payee, and deposited the same in a bank with which he was accustomed to transact business. The bank credited him with the amount of the check as cash, indorsed it for collection, and sent it to a correspondent bank, with a request for an advance, which was made. Afterwards, and before the check was collected, the bank in which plaintiff made the deposit failed. Held, that the correspondent bank was not liable to plaintiff for the check. Cody *v.* City Nat. Bank, 55 Mich. 379, 21 N. W. 373.

Although a general indorsement of a bill of exchange is prima facie proof that the indorsee is the owner, yet if such bill, notwithstanding such general indorsement, is sent for collection only, it still remains the property of the person sending it as to all parties having notice. Blaine *v.* Bourne & Co., 11 R. I. 119, 23 Am. Rep. 429.

Where a bank forwarding a draft for collection inclosed a letter of the drawer, directing the forwarding bank to collect the draft and place the proceeds to the drawer's credit, such letter was notice to the collecting bank that the drawer was the beneficial owner of the claim sought to be collected, notwithstanding the form of the draft and the indorsement were such as to transfer the legal title to the claim, and hence, on the failure of the forwarding bank, the collecting bank was not entitled to credit the proceeds of the draft against the debt of the forwarding bank to it. Morris & Co. *v.* Alabama Carbon Co., 139 Ala. 620, 36 So. 764.

Indorsement of collection number as notice.—Where a draft bears a general indorsement apparently transferring title to a bank, the fact that the bank indorses a collection number upon it does not put a correspondent bank upon notice that it is held for collection merely. Garrison *v.* Union Trust Co., 139 Mich. 392, 102 N. W. 978, 70 L. R. A. 615, 111 Am. St. Rep. 407.

88. View that collecting bank must be purchaser in good faith on present consideration. — Garrison *v.* Union Trust Co., 139 Mich. 392, 102 N. W. 978, 70 L. R. A. 615, 111 Am. St. Rep. 407; Winfield Nat. Bank *v.* McWilliams, 9 Okl. 493, 60 Pac. 229; Commercial Bank *v.* Marine Bank, 42 N. Y. 337, 37 How. Prac. 432, 1 Abb. Dec. 405, 6 Abb. Prac., N. S., 33; Hutchinson *v.* Manhattan Co., 9 Misc. Rep. 343, 29 N. Y. S. 1103, 60 N. Y. St. Rep. 612; Stark *v.* United States Nat. Bank, 41 Hun. 506, 4 N. Y. St. Rep. 56; McBride *v.* Farmers' Bank (N. Y.), 25 Barb. 657, affirmed in 26 N. Y. 450.

Where one bank transmits and delivers to another bank promissory notes of third persons, for collection merely, the latter bank, supposing the notes to be the property of the former bank, but not having parted with anything, given any credit, relinquished any security, or assumed any responsibility, on the faith of such notes, is not entitled to hold the proceeds, on account of a debt due from the former bank. McBride *v.* Farmers' Bank (N. Y.), 25 Barb. 657, affirmed in 26 N. Y. 450.

To justify a bank which has collected notes belonging to a third party, transmitted to it for collection merely, by a bank at the time indebted to such collecting bank, in withholding from the owner of the notes, as belonging to such debtor bank, the money so collected, a credit must have been given on the strength of the particular notes in question or their proceeds. Mc-

transmitting bank has no interest in the paper sent to it, and that such paper was transmitted merely for collection, then the collecting bank is not entitled to retain such paper or its proceeds to answer any balance against the trans-

Bride *v.* Farmers' Bank (N. Y.), 25 Barb. 657, affirmed in 26 N. Y. 450.

A bank receiving from another bank notes, bills, etc., for collection, obtains no better title to them or their proceeds than the remitting bank, unless it becomes a purchaser for value, without notice of any defect of title. Commercial Bank *v.* Marine Bank, 42 N. Y. 337, 1 Abb. Dec. 405, 6 Abb. Prac., N. S., 33, 37 How. Prac. 432.

A bank receiving notes, bills, etc., for collection from another bank is not a purchaser thereof for value by reason merely of its having a balance against the remitting bank, for which it had refrained from drawing, in reliance upon a course of dealings between the banks to collect notes for each other, each keeping an open account of such collections, treating all the paper sent for collection as the property of the other, and drawing upon the proceeds for the balance at pleasure. But if the receiving bank is at liberty, in pursuance of its arrangement with the remitting bank, to credit the paper on receiving it, and does so to form a fund on which the remitting bank is entitled to draw immediately, then the ownership of the paper and its proceeds, as between the banks, is in the receiving bank. Where, however, the paper is to be transmitted to the receiving bank for collection merely, and is to be credited to the remitting bank when received by the receiving bank, title does not pass to the latter bank. Commercial Bank *v.* Marine Bank, 42 N. Y. 337, 1 Abb. Dec. 405, 6 Abb. Prac., N. S., 33, 37 How. Prac. 432.

The property in business paper received for collection by one engaged in the business of banking and collections, forwarded by him in the usual course of such business, without any express agreement in reference thereto, does not become vested in the correspondent, although he may have remitted upon general account in anticipation of collection; but it is only where by express contract or well-established course of dealing the correspondent becomes responsible for the collection, and can not seek reimbursement of advances in case of nonpayment, that the correspondent can retain the paper, or the proceeds thereof, as against the real owner. Corn Exch. Bank *v.* Farmers' Nat. Bank, 42 Hun 659, 4 N. Y. St. Rep. 557, 25 Wkly. Dig. 553.

Where defendant bank received a check from another bank for collection in the usual course of business, it can not apply the proceeds to the indebtedness of such other bank as against the owner of the check, who deposited it with such other bank for collection, though defendant had an agreement with the other bank for a lien on all its property and securities in defendant's hands, and on any balance of its deposit account. Hutchinson *v.* Manhattan Co., 9 Misc. Rep. 343, 29 N. Y. S. 1103, 60 N. Y. St. Rep. 612.

Where, when a negotiable paper is sent by one bank to another bank for collection, it is the custom for the collecting bank to remit any sum arising from such collection, in excess of that owing them, and this custom was for some time observed by the plaintiff and defendant banks, when plaintiff received checks from defendant it was its duty to collect them, and remit any difference in favor of defendant between those items and the ones due from defendant to it. Minier *v.* Second Nat. Bank, 47 Hun 632, 13 N. Y. St. Rep. 222.

Plaintiff bank entered into an agreement with the F. Bank by which each was to make collections for the other, and remit every ten days. After the F. Bank had become insolvent, but before it suspended, it received a check from plaintiff for collection. The F. Bank then sent the check in question to defendant, its collecting agent. Defendant collected the check, retained the proceeds, and credited the account of the F. Bank, which was then indebted to defendant in a sum greater than the amount of the check. Held, that defendant was not a bona fide owner of the check for value, and was liable to plaintiff for the amount thereof. Bank *v.* Wisconsin, etc., Fire Ins. Co., 59 Hun 620, 12 N. Y. S. 952, 36 N. Y. St. Rep. 584.

An insolvent bank took a certificate on a second bank, on a deposit to the credit of the holder thereof, when its officers knew it was insolvent, and a few hours thereafter it was closed. Next day a third bank received said certificate, and collected it from the

mitting bank.[89] Even if the collecting bank had no notice that the transmitting bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, it is not entitled to retain as against the real owner unless credit was given to the transmitting bank or balances suffered to remain, to be met by the negotiable paper, transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks.[90]

second bank, and applied the amount on a pre-existing debt due from the insolvent bank to it. Held, that the third bank was not a bona fide holder, and hence it was liable to the depositor for the amount of the certificate. Harris *v.* First Nat. Bank (Tenn.), 41 S. W. 1084.

89. Where paper received with notice of ownership in third person.—Bank *v.* New England Bank (U. S.), 1 How. 234, 11 L. Ed. 115, reaffirmed in 6 How. 212, 12 L. Ed. 409; Sweeny *v.* Easter (U. S.), 1 Wall. 166, 17 L. Ed. 681; First Nat. Bank *v.* Bank, 33 Fed. 408.

Where a promissory note, left by the holder with a bank for collection, is sent by such bank to another bank to be collected, or returned, the latter bank, if it have notice that the note does not belong to the bank from whom it was received, or if the circumstances known to its officers are such as to put them on the inquiry, can not, as against the owner, retain the note for a balance due to such bank from the bank transmitting it; especially in the absence of any express agreement that such bank should have a lien upon the notes sent to it by the other bank for collection. Van Amee *v.* Bank (N. Y.), 8 Barb. 312, 5 How. Prac. 161.

Where a banker, having mutual dealings with another banker, is in the habit of transmitting to him, in the usual course of business, negotiable paper for collection, the collection being in fact sometimes on account of the transmitting banker himself and sometimes on account of his customers, and fails, owing his corresponding banker a balance in general account, such corresponding banker can not retain to answer that balance any paper so transmitted for collection, and really belonging to third persons, if he knew it was sent for collection merely; and, as respects the knowledge of or notice to the receiving banker, it is unimportant from what source he has derived it. Sweeny *v.* Easter (U. S.), 1 Wall. 166, 17 L. Ed. 681.

In an action against a bank for the proceeds of a bill of exchange, it appeared that the bill had been transmitted to the defendant by the cashier of another bank, where it was lodged for collection, with an indorsement, and a letter informing the defendant that it was sent for collection only. Held, that the defendant could not set off a claim against the bank from which the bill had been received. Lawrence *v.* Stonington Bank, 6 Conn. 521.

Facts held to constitute notice as to actual ownership in another.—Where the holder of an acceptance of a draft indorses it to one bank "for collection," which in turn indorses it to another bank for the same purpose, the first indorsement is notice to the latter bank that the first indorser is the owner and the first bank merely agent for collecting the acceptance, so that the second bank can not detain the proceeds for payment of the general balance of their account with the other bank. Cecil Bank *v.* Farmers' Bank, 22 Md. 148.

Where a bank indorses a draft for collection to another bank, which bank, in turn, indorses it also for collection to a third bank, and that bank collects it, it can not apply the proceeds to a debt due it by the second or intermediate bank, that bank being insolvent, but the proceeds belong to the bank first making the indorsement, the restrictive indorsements giving notice of such ownership. City Bank *v.* Weiss, 67 Tex. 331, 3 S. W. 299.

The indorsement of a draft to a bank for collection is notice to a bank to which it is forwarded for that purpose that the forwarding bank is not the owner, and on the latter's failure after collection and notice of credit, as in the usual course of business, the collecting bank can not apply the proceeds to an open account against the forwarder, as against the real owner. First Nat. Bank *v.* Bank, 33 Fed. 408.

90. Bank *v.* New England Bank (U. S.), 1 How. 234, 11 L. Ed. 115, reaffirmed in 6 How. 212, 12 L. Ed. 409; Sweeny *v.* Easter (U. S.), 1 Wall. 166,

§ 168. Payment of Proceeds—§ 169. —— Liability in General—§ 169 (1) Duty to Account to Principal for Proceeds.—In General. —A bank, being the collecting agent of the person who deposits with it paper for collection,[91] is bound to account to its principal,[92] and liable for failure to pay over to him the proceeds of such collection;[93] unless it has actual

17 L. Ed. 681; Garrison *v.* Union Trust Co., 139 Mich. 392, 102 N. W. 978, 70 L. R. A. 615, 111 Am. St. Rep. 407; Winfield Nat. Bank *v.* McWilliams, 9 Okl. 493, 60 Pac. 229; American Exch. Nat. Bank *v.* Theummler, 195 Ill. 90, 62 N. E. 932, 58 L. R. A. 51, 88 Am. St. Rep. 177; Carroll *v.* Exchange Bank, 30 W. Va. 518, 4 S. E. 440, 8 Am. St. Rep. 101; Hoffman *v.* Miller, 22 N. Y. Super. Ct. 334.

Where a banker in one city, acting only as an agent to transmit, sends the draft of a third person to a banker in another city for collection merely, and no advances are made nor new credits given on account of the draft, and there is no evidence of the mode of dealing between them, the collecting banker can not, on failure of his correspondent, credit the proceeds of the draft to his account, but is liable therefor to the owner. Jones & Co. *v.* Milliken & Son, 41 Pa. (5 Wright) 252.

Where a bank receives from a correspondent a note for collection and credit, it will not be entitled, as against the real owner, to apply the proceeds to the correspondent's indebtedness, although the note has been indorsed generally to the correspondent, unless it has made advances on the faith of the note. First Nat. Bank *v.* Gregg & Co., 79 Pa. 384.

A. deposited with B. a bank, for collection, a note, which he indorsed in blank. B sent it to its correspondent C, indorsed: "Pay N., cashier, or order, for account B." C gave nothing for the note, and afterwards collected the amount of it. Prior to the collection B became insolvent, and was indebted to C in the sum of $7,000, and C applied the proceeds of the note to this indebtedness. Held, upon a suit by A against C., that the usage or custom between B and C to apply the collections to overbalances could not prevail, and that C was liable to A. for the amount of the note. Hackett *v.* Reynolds, 114 Pa. 328, 6 Atl. 689.

M. deposited with L., his banker, two drafts for collection. L. sent them to a bank in St. Louis, indorsed "for collection." The bank credited the amount realized from the drafts to the account of L., who was in its debt to a considerable sum. L. failed after the first draft was paid, but before the second had been collected. Thereupon M. notified the bank, which had been ignorant of the fact, that he was owner of the drafts. Held, that M. was entitled to the proceeds, as the bank had made no advance on the faith of these particular bills, and there was no understanding or previous course of business between L. and the bank which authorized the application of remittances of paper to the credit of the previous account. Millikin *v.* Shapleigh, 36 Mo. 596, 88 Am. Dec. 171.

When one bank transmits commercial paper to another bank for collection merely, with instructions to remit the proceeds, the collecting bank has no such title to the paper, unless it has made advances thereon, or has become a purchaser for value, as will authorize it to retain the proceeds, as against the true owner of the paper, on account of a balance due by the transmitting bank. Lindauer *v.* Fourth Nat. Bank (N. Y.), 55 Barb. 75.

An agreement between two banks that all commercial paper forwarded by one to the other for collection shall be held as collateral security for overdrafts by the forwarding bank, does not give the collecting bank a lien upon such paper unless that bank has made specific advances thereon. Dod *v.* Fourth Nat. Bank (N. Y.), 59 Barb. 265.

91. Bank *v.* Friar, 88 Mo. App. 39. See ante, "Relation between Bank and Depositor for Collection," § 156.

92. Duty of collecting bank to account to principal.—Bank *v.* Friar, 88 Mo. App. 39.

93. Plaintiff delivered a deed and the purchaser's check on a distant bank to defendant, with instructions to deliver the deed on collection of the check, and to credit the proceeds to plaintiff's account. After the bank on which the check was drawn had mailed a draft to defendant in payment of the check, but before defendant had received it, the purchaser requested defendant to return the draft,

notice of the fact that a third party and not its principal is the owner and entitled to its proceeds,[94] or that its principal has obtained possession of the paper by theft or fraud.[95] The mere fact that a note had been assigned to a

because he was not satisfied with the title to the property, which defendant did. Held that, though the draft was payable to defendant, it held the proceeds in trust for plaintiff, and, since the mailing was equivalent to a delivery, defendant, by the wrongful return of the draft, was estopped to claim that he did not receive the proceeds of the check, and was liable to plaintiff therefor. Gregg v. Bimetallic Bank, 14 Colo. App. 251, 59 Pac. 852.

A check drawn on defendant bank was indorsed in blank by the payee, and left with the H.'s private bankers, for collection. They indorsed it to plaintiff's cashier for collection only, and sent it to plaintiff, their correspondent; and the latter in like manner indorsed it to the cashier of defendant, with directions to remit to plaintiff its proceeds. On the day of receiving it, defendant charged the check to the account of the drawer, and canceled it, and at the same time drew its sight draft for the amount, less exchange, and mailed it to plaintiff. On the previous day H. had failed, and on the day after the check had been paid the payee requested defendant to stop payment of its draft, which it did. Held, that defendant could not defeat a recovery on the draft by plaintiff on the ground that the latter did not hold the check for value, and was not entitled to its proceeds as against the payee. Corn Exch. Bank v. Farmers' Nat. Bank, 118 N. Y. 443, 23 N. E. 923, 7 L. R. A. 559.

A national bank may take an absolute assignment of a claim for collection, and agree to pay the proceeds or part thereof to another, and by such transfer the legal title passes to the bank, and its agent to collect the money thereon can not refuse to pay it to the bank, on the ground that it had no legal right to own such claim. King v. Miller, 53 Ore. 53, 97 Pac. 542.

Where a national bank assumed control of a creamery corporation, and operated the same under an agreement with milk producers to pay them the entire proceeds of the butter manufactured from the producer's milk after deducting a commission of 3½ cents per pound, the proceeds of the butter collected by the bank after deducting the commission was the property of the producers until it was paid over, and the bank, having applied such money to other purposes, became at least indebted to the producers therefor. Emigh v. Earling, 134 Wis. 565, 115 N. W. 128.

Effect of limitation of liability by express company receiving draft for collection.—An express company, on receiving a draft for collection, gave a receipt for it, containing a condition that the company would not be liable for loss or damage unless the claim therefor should be presented within ninety days. Held, that this condition had no application to neglect or refusal of the express company, after receiving the money, to pay it over. Bardwell v. American Exp. Co., 35 Minn. 344, 28 N. W. 925.

94. Bank v. Friar, 88 Mo. App. 39.

In an action against a bank for converting moneys of plaintiff, it appeared that checks payable to plaintiff corporation were indorsed in plaintiff's name by one C., and placed with defendant bank for collection, and the money was paid over by defendant to C. when collected. C. had been accustomed to collect the moneys and pay the bills of plaintiff without objection. Held, that plaintiff's officers were estopped to deny C.'s authority to make such collections. Craig Medicine Co. v. Merchants' Bank, 59 Hun 561, 14 N. Y. S. 16, 36 N. Y. St. Rep. 923.

An agent, authorized to indorse checks of customers payable to the principal and deposit them in designated banks for collection, indorsed checks and deposited them with a broker as margins on a personal speculative stock account. The broker deposited the checks in a bank, which received them and paid the proceeds thereof to him in good faith. Held, that as the indorsements made by the agent were not forgeries, within Negotiable Instruments Law, Laws 1897, c. 612, § 42, providing that a forged signature is inoperative, and no right to the instrument can be acquired thereby, the bank was not liable to the principal as for a conversion of the checks. Salem v. Bank, 110 App. Div. 636, 97 N. Y. S. 361.

95. Bank v. Friar, 88 Mo. App. 39.

Plaintiff employed C., a banker, to obtain money plaintiff had on deposit in a bank in Italy, delivering to C. the

third person is not sufficient, on its collection, to authorize the bank to turn the proceeds over to such third person.[96] On the contrary, possession of a note by a party, and delivery of it by him to a bank for collection, authorizes the bank to collect it and place the proceeds to his credit.[97] It is no defense to an action against an agent for money collected by him to show that in equity the money belonged to a third party.[98] Where an agent receives money from third persons for his principal by his authority, the agent is liable to the principal therefor, though the money accrued from an illegal transaction between his principal and such third persons who had no connection with the agent.[99] A bank with which a note is deposited by the payee

bank book representing the deposit. C. delivered the book with a forged power of attorney authorizing him to draw the money, falsely executed by a person who pretended to be plaintiff, to defendant trust company, which advanced all the money on the book, and forwarded it with the power of attorney countersigned by the Italian consul in New York to the Italian bank for payment. In the meantime C. converted the money and absconded, and plaintiff stopped payment and sued to recover the book or its value. Held, that C. having pursued the usual method in obtaining the money on the book, though the means were illegal, the trust company, having acted in accordance with its usual custom, was not liable. Chiarello v. Savoy Trust Co., 141 App. Div. 141, 125 N. Y. S. 1069.

96. Notwithstanding assignment of paper to third person.—Bank v. Friar, 88 Mo. App. 39.

Where a party in possession of a note delivers it to a bank for collection, the mere fact that the note had been assigned to a third person is not sufficient, on its collection, to authorize the bank to turn the proceeds over to him; and hence it was proper for the bank, in the absence of actual notice that the proceeds of the note belonged to such third person, to pay them over to the person who delivered it for collection. Bank v. Friar, 88 Mo. App. 39.

97. Bank v. Friar, 88 Mo. App. 39, citing Boeka v. Neulla, 28 Mo. 180; Davis v. Carson, 69 Mo. 609; Spears v. Bond, 79 Mo. 467; Willison v. Smith, 52 Mo. App. 133.

98. Monongahela Nat. Bank v. First Nat. Bank, 226 Pa. 270, 75 Atl. 359.

99. Monongahela Nat. Bank v. First Nat. Bank, 226 Pa. 270, 75 Atl. 359.

A collecting bank received payment of a check, but on notice that the check was fraudulent it paid the money back on the same day and returned the check to the bank which sent it without giving notice of such payment and return. Held, that the collecting bank in a suit by the transmitting bank to recover the amount of the check which had been paid can not set up as a defense that the cashier of the transmitting bank knew of the fraudulent character of the check. Monongahela Nat. Bank v. First Nat. Bank, 226 Pa. 270, 75 Atl. 359.

A bank that without notice of wrongdoing receives a draft for collection and obtains payment and in good faith pays the proceeds over to its employer is not liable to the drawee in damages because the latter made payment without consideration and in reliance on a forged bill of lading which the drawer had attached and caused to be forwarded with the draft. Nebraska, etc., Grain Co. v. First Nat. Bank, 78 Neb. 334, 110 N. W. 1019.

"The functions and obligations of a collecting agent, merely as such, do not differ essentially or characteristically from those of a messenger boy. What may be his moral or social standing or financial responsibility are, so long as he is free from knowledge or participation in any wrongdoing by his principal, matters of no importance. He performs his whole duty by delivering what he is charged with delivering and receiving what he is entrusted to receive, in exchange, and by disposing of the latter as his principal has directed. It is not only not his duty, but it would be an impertinence by him, to inquire into the value, genuineness, or validity of either the one article or the other." Nebraska, etc., Grain Co. v. First Nat. Bank, 78 Neb. 334, 110 N. W. 1019.

"The business of banking and of collection agencies could not be carried on safely, or at all, if such institutions were held to be liable for the

for collection can not refuse to return it, or its proceeds, to the depositor, on the ground that it was given to defraud creditors of a third person, unless the bank itself is one of those creditors.[1] Where a running account is kept between two banks, and one of them neglects to pay over money received upon drafts collected for the other, the drawer of the drafts is not liable, but the defaulting bank is.[2]

Payment of Proceeds to One Not the Owner.—A bank receiving a draft for collection is liable in an action for money had and received to the true owner, provided notice of such ownership is given before the proceeds are paid over to the depositor of the draft.[3] Where one draws a check payable to the order of a certain person as "cashier," and delivers it to another person to be deposited for collection in a private bank conducted by the person to whom the check is drawn, and another, the bank has no authority to credit the proceeds of the check to the depositor, and permit him to draw against it, but is liable to account for proceeds to the drawer of the check.[4]

Application of Proceeds to Debts Due Bank.—Proceeds of collections which have gone to the credit of a general deposit account may, in the absence of notice of other equities, be applied to a debt due from the depositor to the bank.[5]

frauds and forgeries of their principals with respect to collateral documents and transactions of which they were ignorant, or if their failure to inquire into and ascertain the genuineness and good faith of such matters was held to be actionable negligence." Nebraska, etc., Grain Co. *v.* First Nat. Bank, 78 Neb. 334, 110 N. W. 1019.

1. Retention on ground that note given to defraud creditors.—First Nat. Bank *v.* Leppel, 9 Colo. 594, 13 Pac. 776.

2. Liability of collecting bank to correspondent bank for proceeds of draft.—Kupfer *v.* Bank, 34 Ill. 328, 85 Am. Dec. 309.

3. Payment of proceeds to one not the owner.—Union Bank *v.* Johnson (Md.), 9 Gill & J. 297.

B. employed S. to take timber from B.'s land, B. to be allowed one cent per foot, and have a lien on the timber for the payment. S. took the timber, sold it, and received a note for it in his own name, which was collected by a bank. B. gave the bank notice that the proceeds were his, and not to pay to S., and indemnified it; but the bank paid to S. Held, that B. could recover the amount with interest. First Nat. Bank *v.* Bache, 71 Pa. 213.

4. Kuder *v.* Greene, 72 Ark. 504, 82 S. W. 836.

Where the drawer of a check payable to the cashier of a bank for collection had no notice of the bank's custom to pay the proceeds of such checks to the persons depositing them, he was not bound thereby. Kuder *v.* Greene, 72 Ark. 504, 82 S. W. 836.

5. Application of proceeds to debts due bank.—Gardner *v.* National City Bank, 39 O. St. 600.

A bank may apply the proceeds of a draft which it has collected for a depositor, upon any balance due to it on general account with the depositor. Chaffee *v.* Bank, 40 O. St. 1.

But a bank has no lien upon the proceeds of a draft which it has collected for a depositor, upon the faith of which it has made no advances, and therefore can not apply such proceeds to a note held by it against the depositor, as against the owners of the funds. The only way that the bank can, in such case, arrest any claim to such proceeds by reason of holding such note, is to use the note as a set-off in an action for the proceeds of the draft. Chaffee *v.* Bank, 40 O. St. 1.

A mercantile firm had been in the habit of depositing customers' notes with the bank for collection, the proceeds to go to their credit. The firm being generally indebted to it, the bank always treated such paper as collateral. Certain notes were deposited by the firm without anything indicating the exact purpose for which they were left with the bank. It was

§ 169 (2) Duty to Obey Instructions as to Disposition of Proceeds.—Where paper is sent to a bank with instructions as to the disposition to be made of the proceeds, such instructions must be complied with, and the correspondent will be liable in damages for a misapplication of the proceeds.[6]

§ 169 (3) Duty as to Remittance of Proceeds.—If a draft is sent to a bank with request for immediate collection and remittance, and the collecting bank accepts it with that understanding, its failure to make the remittance immediately after the collection is a fraudulent appropriation of the proceeds of the collection.[7] What is a prompt transmittal of funds, within the meaning of an agreement between a bank and one who sends it notes for collection, depends upon the understanding of the parties, shown by the usage or course of business between them.[8]

§ 169 (4) Sufficiency and Medium of Payment.—Medium of Payment.—Where a bank receiving paper for collection mingles the proceeds of such collection with its own funds, payment of such proceeds must, in the absence of agreement to the contrary between parties, be made in lawful currency.[9] Money collected by one bank for another, placed by the collecting bank with the bulk of its ordinary banking funds and credited to the transmitting bank in account, becomes the money of the former. Hence any depreciation in the specific bank bills received by the collecting bank which may happen between the date of the collecting bank's receiving them and the other bank's drawing for the amount collected falls upon the former.[10]

held, that under this course of dealing between the bank and the firm, the bank had a right to retain and collect the notes, as against the firm, and apply the proceeds to the payment of the balance due on their account. Studebaker Bros. Mfg. Co. *v.* First Nat. Bank (Tex. Civ. App.), 42 S. W. 573, affirmed in 93 Tex. 739, no op.

Generally, as to the lien of collecting bank on paper deposited for collection, see ante, "Lien of Collecting Bank," § 159 (3).

6. **Duty to obey instructions as to disposition of proceeds.**—Where drafts are sent to a bank for collection with instructions that the proceeds be applied to the payment of certain notes held by the bank for collection, the bank has no legal right to make any other disposition of the sum so collected. First Nat. Bank *v.* Munzesheimer (Tex. Civ. App.), 26 S. W. 428.

A bank sent to its correspondent drafts for collection, with instructions for the disposition of the proceeds. The correspondent collected the drafts, and misapplied the proceeds. Held, that the correspondent was liable for damages though the bank sustained no injury. Bank *v.* Metropolitan Nat. Bank, 97 N. Y. 639.

7. **Failure to remit as conversion.**—Mechanics' Nat. Bank *v.* Miners' Bank (Pa.), 13 Wkly. Notes Cas. 236.

8. **What constitutes prompt transmittal.**—McCormick Harvesting Mach. Co. *v.* Yankton Sav. Bank, 15 S. Dak. 196, 87 N. W. 974.

9. **Medium of payment.**—Strauss *v.* Bloom, 18 La. Ann. 48.

S. left with B. & Co. a draft for collection, and the funds received by them in payment of the draft were mingled and used with their own, which were at the time in Confederate currency. In an action to recover from them the amount collected, it was held that an offer of payment in Confederate treasury notes was not good, but that they must pay the amount due in United States lawful currency. Strauss *v.* Bloom, 18 La. Ann. 48.

10. **Liability for depreciation of bank bills received.**—Marine Bank *v.* Fulton

Credit to Third Person at Owner's Order as Payment to Latter.—Where a bank, indebted to one for the amount of a draft collected, is directed by the latter to deliver over the cash to a third person who is a depositor in the bank, the latter, by accepting the order, and crediting the amount to the third person, extinguishes the debt.[11]

Payment by Correspondent to Transmitting Bank.—When a bank indorses commercial paper "for collection," and forwards the same to another bank, the latter, though it acts only as agent for the remitting bank, and has no mutual account with it, is not required to keep the moneys collected separate from other moneys in its possession, and to remit the identical money, nor is the payor required to see that the identical money is remitted.[12]

Payment by Setting Off against Debt Due from Transmitting Bank.—In the absence of directions to the contrary, the collecting bank may pay the money collected to the bank to which it should regularly be remitted by setting it off against a debt due from that bank, and giving credit for it in the account.[13]

Method of Remitting Collection.—There are respectable authorities which hold that it is the custom of banks to remit by check or draft or certificate for the proceeds of any collection, instead of remitting the exact money collected,[14] and that this custom is so general and universal that

Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785.

At a time when the banks in this state were receiving and paying out the paper of Illinois banks, which were of doubtful solvency and their paper at a discount, two bankers, in the usual course of their business, had mutual accounts growing out of remittances and collections, and the relations existing between them were such that the depositor could withdraw his funds at pleasure, and the receiver of the deposits could in like manner return them: Held, that in the absence of any arrangement between them on the subject, the holder of the deposits would be compelled to pay or return in current or par funds. Cushman *v.* Carver, 51 Ill. 509.

But where the banker who owned the deposit, having a considerable balance to his credit with his correspondent, notified the latter by letter that he should require that any remittances he might desire should be made in the paper of certain banks, which he specified, this direction left the banker, who held the deposits, at liberty to make the remittances in bills of any of the banks so designated, which the party to whom the remittances should be made would be compelled to receive at their nominal value. Cushman *v.* Carver, 51 Ill. 509.

And after such letter of direction, the holder of the deposits was thereby authorized to remit to the owner the entire balance which stood to his credit, without further order, in the class of paper so specified, at its nominal value, or in the paper of any one of the banks named, as it was not stated that payment must be made in the bills of all those banks. Nor would this right of the holder of the deposits be affected by the fact that subsequent to the notice given him, and before he had received any further advice on the subject, the paper of such banks had continued to depreciate in value. Cushman *v.* Carver, 51 Ill. 509.

11. Credit to third person at owner's order.—Weedsport Bank *v.* Park Bank, 2 Rob. (N. Y.) 418.

12. Necessity for remittance of identical money.—First Nat. Bank *v.* Wilmington, etc., R. Co., 23 C. C. A. 200, 77 Fed. 401.

13. Payment of setting-off against debt due from transmitting bank.—Freeman's Nat. Bank *v.* National Tube-Works Co., 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461.

14. Remittance of proceeds by check, draft or certificate.—San Francisco

courts take judicial notice of it.[15] Where an intermediary bank did not accept the collecting bank's draft as payment, and it not appearing that any other method might with reasonable probability have resulted in collection from the collecting bank, it has been held that such intermediary bank is not in default in accepting the collecting bank's draft, instead of insisting on payment in money.[16]

§ 169 (5) Recovery Back of Payment Made under Mistake.—Payment by Collecting Bank under Mistake.—It would seem that in a case of payment by a bank to the owner of paper deposited with it for collection, the usual rule applies that money paid under a material mistake of fact may be recovered back,[17] although there was negligence on the part of the one making the payment;[18] subject to the qualification that the payment can not be recalled when the position of the person to whom the payment has been made has been changed to his prejudice towards his debtor, in consequence of the payment. In that case the person making the payment must bear the loss.[19] Where, however, the facts raise a presumption that the

Nat. Bank *v.* American Nat. Bank (Cal.), 90 Pac. 558.

15. San Francisco Nat. Bank *v.* American Nat. Bank (Cal.), 90 Pac. 558.

16. San Francisco Nat. Bank *v.* American Nat. Bank (Cal.), 90 Pac. 558.

17. **Recovery back of payment under mistake.**—First Nat. Bank *v.* Behan, 91 Ky. 560, 13 Ky. L. Rep. 148, 16 S. W. 368.

A bank with which a thirty-days draft had been left for collection held to be entitled to recover of the payee money paid to him before its maturity, under a mistake as to its having been paid in by the drawee, although the drawer was insolvent. De Nayer *v.* State Nat. Bank, 8 Neb. 104.

Where a bank receives a bill to be transmitted to its correspondent for collection, and forwards it, a failure to receive notice from the correspondent of nonpayment is sufficient to justify the bank in presuming that payment has been made; and if, pursuant to such presumption, it pays the owner, it may, upon discovery that the bill has not been collected, recover the money as paid by mistake. Mechanics' Bank *v.* Earp (Pa.), 4 Rawle 384.

Though the extension of a draft deposited in a bank for transmission to another place for collection on the books of the bank and the bank book of the depositor is equivalent to payment, yet, when done under a mutual mistake and belief that the draft had been paid, the bank is not bound by it. Mechanics' Bank *v.* Earp (Pa.), 4 Rawle 384.

Where a bank received drafts from a depositor merely for transmission to another place for collection, and, the collecting bank failing to give notice of their nonpayment, it credited the depositor with them, it need not tender the drafts to the depositor before it is entitled to assert an indebtedness on his part, based on the credit given under such circumstances. Mechanics' Bank *v.* Earp (Pa.), 4 Rawle 384.

In those jurisdictions where the bank to which paper is transmitted by another bank for collection is deemed to be the agent of the owner of the paper and answerable to him alone for the breach of its duty, where the bank to which the owner of the paper delivered it pays the value to such owner, but such paper proves to be dishonored, the bank making the payment may recover back the amount from the payee, and any breach of duty on the part of the other bank is no defense. Farmers' Bank *v.* Owen, Fed. Cas. No. 4,662, 5 Cranch C. C. 504.

18. First Nat. Bank *v.* Behan, 91 Ky. 560, 13 Ky. L. Rep. 148, 16 S. W. 368.

19. First Nat. Bank *v.* Behan, 91 Ky. 560, 13 Ky. L. Rep. 148, 16 S. W. 368.

A bank, having for collection a draft payable five days after sight, sent it to its correspondent, and after lapse of the proper time, presuming that it had been accepted, caused it to be paid to the drawers, who im-

payment was voluntary, and not made by mistake, it can not be retracted.[20] Where a draft is deposited with a bank for collection, and sent to a corresponding bank for the same purpose, and its amount afterwards credited to the depositor, upon information from the corresponding bank that it has been collected, which proves to have been given under a mistake, and the bank, on refusal of the depositor to take back the draft or be charged for it, continues for two years to render him accounts without charging the draft back to him, having also informed its correspondent that it will be looked to for payment, there is an account stated as to the draft, which will prevent the bank from disputing its liability for the draft to the depositor.[21]

Recovery by Correspondent of Payment to Transmitting Bank.—Where a correspondent bank, through mistake of fact, supposed a note sent

mediately sent a receipt to the drawee. The bank subsequently discovered that acceptance had been refused. Held, that the bank was entitled to recover the amount from the drawers as money paid under a mistake, in the absence of a showing that his situation towards his debtor had been changed to his prejudice; that the giving of the receipt, which merely raised a presumption of payment, was not such a change. First Nat. Bank *v.* Behan, 91 Ky. 560, 13 Ky. L. Rep. 148, 16 S. W. 368.

20. Voluntary payment may not be retracted.—A note falling due Sunday, July 4th, was by W. sent for collection to the bank where payable, and on July 3d the bank marked it "Paid," and sent to W. a draft for the proceeds. The maker then had in the bank a small balance to his credit, but not enough to pay the note. On July 6th, the bank, hearing that the maker had failed, stopped payment of the draft, and, claiming that it had been sent by mistake, requested W. to return it, which W. thereupon did. The bank also, on July 6th, caused protest, and mailed notice to the indorser, dating both back to July 3d. Held, that the presumption was that the payment was not made by mistake, but voluntary, in which case it could not be retracted. Whiting *v.* City Bank, 77 N. Y. 363.

Payment of check by bank on which drawn, under mistake as to balance of drawer.—Where a bank transmits checks received by it to a correspondent for collection and the latter presents such checks to the bank upon which they were drawn and receives in payment the draft of such bank, payment of which draft is afterwards stopped, there is no defense to an action on such draft that it was drawn under the mistaken belief that the drawer of the checks had sufficient funds on deposit to meet such checks. First Nat. Bank *v.* Devenish, 15 Colo. 229, 25 Pac. 177, 22 Am. St. Rep. 394.

Certain checks on defendant bank were presented to it by F., the agent of the holder, and the bank gave F. a draft in payment. The draft was stopped on the ground that there was no money in the bank to the credit of the maker of the checks. Defendant's agent testified that he gave the checks to F., and explained the circumstances, and that the latter took them, and said that he could not return the draft because it was in the postoffice, but that the matter would be all right. The witness stated that he could not say exactly what F.'s language was, and that he did not think he said in express words, "I will have the draft returned." F. denied that he agreed to return the draft, or accept the checks in payment. Held, that no agreement by F. to rescind and return the draft was established. First Nat. Bank *v.* Devenish, 15 Colo. 229, 25 Pac. 177, 22 Am. St. Rep. 394.

Where a draft was sent to defendant bank for collection, and defendant, at the request of the drawee, advanced the funds for payment thereof, and mailed a draft to the payee, stating that it was "in payment of the draft" sent to it for collection, defendant, on discovering the insolvency of said drawee, could not intercept the letter, and destroy the draft so mailed. Canterbury *v.* Bank, 91 Wis. 53, 64 N. W. 311, 30 L. R. A. 845, 51 Am. St. Rep. 870.

21. Facts held to show account stated, estopping bank to dispute liability.—Harley *v.* Eleventh Ward Bank (N. Y.), 7 Daly 476.

to it for collection had been paid, and therefore remitted the amount thereof to its principal bank, though, in consequence thereof, the latter, which had already received the amount of the note from an indorser, refunded the indorser's payment, the correspondent could recover the payment made by it to its principal as money paid under a mistake of fact, in the absence of a showing that the indorser was not still responsible to the principal.[22]

Recovery by Correspondent Directly from Owner.—If a note is deposited with one bank for collection, and by it transmitted to another bank for the same purpose, both banks are agents of the holder; and, if the latter bank pays over the amount of the note under the mistaken impression that the note has been paid, it can recover back the money paid in an action brought directly against the owner of the note.[23]

§ 170. —— Negligence or Default of Agents or Correspondents.—While there would seem to be no question that if a person entrusts a home draft or bill to a bank for collection, such bank is responsible to the customer for any negligence or default of its agents, officers, or employees,[24] yet there is great conflict of authority in the different jurisdictions in this country as to what is the law of the case, and who must bear the loss, where a person entrusts to a bank, in the ordinary course of business deal-

22. Recovery by correspondent of payment to transmitting bank.—Union Nat. Bank *v.* Sixth Nat. Bank, 43 N. Y. 452, 3 Am. Rep. 718.

Where the plaintiff bank, being the correspondent of the defendant bank, received from the latter a note for collection from a maker residing at a distance, and sent the note to its correspondent at the residence of the maker, and, the note not having been paid at maturity, such correspondent caused it to be protested, and notices of protest to be sent to the indorsers and to plaintiff and defendant, and plaintiff, by some miscarriage, failing to receive the notice, and supposing, therefore, that the note had been paid to its correspondent, remitted a sum equal to its amount to defendant as collected, it could, on learning its mistake, recover the sum so paid from defendant as a payment under mistake of fact. Union Nat. Bank *v.* Sixth Nat. Bank, 43 N. Y. 452, 3 Am. Rep. 718.

23. Recovery by correspondent directly from owner.—Bank *v.* Smith (N. Y.), 3 Hill 560. This case was subsequently overruled in Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 461, in which the rule now established in New York was laid down that the bank receiving paper for collection is liable for any neglect of duty by its correspondents or agents employed by it.

Where a bank, on collecting drafts for another bank, transmits bank drafts to such bank, which credits the depositor with the amount of such drafts, and then collects only part of the drafts on account of the failure of the other bank, it has a right of action against the depositor for the deficit. Waterloo Milling Co. *v.* Kuenster, 158 Ill. 259, 41 N. E. 906, 29 L. R. A. 794.

24. Liability for negligence or default of agents, officers, or employees, in collection of home paper.—Simpson *v.* Waldby, 63 Mich. 439, 30 N. W. 199; Fanset *v.* Garden City State Bank, 24 S. Dak. 248, 123 N. W. 686.

"There can be no real necessity for the employment of any intermediate agencies where the collecting bank and the drawee bank are both in the same place. If the collecting bank, without distinct permission, sees fit to have recourse to them, it does so at its own risk of all the consequences which may result. This rule, of course, does not operate to abridge the rights of banks to make any of those transfers of debts and credits among themselves in the course of clearing, which usage has introduced for the purpose of facilitating the settlement of their mutual accounts in the most convenient manner." Givan *v.* Bank (Tenn.), 52 S. W. 923, 47 L. R. A. 270.

ing, and in the absence of any express agreement, paper to be collected from a person residing at a distance, in case the home bank through the failure or dishonesty of another bank, or other agent selected by itself never receives the money upon such paper, though the same is paid to the subagent or correspondent by the debtor.[25] In a number of jurisdictions in this country, as in England, it is held that the home bank, in the absence of any statute or agreement to the contrary, must be the loser, upon the principle that such bank undertakes the collection of the paper, and selects its agent or agents and must be responsible for their neglect, as it would be for the default or neglect of its officers or clerks in the collection of a home bill, or as a contractor would be bound to answer for any negligence or default of the subcontractor or workmen in the performance of his contracts.[26] In a number

25. Conflict of authority as to liability for collections upon foreign paper.—Simpson *v.* Waldby, 63 Mich. 439, 30 N. W. 199.

26. Doctrine that home bank is liable for all negligence or defaults of agents or correspondents. — *United States.*—Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722, 5 S. Ct. 141; Hyde *v.* First Nat. Bank, Fed. Cas. No. 6,970, 7 Biss. 156; Kent *v.* Dawson Bank, Fed. Cas. No. 7,714, 13 Blatchf. 237.

English.—Van Whart *v.* Woolley, 3 Barn. & C. 439; MacKersey *v.* Ramsays, 9 Clarke & F. 818.

California.—San Francisco Nat. Bank *v.* American Nat. Bank (Cal.), 90 Pac. 558.

Colorado.—Manhattan Life Ins. Co *v.* First Nat. Bank, 20 Colo. App. 529, 80 Pac. 467.

Florida.—Brown *v.* People's Bank, 59 Fla. 163, 52 So. 719.

Indiana. — Tyson *v.* State Bank (Ind.), 6 Blackf. 225, 38 Am. Dec. 139.

Kansas.—First Nat. Bank *v.* Craig, 3 Kan. App. 166, 42 Pac. 830.

Michigan.—Simpson *v.* Waldby, 63 Mich. 439, 30 N. W. 199.

Missouri.—Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770.

Montana.—Power *v.* First Nat. Bank, 6 Mont. 251, 12 Pac. 597.

New Jersey.—Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. 588.

New York.—Commercial Bank *v.* Union Bank, 11 N. Y. 203; Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Naser *v.* First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077; St. Nicholas Bank *v.* State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241; Allen *v.* Merchants' Bank, 22 Wend. 215, 34 Am. Dec. 289; Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459, Seld. Notes 12.

Ohio.—Reeves, etc., Co. *v.* State Bank, 8 O. St. 465; Hermann *v.* Dayton, etc., State Bank, 10 O. St. 446; Bank *v.* Butler, 41 O. St. 519, 52 Am. Rep. 94; Bridge Co. *v.* Savings Bank, 46 O. St. 224, 20 N. E. 339; Young *v.* Noble, 2 Disn. 485, 13 O. Dec. 297.

Pennsylvania.—Wingate *v.* Mechanics' Bank, 10 Pa. 104; Bradstreet *v.* Everson, 72 Pa. 124, 13 Am. Rep. 665.

South Carolina.—City Nat. Bank *v.* Cooper, 91 N. C. 91, 74 S. E. 366; Harter *v.* Bank, 92 S. C. 440, 75 S. E. 696.

In New York it was formerly held that a paper payable at a distance and deposited in a bank for collection and then transmitted by the bank to another bank for the same purpose, the latter was to be regarded as the agent of the holder. Bank *v.* Smith (N. Y.), 3 Hill 560.

Where paper due at a distant place is left with a local banker for collection only, and he transmits it to a collector, who receives payment of it, the collector can not discharge his liability to the owner of the paper by passing the money to the banker's credit in general account. Echarte *v.* Clark (N. Y.), 2 Edm Sel. Cas. 445.

Since the decision in Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459, Seld. Notes 12, however, the New York doctrine has been, as stated in the text, that the agent or correspondent is considered to be the agent of the bank receiving the paper for collection, and that such bank is liable for the negligence or default of its subagents.

Where paper due at a distant place is left with a local banker for collection only, and he transmits it to a collector, who receives payment of it, the collector is agent directly for the owner of the paper, and responsible

of other jurisdictions, however, it is held that, in the absence of a statute of special agreement, where commercial paper payable in one locality is de-

for neglect in paying over the money. Echarte *v.* Clark (N. Y.), 2 Edm. Sel. Cas. 445.

"Where a subagent collects, but fails to pay over, and becomes insolvent, such insolvency will not shield the collecting agent from liability for the loss. St. Nicholas Bank *v.* State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241; Briggs *v.* Central Nat. Bank, 89 N. Y. 182, 63 How. Prac. 309, 42 Am. St. Rep. 285." National Revere Bank *v.* National Bank, 172 N. Y. 102, 64 N. E. 799.

A bank accepting a draft or bill for collection is liable for any default or breach of duty made by a subagent, to whom it transmits the paper for collection. Second Nat. Bank *v.* Bank, 99 Ark. 386, 138 S. W. 472.

In an action against a bank for moneys received to plaintiff's credit, where it is shown that defendant was employed to collect certain drafts, and it is shown that the money was paid to its correspondent, a bank in the town where the drawee lived, and the correspondent forwarded a draft for the money to defendant, defendant must show that, through no fault or want of diligence on its part, the draft was not paid. Simpson *v.* Waldby, 63 Mich. 439, 30 N. W. 199.

Where a bank is the collecting agent of another bank, it does not cease to become such because drafts forwarded to it for collection are drawn upon it. Judgment, 54 App. Div. 342, 66 N. Y. S. 662, affirmed. National Revere Bank *v.* National Bank, 172 N. Y. 102, 64 N. E. 799.

A Cincinnati house, Y. & P., after receiving from the owner a bill of exchange and undertaking gratuitously to send the same for collection to a bank in New York, where payable, and pay over the proceeds to the owner, ordered the bank when the bill was paid to place the proceeds to their general account; which the bank did, but failed before the money was drawn by Y. & P. Held, that Y. & P. were liable to the owners for the proceeds. The bank became their agent in the collection. Young *v.* Noble, 2 Disn. 485, 13 O. Dec. 297.

A collection or mercantile agency receiving and remitting a claim to their own attorney, who collects and fails to pay over the proceeds, is liable for his default. Bradstreet *v.* Everson, 72 Pa. 124, 13 Am. Rep. 665.

Where the owner of a draft sends it for collection, without any specific instructions, to a bank situated some considerable distance from the drawee's residence, the bank is liable for the failure of the agent at the latter place, to whom it sends the draft, to pay over the amount collected. Kent *v.* Dawson Bank, Fed. Cas. No. 7,714, 13 Blatchf. 237.

Where a note is delivered to a bank for collection, the bank does not thereby become the agent of the holder, but is an independent contractor, and may employ other banks or agents to make the collection, which are alone accountable to the first bank, and not to the owner of the note. The bank with which the paper is first deposited is answerable to the owner for the performance of all acts necessary to secure his rights, including payment of the money when collected, which liability attaches as soon as the money is paid, either to it or to its subagent. Hyde *v.* First Nat. Bank, Fed. Cas. No. 6,970, 7 Biss. 156.

Where a note was placed in a bank for collection, with instructions to collect when due, and apply the proceeds to the depositor's paper, and a person voluntarily selected by the bank to present the note at the place named for payment and receive payment thereon collected the note, the bank was liable for the proceeds to the owner. First Nat. Bank *v.* Craig, 3 Kan. App. 166, 42 Pac. 830.

Where a bank in this state receives for collection a draft, payable in this state, and for the same purpose forwards the draft to its correspondent in Pennsylvania, and the bank in Pennsylvania forwards it for like purposes to another bank in Ohio, where it is payable, such last-named bank is the agent of the bank in Pennsylvania, and is not the subagent of the bank in Ohio that first received the draft. The bank in Ohio, where the collection is to be made, is responsible for its negligence to the Pennsylvania bank only. First Nat. Bank *v.* Mansfield Sav. Bank, 6 O. C. D. 452, 10 O. C. C. 233.

Y. & P. received from the owner a bill of exchange, upon an agreement that, without commission or reward, they would send the bill to the place

posited with a bank in another locality, and the bank of deposit uses due care and diligence in selecting the collecting agent and in forwarding the paper for collection, it is not liable for the failure of the agent

where payable, for collection, and pay to the owner the whole proceeds of the paper when collected. Afterwards the bill was paid to the bank to which it was sent, and, by direction of Y. & P., placed to their general account: but before the money was drawn by Y. & P., the bank failed. It was held that the bank became, by the deposit of the bill, the agent of Y. & P., and the proceeds, when paid to it, were, for all legal purposes, in the hands of the principals, and they were liable to the owner therefor. Young *v.* Noble, 2 Disn. 485, 13 O. Dec. 297.

A bank agreed to collect a depositor's drafts for ten cents on each $100. Held, that in the absence of proof to the contrary, the court would deem the consideration a valuable one, making the bank liable for the default of its correspondent. Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770.

A bank agreed to collect a person's drafts for a compensation of ten cents on each $100. The person deposited with the bank a draft for collection. The bank sent the same to its correspondent, which received in payment thereof a check and notified the bank that the draft had been paid. The bank gave the person credit for the amount of the draft. Held, that the bank was chargeable with the amount of the credit, notwithstanding the fact that the check was subsequently dishonored. Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770.

A depositor's passbook contained a notice reciting that all items received by the bank for collection were taken at the depositor's risk, and that the bank would assume no responsibility for default of its correspondents. The depositor and the bank entered into an agreement, whereby the bank, for a compensation of ten cents on each $100, agreed to collect the depositor's drafts. Held, that the bank was responsible for the default of its correspondents in making collections, notwithstanding the notice in the passbook. Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770.

Where a life insurance company transmitting to a bank for collection the renewals on policies had no knowledge that collections were made by its agent, it did not ratify the unauthorized act of the bank in permitting the agent to make the collections, and the bank was not relieved from liability for a loss sustained by reason of the agent's failure to deposit in the bank the sums collected. Manhattan Life Ins. Co. *v.* First Nat. Bank, 20 Colo. App. 529, 80 Pac. 467.

Where a life insurance company sent to a bank for collection the renewals on policies, and the bank permitted an agent of the company to make the collections, the agent, in making the collections, was the agent of the bank, rendering it liable for a loss sustained by the agent's failure to deposit in the bank the sums collected. Manhattan Life Ins. Co. *v.* First Nat. Bank, 20 Colo. App. 529, 80 Pac. 467.

Liability of express companies for acts of agents.—Where the line of an express company, whose agent stated that he would, as requested by the one delivering a note to him, send it by express for collection upon the makers at a certain place, did not extend to that place, but the custom or practice of the receiving company was to deliver packages and demands for collection going beyond its own route to such connecting express line, between which and the receiving company there was no business connection, nor any division of profits or compensation for carriage or collections, although with respect to demands for collection received by the connecting company from the receiving company the former reported to the latter's general agent, and followed his directions, although such facts do not, as matter of law, impose any obligation upon the receiving company with regard to the collection of the note after its delivery to the connecting company, yet they are evidence of a contract by the receiving company to do with the note according to its custom and usage with respect to business of that description, even though a part of such undertaking was carried out at a point beyond its own line, and by agents not in its immediate employ. Knapp *v.* United States, etc., Exp. Co., 55 N. H. 348.

Where a note is delivered to the agent of an express company, with directions to take it to the place where

to pay the proceeds of the paper when collected.[27] This holding is based

the maker resides, present it for payment, and, in case of refusal to pay, to sue and collect immediately, and it is received and sent forward by the agent with instructions in accordance with the directions, this is a contract to carry, not to forward, the note; and if the company's line does not extend to the designated place (the sender being ignorant of the fact, and not being advised thereof at the time of the delivery of the note), and the note is forwarded by another company, the latter becomes the agent of the former, and the former is responsible for damages resulting from the negligence or noncompliance by the latter with the directions. Palmer *v.* Holland, 51 N. Y. 416, 10 Am. Rep. 616.

Liability for overcharges by correspondent.—A bank which receives in pledge as security for a loan, and undertakes to collect for another party, Havana lottery tickets which have won prizes, and consigns them to its own correspondent for collection, is responsible to its principal for the amount of commission which its correspondent or agent has overcharged for the collection of such values. Masich *v.* Citizens' Bank, 34 La. Ann. 1207.

27. Doctrine that bank of deposit is not liable where due care and diligence used in selection of subagent. —*United States.*—Britton *v.* Niccolls, 104 U. S. 757, 26 L. Ed. 917; Tradesmans' Nat. Bank *v.* Third Nat. Bank, 112 U. S. 293, 28 L. Ed. 728, 5 S. Ct. 149; Bank *v.* Triplett, 1 Pet. 25, 7 L. Ed. 37; Farmers' Bank *v.* Owen, Fed. Cas. No. 4,662, 5 Cranch C. C. 504.

California.—San Francisco Nat. Bank *v.* American Nat. Bank, 90 Pac. 558.

Connecticut.—East Haddam Bank *v.* Scovil, 12 Conn. 303.

Illinois.—Fay *v.* Strawn, 32 Ill. 295; Ætna Ins. Co. *v.* Alton City Bank, 25 Ill. 243, 79 Am. Dec. 328; Waterloo Milling Co. *v.* Kuenster, 158 Ill. 259, 41 N. E. 906, 29 L. R. A. 794; Wilson *v.* Carlinville Nat. Bank, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632.

Indiana.—Citizens' Bank *v.* Howell, 8 Ind. 530.

Iowa. — Guelich *v.* National State Bank, 56 Iowa 434, 9 N. W. 328, 41 Am. Rep. 110.

Kentucky.—Second Nat. Bank *v.* Merchants' Nat. Bank, 111 Ky. 930, 65 S. W. 4, 55 L. R. A. 273, 23 Ky. L. Rep. 1255, 98 Am. St. Rep. 439.

Louisiana.—Hum *v.* Union Bank, 4 Rob. 109.

Maryland.—Jackson *v.* Union Bank, 6 Har. & J. 146.

Massachusetts.—Fabens *v.* Mercantile Bank, 23 Pick. 330, 34 Am. Dec. 59; Dorchester, etc., Bank *v.* New England Bank, 1 Cush. 177.

Michigan.—Simpson *v.* Waldby, 63 Mich. 439, 30 N. W. 199.

Mississippi.—Bowling *v.* Arthur, 34 Miss. 41.

Missouri.—Daly *v.* Butchers', etc., Bank, 56 Mo. 94, 17 Am. Rep. 663.

Pennsylvania.—Mechanics' Bank *v.* Earp, 4 Rawle 384.

South Dakota. — Fanset *v.* Garden City State Bank, 24 S. Dak. 248, 123 N. W. 686.

Tennessee.—Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Bank *v.* First Nat. Bank, 67 Tenn. (8 Baxt.) 101, 35 Am. Rep. 691; Givan *v.* Bank, 52 S. W. 923, 47 L. R. A. 270.

Texas.—Schumacher *v.* Trent, 18 Tex. Civ. App. 17, 44 S. W. 460.

Wisconsin.—Stacy *v.* Dane County Bank, 12 Wis. 702.

The rule that the bank's liability, in taking for collection drafts on a drawee at another town extends merely to the exercise of due care in the selection of a competent agent there, and to the transmission of the drafts to such agent, with proper instructions; and that the correspondent bank is not its agent, but the agent of the depositor, so that the bank is not liable for the default of the correspondent bank, due care having been used in selecting that bank, is established in Massachusetts, in Maryland, in Connecticut, in Missouri, in Illinois, in Tennessee, in Iowa, in Wisconsin, and in Mississippi. Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722, 5 S. Ct. 141; Tradesman's Nat. Bank *v.* Third Nat. Bank, 112 U. S. 293, 28 L. Ed. 728, 5 S. Ct. 149; Britton *v.* Niccolls, 104 U. S. 757, 763, 26 L. Ed. 917.

"In the case of Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618, it is said: 'By the great weight of authority, the bank receiving a bill for collection, payable at a distant point, is impliedly instructed to send such bill to a suitable agent for collection at the place of payment; and such agent, when so selected, becomes the agent of the owner of the bill, and is not the agent

upon the theory that the customer depositing paper for collection must be presumed to know, and contract upon the knowledge, that in the ordinary course of business the bank of deposit must employ correspondents or agents abroad to make the collection and transmit the money collected, and therefore, he impliedly, assents to the employment of such correspondents or agents, and makes them his agents.[28] While this latter doctrine seems to

of the transmitting bank. Bank *v.* First Nat. Bank, 8 Baxt. 101. If the debt be lost by the negligence of the agent so selected, the right of action is in the owner of the paper, and not in the bank forwarding the paper. The liability of the transmitting bank is only for its own negligence.'" Givan *v.* Bank (Tenn.), 52 S. W. 923, 47 L. R. A. 270.

"Where the bill is transmitted successively to several banks, and into the hands of a notary, each party is liable to the owner for its own negligence or want of diligence, and is not liable to any agent in the chain of transmission except by special contract." Bank *v.* First Nat. Bank, 67 Tenn. (8 Baxt.) 101, 35 Am. Rep. 691.

Where a note is deposited with one bank for transmission to another for collection, the bank to which it is sent is the agent of the depositor. Schumacher *v.* Trent, 18 Tex. Civ. App. 17, 44 S. W. 460.

Where a bank receives for collection a note payable in another town, and forwards it to a competent and solvent correspondent at the place of payment, such bank is not liable for the failure of its correspondent to pay over the amount collected. Hum *v.* Union Bank (La.), 4 Rob. 109.

Plaintiff accepted a check on an Arizona bank from a customer for collection, and, in accordance with plaintiff's custom, forwarded the check the same day to defendant bank in Los Angeles for collection, defendant, on receiving the check, immediately forwarded it to a bank in the place where the check was payable for presentment and collection. This bank was in fact insolvent, and its draft, sent to defendant bank for the proceeds of the collection, was protested, and remained unpaid on the bank's failure shortly thereafter. Held that, when the bank making the collection obtained the money on the check, it became the debtor of plaintiff's depositor, and that defendant was therefore not liable for the collecting bank's default, not having been negligent in selecting the bank to make the collection. San Francisco Nat. Bank *v.* American Nat. Bank (Cal.), 90 Pac. 558.

An indorsee of a bill indorsed and delivered it to plaintiff bank for collection, and the bank sent it to its correspondent where it was payable for collection, without indorsing it. Not being paid when due, it was protested, and due notice given to the drawer, but no notice was given to the bank or to the indorser; and the bank, two weeks afterwards, supposing the bill to have been paid, paid it to defendant, and on discovering its mistake, sued him to recover the money. Held, that the bank was justified in assuming that the draft had been paid, and, having paid the money under mistake of fact, might recover it. East Haddam Bank *v.* Scovil, 12 Conn. 303.

Plaintiff was not responsible for the negligence of its correspondent in failing to give notice, and was entitled to recover. East Haddam Bank *v.* Scovil, 12 Conn. 303.

Where a customer deposits with a bank a third person's check on another bank, and the depositary credits the customer with the amount, which is afterwards drawn by him, and transmits the check for collection to its correspondent bank, using reasonable care and prudence in selecting such correspondent bank as an agent for collection, the latter bank becomes the agent of the depositor, and the depositary is not liable to its customer for any negligence in the correspondent bank by which the amount of the check was lost, but may recover such amount from him. Judgment, 87 Ill. App. 364, affirmed. Wilson *v.* Carlinville Nat. Bank, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632.

Bill transmitted to bank known to be unworthy.—"If the bill were sent to a bank or other agent known to the transmitting bank to be unworthy of confidence, that would be an act of negligence and carelessness of the interests of the holder, for which it would be held liable." Bank *v.* First Nat. Bank, 67 Tenn. (8 Baxt.) 101, 35 Am. Rep. 691.

28. Basis of doctrine.—Simpson *v.* Waldby, 63 Mich. 439, 30 N. W. 199;

find support in the decisions of the greater number of the states, yet it would seem that the doctrine making the bank of deposit liable for the negligence or default of agents or correspondents, is the better one and most in accord with principle. As already pointed out, there seems to be no controversy as to the liability of the bank to which home paper is intrusted for collection, and, as pointed out by the Michigan court in a well-considered decision, it is difficult to see why any different rule should be had in the collection of foreign paper. In the former case, as in the latter, the customer of the bank depositing the paper for collection knows that some agent or employee of the bank will do the work, or some part of it, and does not know or inquire who will do it. He contracts with the bank that suitable agents will be employed, and holds it responsible for their acts, and the law authorizes him so to do. If the customer entrusts the same bank with foreign paper he knows that they will employ some agent or correspondent abroad, of their selection, not of the customer's, of whom the latter knows nothing, and with whom the bank is supposed to have business relations. He does not inquire who the bank is to select, but presumes, and has a right to presume, that they have business knowledge of such agent or agents which the customer does not and can not possess, by the very course of their dealings as banks. In each case the bank holds itself out for a consideration, to collect the customer's paper, and it can make no difference whether the compensation is great or small. In each case the bank selects its own agents in the premises. In each case the customer has no part in or control over such selection. In each case there is no privity between the party selected and the customer at the bank. In view of these facts it is difficult to perceive why, in the one case more than the other, the customer adopts the immediate

Brown *v.* People's Bank, 59 Fla. 163, 52 So. 719, and see cases cited to preceding text.

"The authorities which support this rule rest on the proposition that since what is to be done by a bank employed to collect a draft payable at another's place can not be done by any of its ordinary officers or servants, but must be entrusted to a subagent, the risk of the neglect of the subagent is upon the party employing the bank, on the view that he has impliedly authorized the employment of the subagent; and that the incidental benefit which the bank may receive from collecting the draft, in the absence of an express or implied agreement for compensation, is not a sufficient consideration from which to legally infer a contract to warrant against loss from the negligence of the subagent." Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 281, 28 L. Ed. 722, 5 S. Ct. 141.

Where a regular customer of and depositor in a bank who had an understanding with the bank by which he was to deposit out of town checks and receive credit therefor, but was to be charged with checks which were not paid, deposited a check which was payable in a distant city, the bank will not be liable for the loss of the proceeds which one of the agents, through which the bank endeavored to collect the check, failed to transmit, in the absence of fraud or negligence of the bank, as the depositor, by implication, authorized the collection through subagents and the transmission of the proceeds back to the bank through the customary course of banking business, although when paper is delivered to a bank for personal collection, or is made payable at the same bank or in the same vicinity, or when the bank sent the paper to the bank against which it is drawn, the bank will be liable for the proceeds. Fanset *v.* Garden City State Bank, 24 S. Dak. 248, 123 N. W. 686.

party collecting and protesting the paper as his agent.[29] Of course, in each particular case, whatever the doctrine in the particular state may be, the bank may be relieved from liability for the default or negligence of its subagents, or such liability may be imposed, by special agreement of the parties.[30] In some states, express statutory provision is made as to the liability of banks receiving negotiable instruments for collection.[31]

29. Simpson *v.* Waldby, 63 Mich. 439, 30 N. W. 199.

"Sound reason and practical justice require the enforcement of the rule imposing liability for the loss of the proceeds of a deposited check upon the bank of deposit when the check is paid by the drawee in a distant city upon its presentation by the collecting agent of the depositing bank, where the depositor had no part in the selection of the collecting agent or in the collection. See Power *v.* First Nat. Bank, 6 Mont. 251, 12 Pac. 597; Streissguth *v.* National German-American Bank, 43 Minn. 50, 44 N. W. 797, 7 L. R. A. 363, 19 Am. St. Rep. 213; State Nat. Bank *v.* Thomas Mfg. Co., 17 Tex. Civ. App. 214, 42 S. W. 1016." Brown *v.* People's Bank, 59 Fla. 163, 52 So. 719.

"The collecting bank assumes the obligation to collect and pay over or remit the money due upon the paper, and the agents it employs to effect the collection, whether they be in its own banking house or at some distant place, are its agents, and in no sense the agents of the owner of the paper. Because they are its agents, it is responsible for their misconduct, neglect, or other default." St. Nicholas Bank *v.* State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241.

In one of the earliest decisions upon this question in the courts of the United States, the federal circuit court, after discussing the conflict of authority upon the point, held that an undertaking "to collect" is not merely an undertaking to select a suitable agent, and transmit the paper to him to collect as agent for the owner, but is an undertaking to respond for any default of the agent selected. Kent *v.* Dawson Bank, Fed. Cas. No. 7,714, 13 Blatchf. 237.

30. Effect of agreement of parties.—"All the authorities agree that the general liability, whatever it may be, incurred by a bank in taking for collection commercial paper, foreign or domestic, may be varied by agreement, express or implied, of the parties." Bank *v.* Butler, 41 O. St. 519, 52 Am. Rep. 94.

Where the paper was delivered for transmission, not for collection, by transmitting the bill, as directed, the receiving bank performed its whole duty, and the entire responsibility of collection devolved on the correspondent bank. Bank *v.* Triplett, 1 Pet. 25, 7 L. Ed. 37.

The owner of negotiable paper placed it with a Boston bank, to be transmitted to its New York correspondent for collection, for the account of the owner, and the Boston bank so instructed the New York bank. Held, that the New York bank became the agent of the owner of the paper, and was liable to him for negligence in making the collection. Kelley *v.* Phœnix Nat. Bank, 17 App. Div. 496, 45 N. Y. S. 533.

Where an agent accepts a bill for collection and transmits to another for collection with the authority to collect and place the proceeds to his credit, he makes such person his agent and for loss, if any, such other person is liable to the original agent and not to the principal. Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770.

31. Statutory provision as to liability of banks receiving paper for collection.—Chapter 5951 of the Florida Laws of 1909, provides that, when a negotiable instrument is deposited in a bank for credit or collection, it constitutes due diligence of the bank to forward it without delay in the usual way according to the regular course of business of banks, and that the indorser, maker, etc., of a negotiable instrument so deposited shall be liable to the bank until actual final payment is received, and that a bank receiving a negotiable instrument for collection shall only be liable after actual final payment is received by it, except in case of want of due diligence on its part. Brown *v.* People's Bank, 59 Fla. 163, 52 So. 719, in which case it was held that the legislation in question, being manifestly designed to change the existing rule, was not retrospective in effect.

§ 171. Failure to Collect—§ 171 (1) Liability of Bank in General.—Duty to Make Collection or Return Paper.—A banker receiving paper for collection is bound to return it or to account for the amount of its proceeds.[32] It has been held, however, that the failure of a bank to return

32. Must return paper or account for proceeds.—McClure *v.* Osborne & Co., 86 Ill. App. 465; National Revere Bank *v.* National Bank, 172 N. Y. 102, 64 N. E. 799, affirming 54 App. Div. 342, 66 N. Y. S. 662; Kershaw *v.* Ladd, 34 Ore. 375, 56 Pac. 402, 44 L. R. A. 236.

Where a bank transmits drafts to another in the ordinary course of business, and the receiving bank mails them to its correspondent at the place of payment, in the absence of any special agreement the receiving bank undertakes to perform the duty of collecting the paper and paying over the proceeds if received, and, if the drafts are not paid, of returning them with the liability of the parties thereto unimpaired. Judgment, 54 App. Div. 342, 66 N. Y. S. 662, affirmed. National Revere Bank *v.* National Bank, 172 N. Y. 102, 64 N. E. 799.

Where a draft was drawn in favor of the A. Bank, and by it transmitted to the B. Bank for collection, the B. Bank was liable to the drawer of the draft for any damages suffered by the drawer owing to the failure of the B. Bank to promptly return the draft after its nonpayment. Lord *v.* Hingham Nat. Bank, 186 Mass. 161, 71 N. E. 312.

A draft sent to a bank for collection was accompanied by a slip requesting that the draft should not be protested, and the letter of instructions accompanying the draft stated: "Return at once all items unpaid at maturity. They must not be held for the convenience of parties." In an action by the drawer against the bank for its negligence in failing to promptly return the draft after its nonpayment at maturity, it appeared that it was the practice of some banks to retain no protest items notwithstanding such instructions, but that such practice was not universal. Held, that a finding that the bank by failing to comply with its instructions was guilty of negligence was warranted. Lord *v.* Hingham Nat. Bank, 186 Mass. 161, 71 N. E. 312.

Plaintiff, a regular depositor, deposited with defendant a draft on a foreign bank for collection. Defendant forwarded it to its agent where the drawee was located, for collection. The drawee gave as payment a sight draft upon its correspondent in another city. Upon receipt of such information from its agent, defendant credited plaintiff with the proceeds of the draft, and notified him to that effect. On presentation of the sight draft, payment was refused. About a month afterwards, defendant notified plaintiff that the credit given him on the draft was canceled. Plaintiff demanded the return of the draft. Held, that defendant was liable upon failure to return the draft, properly protested, or the amount thereof. Kirkham *v.* Bank, 26 App. Div. 110, 49 N. Y. S. 767, order affirmed 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714.

A bank received a draft for collection February 19th, presented it, and obtained an oral acceptance, and a promise that it would be paid in a few days. At maturity the merchant requested the bank to hold it, and repeated his promise to pay in a few days. The same thing occurred later. The bank held the draft, without communicating with the drawers, until March 5th, when, at the merchant's request, it wrote the drawers, asking an extension of 30 days. March 7th, and before an answer was received, it took a conveyance of all of the merchant's property, in satisfaction of a debt to itself, and with an agreement to pay debts to strangers to a large amount, but not including the drawers of the draft. It then returned the draft, which could not be collected. Held, that it had not performed its duties in good faith, and was liable. Dern *v.* Kellogg, 54 Neb. 560, 74 N. W. 844.

Plaintiff delivered a check to defendant bank April 27th on another bank, with the understanding that the amount would be immediately placed to his credit, and that he could check against it. Defendant transmitted it to its correspondent C. Bank, charging it against, and receiving credit in, that bank as a cash item. C. Bank, in turn, transmitted it to its correspondent bank at G., charging it to that bank as a cash item, and the bank at G. transmitted it to the drawee for remittance thereon, and on May 12th it was canceled by the drawee and the amount charged against plaintiff's account. On

to the drawer of a check sent to it for collection, the dishonored check received from the drawee bank until after the latter had closed its doors, does not injure the drawee where he is nevertheless enabled to and does sue the drawee bank.[33] Where a bank, with which a check was deposited for collection, presented it for payment, gave notice of its dishonor, and charged it back to the depositor, it was then the property of depositor, so that he alone could file it against estate of bankrupt bank on which it was drawn, and the collecting bank can not be held bound to have filed it, and liable for its full amount, on the ground that it had made the check its own, because it did not return it to the depositor; it having at all times remained in the possession of the bankrupt bank and its receiver in bankruptcy.[34] In an action against a bank for negligence in failing to collect a draft, it is not essential to plaintiff's right to recover that the jury should find that the draft was returned to defendant after defendant had redelivered it to plaintiff.[35]

Right of Collecting Bank to Protect Its Own Interests or Those of General Creditors.—The fact that a bank has received in ordinary course notes for collection against a depositor, as to which it has done its full duty by demand and notice, does not affect its right to advise or promote the general assignment by the depositor, or any other action, which it may deem to its own interest or to that of general creditors.[36]

§ 171 (2) Negligence of Collecting Bank in General.—Where a bank receives commercial paper for collection, the law implies a contract on its part to use ordinary care and reasonable diligence in making the collection, and if, in consequence of its failure to use such reasonable diligence and care, a loss happens, it is liable therefor.[37] A collecting bank, knowing

June 2d defendant bank was notified by the bank at G., through C. Bank, that it had had no response from the drawee, and defendant notified plaintiff without offering to return the check, and in the meantime the drawee failed. Held, that defendant was the owner of the check for value, and liable to plaintiff for loss on account of such laches. Hobart Nat. Bank *v.* McMurrough, 24 Okl. 210, 103 Pac. 601.

33. **Where a drawer of dishonored check not injured by delay in returning same.**—Kershaw *v.* Ladd, 34 Ore. 375, 56 Pac. 402, 44 L. R. A. 236.

34. **Failure to return dishonored check.**—Hendricks *v.* Jefferson County Sav. Bank, 153 Ala. 636, 45 So. 136.

35. **Necessity for return of draft to bank after redelivery to plaintiff.**—Merchants' Bank *v.* Bank, 24 Md. 12.

36. **Right of bank to protect its own interest, after the performance of duty to owner of paper.**—Carpenter *v.* National Shawmut Bank, 109 C. C. A. 55, 187 Fed. 1.

A bank receiving drafts for collection only, having claims of its own against the drawee, is not forbidden to attach his property, and thus secure priority for its debt over the drafts. Freeman *v.* Citizens' Nat. Bank, 78 Iowa, 150, 42 N. W. 632, 4 L. R. A. 422.

37. **General rule as to liability of collecting bank for negligence resulting in loss.**—*Colorado.*—Manhattan Life Ins. Co. *v.* First Nat. Bank, 20 Colo. App. 529, 80 Pac. 467.

Georgia.—Georgia Nat. Bank *v.* Henderson, 46 Ga. 487, 12 Am. Rep. 590; Bailie *v.* Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74; Comer *v.* Dufour, 95 Ga. 376, 22 S. E. 543, 30 L. R. A. 300, 51 Am. St. Rep. 89.

Louisiana.—Louisiana Ins. Co. *v.* Louisiana State Bank, 3 Mart. 610.

Massachusetts.—Fabens *v.* Mercantile Bank, 23 Pick. 330, 34 Am. Dec. 59;

of the depressed financial condition of the debtor, has been held to be delinquent in its duty, if it neglects to inform its customer of such vital condition, and fails to take vigorous measures to secure payment, and, if loss occurs by its negligence to exercise that degree of skill, care and diligence which the nature of its undertaking calls for, with reference to the time,

Lord *v.* Hingham Nat. Bank, 186 Mass. 161, 71 N. E. 312.

Michigan.—Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

Mississippi.—Capitol State Bank *v.* Lane, 52 Miss. 677.

Nebraska.—Dern *v.* Kellogg, 54 Neb. 560, 74 N. W. 844; Omaha Nat. Bank *v.* Kiper, 60 Neb. 33, 82 N. W. 102.

New York.—Kirkham *v.* Bank, 26 App. Div. 110, 49 N. Y. S. 767, order affirmed 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714.

North Carolina.—Bank *v.* Floyd, 142 N. C. 187, 55 S. E. 95.

Oklahoma.—Hobart Nat. Bank *v.* McMurrough, 24 Okl. 210, 103 Pac. 601.

Ohio.—Huff *v.* Hatch, 2 Disn 63, 13 O. Dec. 39; White *v.* Third Nat. Bank, 7 O. Dec. 666, 4 Wkly. L. Bull. 791.

Tennessee.—Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 273; Givan *v.* Bank, 52 S. W. 923, 47 L. R. A. 270; Winchester Milling Co. *v.* Bank, 120 Tenn. 225, 111 S. W. 248.

Texas.—Diamond Mill Co. *v.* Groesbeeck Nat. Bank, 9 Tex. Civ. App. 31, 29 S. W. 169; Farmers' Nat. Bank *v.* Merchants' Nat. Bank (Civ. App.), 136 S. W. 1120.

Utah.—Mound City Paint, etc., Co. *v.* Commercial Nat. Bank, 4 Utah 353, 9 Pac. 709.

West Virginia.—Pinkney *v.* Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012.

United States.—Milwaukee Nat. Bank *v.* City Bank, 103 U. S. 668, 26 L. Ed. 417; Britton *v.* Niccolls, 104 U. S. 757, 26 L. Ed. 917; Bank *v.* Monongahela Nat. Bank, 126 Fed. 436; Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641, 19 L. Ed. 422; Bank *v.* Triplett, 1 Pet. 25, 7 L. Ed. 37; First Nat. Bank *v.* First Nat. Bank, Fed. Cas. No. 4,810, 4 Dill. 290; Merchants' Nat. Bank *v.* National Bank, Fed. Cas. No. 9,446, 7 Am. L. Review 572.

The power to make collections upon business paper is incident to the banking business, and important trusts are necessarily imposed in their hands. In accepting a collection from a customer, the bank assumes an agency which requires the exercise of reasonable care and diligence in the discharge of the assumed duties, and if it should neglect such duties, and the principal thereby incurs loss, the bank would be liable for such loss. Diamond Mill Co. *v.* Groesbeeck Nat. Bank, 9 Tex. Civ. App. 31, 29 S. W. 169.

"If a bank fails to do its duty in the matter of collection with reasonable skill and care, it is liable for damages resulting to any party interested in the paper, whether his name appears on the paper or not." Diamond Mill Co. *v.* Groesbeeck Nat. Bank, 9 Tex. Civ. App. 31, 29 S. W. 169.

A bank which receives a check for collection, and enters the value of it as a deposit credit to the owner, is an agent for collection, and if the collection is made the relation of banker and depositor is consummated, and if the bank fails to collect through its own fault it is liable for the resulting damages. Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246.

An averment of an employment to collect a draft for a reward to be paid, with an acceptance of the duty, creates an obligation, the breach of which, if properly set out, will sustain an action. American Exp. Co. *v.* Pinckney, 29 Ill. 392.

A bank which acts as the collecting agent of another bank must use reasonable diligence and care, and if, in consequence of a failure to do so, a loss happens, it is liable. First Nat. Bank *v.* First Nat. Bank, Fed. Cas. No. 4,810, 4 Dill. 290.

Liability of national banks.—Collecting commercial paper is a part of the regular business of banking, and a national bank will be liable for negligence in collecting a draft, the same as any other bank or agent. Mound City Paint, etc., Co. *v.* Commercial Nat. Bank, 4 Utah 353, 9 Pac. 709.

Liability of nonbanker undertaking collection.—Where a merchant, who is accustomed to receive from a customer drafts for collection, receives a draft on a person living in the same place, and deposits it with a bank for collection, he is liable for the bank's negligence in presenting it. Dyas *v.* Hanson, 14 Mo. App. 363.

Liability notwithstanding change of maker's domicile.—A bank, receiving a

place, and circumstances surrounding the undertaking, it will incur liability to its customer for the loss sustained.[38] The question of negligence, where there is evidence, is one for the jury.[39]

§ 171 (3) Negligence in Sending Paper Directly to Debtor.—As has been already seen, according to the weight of authority it is prima facie negligence for a bank receiving a check for collection to send it to the drawee bank for payment in the absence of instruction so to do.[40]

§ 171 (4) Failure to Present or Delay in Presenting Paper for Acceptance and Payment.—A bank receiving for collection a bill, note, or draft must present the same for acceptance where acceptance is necessary, without delay, and for payment at maturity.[41] By failure to make

note for collection, is not relieved from using due diligence by the removal of the maker's domicile from the city. Louisiana Ins. Co. *v.* Louisiana State Bank (La.), 3 Mart. 610.

Exercise of ordinary care as exempting from liability.—Where checks are deposited with a bank for collection, and it credits them to the depositor's account as cash, and the deposit slip and passbook contain a statement that "all cash items not actual cash are entered subject to payment," the depositor can not recover the amount of the checks when the bank, exercising ordinary diligence, fails to collect them. Givan *v.* Bank (Tenn.), 52 S. W. 923, 47 L. R. A. 270. See ante, "Liability of Bank In General," § 171 (1).

Liability as dependent on resulting loss.—A bank, though negligent in the discharge of its duties as collecting agent, is not liable to its customers for the claim placed in its hands, unless it is shown that the claim was collectible by due diligence, and was lost in consequence of the bank's negligence. Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

Presumption from loss—Burden of proof.—An accidental loss or disappearance in a bank of a bill sent to it to collect, from the bank's not taking sufficient care of letters brought to it from the mail, carries with it a presumption of negligence in the bank; and on a suit against it, the burden of proof is on the bank to explain the negligence. Chicopee Bank *v.* Philadelphia Bank (U. S.), 8 Wall. 641, 19 L. Ed. 422.

If, through this negligence alone, it is inferable that notice of presentment, demand, and nonpayment, were not given to the holder, so as to enable him to hold parties prior to him, the bank guilty of the negligence is responsible to the holder for the amount of the bill, even though the holder himself have not been so entirely thoughtful, active, and vigilant as he perhaps might have been. Chicopee Bank *v.* Philadelphia Bank (U. S.), 8 Wall. 641, 19 L. Ed. 422.

38. Degree of diligence measured by circumstances of particular cases.—Pinkney *v.* Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012.

39. Negligence a question for the jury.—Thompson *v.* Bank (S. C.), 3 Hill 77, 30 Am. Dec. 354; Fox *v.* Davenport Nat. Bank, 73 Iowa 649, 35 N. W. 688; Ayrault *v.* Pacific Bank, 29 N. Y. Super. Ct. 337; Diamond Mill Co. *v.* Groesbeeck Nat. Bank, 9 Tex. Civ. App. 31, 29 S. W. 169; Milwaukee Nat. Bank *v.* City Bank, 103 U. S. 668, 26 L. Ed. 417.

40. Negligence in sending paper directly to debtor.—See ante, "Propriety of Appointment of Drawee as Agent," § 162 (1b).

41. Duty to present paper for acceptance and payment.—*Indiana.*—Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171; Tyson *v.* State Bank, 6 Blackf. 225, 38 Am. Dec. 139.

Iowa.—Stoner *v.* Zachary, 122 Iowa 287, 97 N. W. 1098.

Massachusetts.—Fabens *v.* Mercantile Bank, 23 Pick. 330, 34 Am. Dec. 59.

Mississippi.—Capitol State Bank *v.* Lane, 52 Miss. 677.

Missouri.—Ivory *v.* Bank, 36 Mo. 475, 88 Am. Dec. 150.

New York.—Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459, Seld. Notes 12; National Revere Bank *v.* National Bank, 172 N. Y. 102, 64 N. E. 799; Kirkham *v.* Bank, 26 App. Div. 110, 49 N. Y. S. 767, order affirmed in 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714; McBride *v.* Illinois Nat.

Bank, 138 App. Div. 339, 121 N. Y. S. 1041.

South Carolina.—Thompson *v.* Bank, 3 Hill 77, 30 Am. Dec. 354.

United States.—Woolen *v.* New York, etc., Bank, Fed. Cas. No. 18,026, 12 Blatchf. 359.

Where there is no statute or usage or special contract in this case, to qualify or vary the obligation resulting from the deposit of the drafts with the bank for collection, on its receipt of the drafts, under these circumstances, an implied undertaking by it arose, to take all necessary measures to make the demands of acceptance necessary to protect the rights of the holder against previous parties to the paper. Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722, 5 S. Ct. 141.

When a note payable at bank, is placed in a bank for collection, it is the duty of the bank to see to it that it is properly presented for payment, and on its dishonor, to have it duly presented, and notice given to the indorsers. Georgia Nat. Bank *v.* Henderson, 46 Ga. 487, 12 Am. Rep. 590.

A bank receiving paper for collection undertakes to use due diligence in making demand at maturity, and giving the proper notices of nonpayment. An unreasonable delay will charge the bank with a liability for the amount. And proof that the paper would not have been paid if presented is not a defense. Capitol State Bank *v.* Lane, 52 Miss. 677.

Plaintiff bank, with which defendants deposited a draft for collection, though never collecting it, having notified them that it was collected, and not having notified them to the contrary till it was too late to share in the insolvent estate of their debtor, because of its negligence in not so notifying them, is liable to them for the proportion of the draft which could have been collected by presenting the claim in the insolvency proceedings. Farmers' Nat. Bank *v.* Merchants' Nat. Bank (Tex. Civ. App.), 136 S. W. 1120.

Where a draft, deposited with plaintiff bank for collection, was forwarded by it to defendant bank to collect, and plaintiff, immediately on notice of its receipt by defendant, entered the amount thereof to the depositor's credit, which they immediately drew out, any subsequent negligence of defendant, in making statements showing the amount of the draft to plaintiff's credit, when the draft, through no negligence, however, was never collected, did not make it liable to plaintiff; plaintiff being entitled to recover of the depositors the amount it advanced to them, and being liable to them only because of its negligence in not informing them of nonpayment of the draft in time for them to present their claim against the insolvent estate of their debtor, whereby they could have secured payment of part of it, and plaintiff having been informed by defendant of the nonpayment in time for this. Farmers Nat. Bank *v.* Merchants' Nat. Bank (Tex. Civ. App.), 136 S. W. 1120.

Where the payee of a check indorses it to a bank in a neighboring town for collection, and the latter, without the knowledge or consent of the payee, sends it for collection through a distant bank, situate outside the state, thereby consuming three days for making a presentment for payment which might have been made in one day, the indorsee will be liable for the consequences of such delay, and for any default or negligence of the bank chosen to make the collection. Bedell *v.* Harbine Bank, 62 Neb. 339, 86 N. W. 1060.

The town of S. was situated on the same railroad, 12 miles beyond the town of M. A bank at K. received a check on a bank at S. for collection, and on account of the suspected insolvency of its correspondent, the only other bank at S., mailed the check to a bank at M., where it was received on Saturday, on which day the bank at S. became insolvent. Held, that the bank at K. was negligent in not mailing the check direct to its correspondent at S., and the suspected insolvency afforded no excuse. Herider *v.* Phœnix Loan Ass'n, 82 Mo. App. 427.

Saturday, May 31st, M. deposited in a bank of W., Neb., checks drawn to his order on a bank in C., Neb., 27 miles apart, but connected by telegraph, telephone, and railroad. A mail left W. at 6 p. m. daily, arriving at C. at 9 p. m. The W. bank made no inquiry of the C. bank, but mailed them to a bank in St. Joseph, Mo., which sent them to a bank in Omaha, Neb., and this bank forwarded them to the bank in C., at which they arrived June 5th, and were protested. Held, that the W. bank did not present them to the C. bank in a reasonable time, and that M., as indorser, was discharged. First Nat. Bank *v.* Miller, 37 Neb. 500, 55 N. W. 1064, 40 Am. St. Rep. 499, reaffirmed in 62 N. W. 195.

Where the payee of a check indorses and delivers it to a bank in a neighboring town for collection, and accom-

timely demand of payment of a bill received for collection, the bank makes

panies the act with a request that it be not immediately presented for payment, and agrees that it may be sent for collection through a distant bank, situate outside the state, the indorsee will not be liable for the consequences of the delay necessarily incident to the course adopted, nor for the default or negligence of the bank chosen to make presentment for payment. Bedell *v.* Harbine Bank, 62 Neb. 339, 86 N. W. 1060.

Where an express company, having received an overdue draft from the drawer for collection, with instructions to return it at once if not paid, presented it, and was tendered the principal only, and consented to hold it until the drawee should receive by mail from the drawer an explanation of the interest charged, but neglected to present it again till two days after the drawee had received such reply, and meanwhile he became insolvent, held, that the express company was liable for the loss. Whitney *v.* Merchants' Union Exp. Co., 104 Mass. 152, 6 Am. Rep. 207.

Where an express company, receiving a draft for collection with instructions to return it at once if not paid, retained it after presentment and refusal, to enable the drawees to communicate with the drawer as to the amount, and the former wrote the latter that the express company would retain the draft until the drawee heard from the drawer, such notification does not relieve the express company from liability for subsequent failure to present and collect the draft. Whitney *v.* Merchants' Union Exp. Co., 104 Mass. 152, 6 Am. Rep. 207.

Time for presentment of sight draft.—A bank which receives a sight draft for collection, where the drawee has an office in the same town, should present the draft for acceptance not later than one day after its receipt; and the fact that the bank is ignorant of the insolvent condition of the drawee does not excuse negligence in presenting the same. Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

The qualification of the general two-day rule allowed for forwarding paper for presentment is that, if there be more than one mail on the second day, the paper need not go by the first, but, if there be but one, it must go by it, unless it leave or close at an unreasonably early hour, and the whole of the second day is not allowed, unless the last mail of that day goes at the close of business. Pinkney *v.* Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012.

Sufficient diligence in presentment of check.—In absence of special circumstances, the presentment of a check for payment by a collecting bank on the day after it is deposited for collection is a sufficient exercise of diligence. Merchants' Nat. Bank *v.* Dorchester (Tex. Civ. App.), 136 S. W. 551.

Where a bank receives checks for collection after banking hours, against a bank in another town, it exercises due diligence by transmitting them for collection on the next day, in its usual method of business, to a third bank, in a more distant place. Givan *v.* Bank (Tenn.), 52 S. W. 923, 47 L. R. A. 270.

Sufficiency of presentment through clearing house.—Plaintiff received defendant's check in payment of goods at 8 o'clock a. m. on October 16th and deposited it, for its own convenience, with a bank for collection, knowing of the usage of the banks to collect checks through the clearing house, and the check was presented to the drawee bank after 3 o'clock p. m. on the 17th after going through the clearing house, when that bank had become insolvent, but it would have been paid had it been presented before 3 o'clock. Defendant had no knowledge of the method of collecting checks through the clearing house, and did not know that it would not be presented directly to the drawee bank. Held, that the neglect of plaintiff or its agent, the collecting bank, to present the check for collection on the 17th within banking hours released defendant from liability thereon; it not having impliedly consented to the presentment of the check through the clearing house, instead of directly to the drawee. Merchants' Nat. Bank *v.* Dorchester (Tex. Civ. App.), 136 S. W. 551.

When plaintiff deposited a check with defendant bank for collection, he knew of a usage among the banks of collecting checks through the clearing house, and that, when checks were deposited too late in the day to permit their being cleared that day, they were held by the collection bank and presented at the clearing house the next day. The check was deposited with defendant too late to go to the clearing house on that day, and was held until the next day pursuant to the cus-

the bill its own, and becomes liable to its owner for the amount thereof.[42]

tom, but, when it went to the clearing house and was presented to the drawee bank on the next day, that bank had closed its doors. Held, that defendant was not negligent in presenting the check for payment to the clearing house, instead of directly to the drawee bank, having done so with plaintiff's implied consent, and hence was not liable for the amount of the check. Merchants' Nat. Bank *v.* Dorchester (Tex. Civ. App.), 136 S. W. 551.

Where last day of grace falls on Sunday.—A bank receiving a note for collection is not liable in damages for failing to demand payment on Saturday where the last day of grace falls on Sunday, where its known and established method of business in such case was not to demand payment until Monday. Patriotic Bank *v.* Farmers' Bank, Fed. Cas. No. 10,811, 2 Cranch C. C. 560.

Effect of demand and notice on day note due, without grace.—The holder of a post note, which was issued by a bank that failed before the note fell due, sent it to another bank for collection, and this bank caused payment to be demanded, and notice of nonpayment to be given to the indorsers, on the day the note was due, without grace, whereby the indorsers were discharged on the ground that by law the promisors were entitled to grace on the note, although they had, while solvent, paid such notes without grace. The holder thereupon brought an action against the collecting bank, to recover damages for negligence in not making such demand and giving such notice as would hold the indorsers. It appeared on the trial that, at the time when the note fell due, the question whether banks were entitled to grace on their post notes had never been decided, and that there was no uniform practice as to demanding payment of such notes, and of giving notice to the indorsers after the promisors failed. Held, that the action could not be maintained. Mechanics' Bank *v.* Merchants' Bank (Mass.), 6 Metc. 13.

Evidence held insufficient to show negligence in presentment.—Plaintiff drew a draft, "without protest," on his debtor, payable at sight, and inclosed it to defendant bank for collection, without instruction of any kind as to presentment. The drawee lived seven miles from the bank, and defendant notified him by mail, according to its custom, as well as that of other bankers in the vicinity, that it held the draft. About a week thereafter the drawee came to the bank and accepted the draft. The drawee was insolvent when the draft was drawn, and executed an assignment two weeks after accepting the draft. There was no evidence that defendant's officers were aware of the drawer's financial condition. Held, that the evidence was insufficient to sustain a finding of negligence on the part of defendant in not making an immediate presentment of the draft. Crouse *v.* First Nat. Bank, 61 Hun 618, 15 N. Y. S. 408, 39 N. Y. St. Rep. 654, judgment affirmed 137 N. Y. 383, 33 N. E. 301.

42. Bank *v.* Triplett (U. S.), 1 Pet. 25, 7 L. Ed. 37; McKinster *v.* Bank (N. Y.), 9 Wend. 46; Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171; Capitol State Bank *v.* Lane, 52 Miss. 677; Britton *v.* Niccolls, 104 U. S. 757, 26 L. Ed. 917.

A bank, receiving paper for collection, undertakes to use due diligence in making demand at maturity, and giving the proper notices of nonpayment; and an unreasonable delay will charge the bank with a liability for the amount. Bank *v.* Kenan, 76 N. C. 340.

The place of residence of the maker of a note being presumptively where it is dated, the duty of the bankers as collecting agents is, to make inquiry for his place of business or residence in that city, and, if he had either, to make there the presentment of the notes, but if he had neither, to use reasonable diligence to find him for that purpose. Where it turned out that the maker had neither domicile nor place of business in the city, and was absent at the time from it, no demand upon him there was possible, nor was that essential to charge the indorsers. Britton *v.* Niccolls, 104 U. S. 757, 26 L. Ed. 917.

A bank in one place which receives for collection a note payable in another is responsible for failure to make proper presentment, by reason of which an indorser is discharged. First Nat. Bank *v.* Moore, 6 O. Dec. 779.

Obligation as varied by custom.—Where a note is left at a bank for collection, the mere employment of a notary for the purpose of making demand does not excuse the bank from procuring a proper presentment and notice in case of nonpayment, since the obligation is a positive and universal

The insolvency of the drawee of a draft which has been indorsed to a third person is no excuse for failure of the collecting agent to present it for acceptance.[43] The fact that a bona fide indorsee of a draft did not inquire whether the drawer had the right to draw, or had reason to expect it to be paid, will not excuse the bank that undertook the collection of the draft from presenting same for acceptance.[44] A collecting bank is not in fault for not presenting an accepted draft to a bank wherein the acceptor has funds, if the acceptor has not directed the bank to pay.[45] It has been held that where the drawee bank was insolvent at the time the check was drawn, it was not at all certain that the check would have been paid even if presented, and it was not collectable at law, no right of action will exist against the defendant bank to whom it was given for collection even though it had been guilty of negligence. There must not only be negligence but injury as a result of it.[46] A bank is responsible for mistaking the date of a note received for collection, whereby it was presented for payment before the proper time, and the indorser discharged.[47] A bank which presents for payment, at its maturity, a paper left with it for collection, addressed to another bank, and requesting it to pay a certain sum to a third party on a future day, is liable to the owner of such paper for negligence in presenting it for payment before grace expired, though it was not accustomed to deal in such

rule of law, and can not be varied by custom. Ayrault *v.* Pacific Bank, 29 N. Y. Super. Ct. 337, affirmed in 47 N. Y. 570, 7 Am. Rep. 489.

In an action against a bank for negligence in not duly demanding of the maker payment of a note left by the plaintiff with them for collection, the defense being that the note was duly placed by the defendants in the hands of a competent notary public for demand and protest, and that the negligence, if any, was on his part, the defendants having been the collecting agent for the plaintiff for more than ten years, and having invariably placed their notes in the hands of a notary for demand and protest, with the knowledge of the plaintiff, evidence is admissible for the defendants of an invariable usage among the banks in Boston, including the defendants, when notes are sent to them for collection, to keep the same for payment until the close of banking hours, and, if not then paid, to put them in the hands of a notary for demand and protest. Warren Bank *v.* Suffolk Bank (Mass.), 10 Cush. 582.

43. Insolvency of drawee no excuse for nonpresentation for acceptance.—Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

44. Failure of indorsee of draft to inquire as to right of drawer to draw.—Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

45. Failure to present an accepted draft to bank holding funds of acceptor.—Haines *v.* McFerren, 19 Ill. App. 172.

46. Necessity for injury resulting from nonpresentation of check.—Givan *v.* Bank (Tenn.), 52 S. W. 923, 47 L. R. A. 270, citing Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373; Bruce & Co. *v.* Baxter, 75 Tenn. (7 Lea) 447; Collier *v.* Pulliam, 81 Tenn. (13 Lea) 114.

In an action by the owners of a note against a banking firm at whose office the note was made payable for neglect in not demanding payment from the maker, it is a sufficient defense to show that the maker had no funds in the banking office when it fell due. Hallowell & Co. *v.* Curry, 41 Pa. (5 Wright) 322.

See, however, Bank *v.* Kenan, 76 N. C. 340, in which it was held that to charge a bank for the amount of a check taken by it for collection, on the ground that it has failed, without excuse, to demand payment, and give proper notice of nonpayment, proof that the check would not have been paid if presented is no defense.

47. Liability for presentment before proper time.—Bank *v.* Broomhall, 38 Pa. (2 Wright) 135.

paper.[48]

§ 171 (5) Duty to Give Notice of Nonpayment or Dishonor.—In General.—Where payment of a note is refused on presentment by a bank with which it has been deposited for collection, the bank is bound to notify the owner thereof in order that he may take measures for his own security.[49] So, where a bank neither collects a bill or draft received by it for

48. **Negligence in presentment before expiration of grace.**—Ivory *v.* Bank, 36 Mo. 475, 88 Am. Dec. 150.

Custom of treating certificate of deposit as payable without grace as defense.—The indorsee of a certificate of deposit payable "in current funds" sent it for collection to a bank, which protested it without allowing days of grace, thereby discharging the indorser. Held, in an action against the bank by the indorsee, that the fact that defendant acted according to a custom which existed among the banks of the place, to treat such certificate as payable without grace, was a good defense. Haddock *v.* Citizens' Nat. Bank, 53 Iowa, 542, 5 N. W. 766.

49. **Duty to give notice to owner of note of its nonpayment.**—Bank *v.* Huggins, 3 Ala. 206; Wingate *v.* Mechanics' Bank, 10 Pa. 104; Bank *v.* Kenan, 76 N. C. 340.

"A principal is entitled to notice from his collecting agent of what steps he has taken; and if the agent negligently fail to disclose to his principal that payment is not made or is refused, and by reason of this negligence loss results, the agent is bound." Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

"The general duty of an agent who receives for collection a bill of exchange is to use due diligence in presenting the same for acceptance, and in presenting it for payment, if it has been accepted, and to give the holders and other parties to the paper, by the next day's post, the notices of dishonor required by law in case acceptance or payment is refused, and to give to his principal any special notice which is required by the terms of the instructions to the agent, or of the contract which the agent has entered into with his principal." Merchants', etc., Bank *v.* Stafford Nat. Bank, Fed. Cas. No. 9,438, 44 Conn. 564.

Where a promissory note is indorsed and delivered to a bank for collection, there is an implied undertaking, on the part of the bank, to charge the indorsers by a notice of nonpayment; and, if they neglect to do this, the holder may maintain an action against them for the neglect. Bank *v.* Smedes (N. Y.), 3 Cow. 662.

A bank, receiving paper for collection, undertakes to use due diligence in making demand at maturity, and giving the proper notices of nonpayment. An unreasonable delay will charge the bank with a liability for the amount. Capitol State Bank *v.* Lane, 52 Miss. 677.

A note was sent to a bank to collect. The maker was a stockholder and director of the bank, and the bank knew that he was largely in debt, and would not be able to pay his obligations if pressed by all his creditors. For many weeks after the note reached the bank, the debtor had an unincumbered stock of goods in his store, which was worth $2,500, and also real estate partially unincumbered. The bank did not inform its principal of the facts, but withheld information for a long period after the maturity of the note, and replied only in response to a telegram of inquiry. In the interim, the bank obtained security from the maker to protect its own claims. Held, that the bank is liable to its principal for negligence. Commercial Bank *v.* Red River Valley Nat. Bank, 8 N. Dak. 382, 79 N. W. 859.

The claim of a creditor bank against a national bank in the hands of a receiver was for notes and bills sent by the plaintiffs to the cashier of the defendant bank for collection. The plaintiff bank was a holder of the paper for collection, but had paid its full amount to other banks, from which it was received. The cashier of the plaintiff bank had given notice to the cashier of the defendant bank to protest and return all paper not paid; but the paper of one S., which had been sent by the plaintiff bank to the cashier of the defendant bank for collection and charged to the latter and posted in the account against the defendant bank, was not paid by S., and was not protested or returned, or any notice of its nonpayment given to the plaintiff bank. A semimonthly statement of the account was sent by the

collection nor notifies the drawer of its nonacceptance or nonpayment in due time, it is guilty of negligence as a matter of law,[50] rendering it liable

cashier of the plaintiff bank to the cashier of the defendant bank, and its correctness acknowledged by the latter. Held, that the plaintiff bank had a right, after a reasonable time had elapsed without notice of nonpayment or a return of the paper, to charge the amount to the defendant bank, and to recover in assumpsit for an account stated. National Pahquioque Bank *v.* First Nat. Bank, 36 Conn. 325, 4 Am. Rep. 80.

50. Duty to notify drawer of draft of its nonpayment or nonacceptance.—Selz *v.* Collins, 55 Mo. App. 55.

An agent for the collection of a bill of exchange is liable if he fails to notify his principal when such bill has been duly presented and acceptance according to its tenor refused. Exchange Nat. Bank *v.* Third Nat. Bank, 4 Fed. 20.

One drew a draft payable to himself at a bank in another place on a resident thereof, which he gave to his own bank, which sent it to the former one. The collecting bank presented it in due time, but it was not formally accepted, and such bank did not inform the other one that it was not paid until several weeks later. In the meantime the drawer's bank, on the strength of a letter from the drawee to the drawer, stating that the draft had been paid, discounted it. Held, that the collecting bank was liable to the other for its negligence. Merchants', etc., Bank *v.* Stafford Nat. Bank, Fed. Cas. No. 9,438, 44 Conn. 564.

A draft payable at sight was left with plaintiff bank for collection, which forwarded it to defendant bank, with instructions to return without protest if not accepted or paid. Defendant promptly presented the draft, and the drawee said that he would look the matter up. Defendant bank mislaid the draft, and took no further steps for several weeks. Immediately after presentation of the draft the drawee wrote the drawers that it was paid, and, his letter being shown to plaintiff bank, it thereupon paid to the drawers the amount of the draft. The drawee subsequently ascertained that he owed the drawers nothing, and the draft was not paid. Held, that defendant bank was guilty of negligence in not immediately notifying plaintiff as to the state of affairs, and was therefore liable for the amount of plaintiff's loss, it appearing that the drawers had no visible property from which the amount could be made by legal proceedings. Merchants', etc., Bank *v.* Stafford Nat. Bank, Fed. Cas. No. 9,438, 44 Conn. 564.

Plaintiff made a draft payable at sight to defendant bank, and sent it to defendant for collection without further instructions. The drawees failed to pay it when presented, and defendant took their acceptance, which it held for forty-seven days, without communicating with plaintiff further than to acknowledge the receipt of the draft, and then returned to plaintiff, stating that it was unable to collect. It appeared that the drawees were insolvent, but owned property largely in excess of the amount of the draft, and covered by an invalid deed of trust. Held, that defendant was liable for the amount of the draft. Mound City Paint, etc., Co. *v.* Commercial Nat. Bank, 4 Utah, 353, 9 Pac. 709.

Plaintiff drew a sight draft on its debtor in favor of defendant, a national bank, and forwarded the same for collection. Defendant presented the draft, had it accepted, and notified plaintiff thereof, but gave no further information until forty-seven days later, when it returned the draft uncollected. In the meantime defendant had extended credit to the drawee, and, about the time the draft was returned, said drawee made an assignment for the benefit of creditors, in which defendant was preferred in a sum larger than the amount of the draft. Held, that defendant was negligent, and therefore liable for the amount of the draft. Mound City Paint, etc., Co. *v.* Commercial Nat. Bank, 4 Utah, 353, 9 Pac. 709.

Time for giving notice of dishonor.—Where the day after the dishonor of a bill of exchange was Sunday, the bank to whom it was sent for collection had at least until Monday to mail notice to the drawer of the dishonor, and as a notice mailed on that day would not have reached him in time to have enabled him to sue out an attachment earlier than he in fact did, he was not damaged by the failure of the bank to give notice, there being no intervening parties to whom he had the right to look on the failure of the acceptor to pay the bill. Bamberger,

for loss resulting from such negligence.[51] The indorsee of a draft is entitled, as against the collecting agent, to notice of its nonacceptance notwithstanding the insolvency of the drawer.[52] It is the duty of a collecting bank to give the depositor notice of the dishonor of a check deposited with it for

etc., Co. *v.* Bank, 15 Ky. L. Rep. 301, 361.

Facts held not to constitute such negligence as to impose liability.—The fact that a bank after receiving a draft for collection, and after presenting it for payment, and receiving a promise of payment, holds the same, according to its customary method of business, for ten days, without notice to the drawer, during which time the drawee makes an assignment, does not, of itself, constitute such negligence as will entitle the drawer to recover from the bank. Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

51. Where a bank to which a bill of exchange is sent to be presented for acceptance, and collected when due, fails to give notice of nonacceptance, it is liable unless it can show affirmatively that the owner sustained no damage therefrom. Crawford *v.* Louisiana State Bank (La.), 1 Mart., N. S., 214.

Necessity for resultant loss.—Where a bill is indorsed by the payee to a bank for collection, and it is alleged that the bank was negligent in demanding payment and giving notice of dishonor, the drawer to whose order the bill was payable must, in order to recover of the bank, not only show negligence on its part, but must show loss as the result of that negligence. Bamberger, etc., Co. *v.* Bank, 15 Ky. L. Rep. 301, 361.

A bill payable "Dec. 15, 1888, fixed" —that is, without grace—was indorsed to a bank for collection. The bill was presented on the 15th, and payment was refused. Supposing that the drawee was entitled to grace, notice of the dishonor was not given till the 18th, and was then personally given to an agent of the holder, and he at once sued out an attachment against the drawee. The holder sued the bank for negligence in not at once giving notice of dishonor. It appeared that, as the next day after dishonor was Sunday, the bank had at least until Monday to mail notice to plaintiff of the dishonor, and that a notice mailed on that day would not have reached him in time to have enabled him to sue out an attachment earlier than he in fact did. Held, that plaintiff was not damaged by the failure of the bank to give the notice, there being no intervening parties to whom he had the right to look on failure of the drawee to pay the bill. Bamberger, etc., Co. *v.* Bank, 15 Ky. L. Rep. 301, 361.

52. Drawee of draft entitled to notice of nonacceptance though drawer insolvent.—Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

The fact that, at the time a draft was drawn, the indorsee knew that the drawer was indebted to the drawee, and that there was no reasonable ground to believe that the draft would be accepted, does not, in the absence of fraud, deprive the indorsee of his usual rights to notice of dishonor, as against the bank to which the draft was sent for collection. Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

A bank in Pittsburg sent to a bank in New York, for collection, eleven unaccepted drafts, dated at various times through a period of over three months, and payable four months after date. They were drawn on "Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J.," and were sent to the New York bank as drafts on the tea tray company. The New York bank sent them for collection to a bank in Newark, and, in its letters of transmission, recognized them as drafts on the company. The Newark bank took acceptances from Conger individually, on his refusal to accept as secretary, but no notice of that fact was given to the Pittsburg bank until after the first of the drafts had matured. At that time the drawers and an indorser had become insolvent, the drawers having been in good credit when the Pittsburg bank discounted the drafts. Held, that the New York bank was liable to the Pittsburg bank for such damages as it had sustained by the negligence of the Newark bank. Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722, 5 S. Ct. 141; Tradesman's Nat. Bank *v.* Third Nat. Bank, 112 U. S. 293, 28 L. Ed. 728, 5 S. Ct. 149.

collection.[53] The liability of a bank, with which a check is deposited for collection, for negligence in not collecting it and not giving notice of nonpayment till after the bank on which it was drawn suspended payment because of insolvency, is only for such amount as the depositor will lose thereby, which he must allege and prove.[54]

Duty to Notify all Prior Parties to Paper.—According to some decisions it is held that where a bill or note is sent to a bank for collection merely, in the absence of express contract or usage, it is not obligatory on the corresponding or collecting bank to notify and duly charge all the prior parties to the paper, but only to notify its principal.[55] According to other

53. Duty to notify depositor of check of dishonor of same.—Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246; Bank *v.* Kenan, 76 N. C. 340.

Where a check on itself is sent to a bank for collection, the bank becomes the agent of the person sending it, and is liable to the latter for damage caused by its failure to give notice to the drawer of nonpayment. Exchange Bank *v.* Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173.

A bank received a check upon itself for collection, being at the same time a large creditor of the drawer, and failed, without excuse, to notify the depositor of the nonpayment of the check. Held, that the bank was chargeable with negligence. Bank *v.* Kenan, 76 N. C. 340.

Time of notice.—A bank receiving for collection, from a correspondent, checks drawn upon it by a customer, with instructions to protest in case of nonpayment, must, if payment be refused for want of funds, give notice to the bank from which they were received not later than the next day after dishonor; and when they are held for two days in order to enable the drawer to provide funds a jury will be warranted in finding that the bank intended to accept them. Wood River Bank *v.* First Nat. Bank, 36 Neb. 744, 55 N. W. 239.

Bank checks are due on presentation, and are not entitled to days of grace, and therefore where a bank fails to give notice of nonpayment of a check sent to it for collection, until three days after demand, it will be liable. Wood River Bank *v.* First Nat. Bank, 36 Neb. 744, 55 N. W. 239.

54. Extent of bank's liability.—Hendricks *v.* Jefferson County Sav. Bank, 153 Ala. 636, 45 So. 136. See post, "Measure of Damages," § 175 (6).

55. Sufficiency of notification to bank's principal.—State Bank *v.* Bank, 17 Abb. Prac. 364, 41 Barb. 343, 27 How. Prac. 57; Phipps *v.* Millbury Bank (Mass.), 8 Metc. 79; Bank *v.* Goddard, 5 Mason 366, Fed. Cas. No. 917; Codrington *v.* Adams, Fed. Cas. No. 2,937; Locke *v.* Merchants' Nat. Bank, 66 Ind. 353.

"The weight of authority, however, is strongly to the effect, and the law may be assumed to be, that it is only necessary for the bank to notify its immediate predecessor, that is, the party from whom it received the paper, no matter what may be the nature of the title or interest of that party to or in it. But special circumstances may vary this general principal. Thus an agreement between the bank and its principal may vary it. So also, may a usage of the collecting bank." Locke *v.* Merchants' Nat. Bank, 66 Ind. 353, quoting 1 Dan. Neg. Inst., p. 246, § 331.

A bank which receives a note for collection in the ordinary course of business, from a bank in another city, bearing the indorsement of the latter's cashier, is not bound to send notice of nonpayment to any other party than its principal; and the fact that the first indorser resided in the same city with the first bank, even if known, would not change the duty of its agency. Codrington *v.* Adams, Fed. Cas. No. 2,937.

A bank receiving a note for collection need only give notice of dishonor, and need not give it to an indorser, though the bank has knowledge of the indorser's residence, and such residence is nearer the bank than to the holder's residence. Bank *v.* Goddard, 5 Mason 366, Fed. Cas. No. 917.

A bank that receives from another bank, for collection, a note indorsed by the cashier of that bank, is bound to present the note to the maker for payment, at maturity, and, if it is not paid, to give notice of nonpayment to

decisions, however, where a bank receives a bill or note for collection, it is bound to demand payment of the maker, and to cause notice of nonpayment to be given to all the indorsers, and failure to do so is a neglect of the obvious and legal means of collection.[56]

Duty as to Paper Left on Special Deposit.—Where a cashier of a bank places his indorsed note in the private envelope of a depositor, in the vault of the bank, as collateral security for his individual note to the depositor, the bank is not liable for the release of the indorser by failure to present the note for payment, and to notify the indorser of nonpayment; the note being merely a special deposit with the bank, and constructively in

the bank from which the note was received; but it is not bound, unless by special agreement, to give such notice to the other parties to the note. Phipps *v.* Millbury Bank (Mass.), 8 Metc. 79.

Where one indebted to a bank gives as collateral security a note held by him as indorsee, with instructions to the bank to collect and apply the proceeds to the debt, the bank must make demand and give notice of dishonor to the indorsers on the note, and will be liable for omitting to do so, only when such demand and notice are necessary to preserve its employer's rights on the note against those contingently liable to him. West Branch Bank *v.* Fulmer, 3 Pa. 399, 45 Am. Dec. 651.

Insufficient evidence of custom to notify all indorsers.—Where the collecting bank transmits notices of protest to other parties besides its own principal, this may be some evidence of an agreement to notify all the indorsers, but not sufficient evidence of such an agreement, in the absence of proof of custom or usage. State Bank *v.* Bank, 17 Abb. Prac. 364, 41 Barb. 343, 27 How. Prac. 57.

56. Bank required to give notice to all indorsers.—Fabens *v.* Mercantile Bank (Mass.), 23 Pick. 330, 34 Am. Dec. 59; Thompson *v.* Bank (S. C.), 3 Hill 77, 30 Am. Dec. 354; Branch Bank *v.* Knox & Co., 1 Ala. 148.

A bank which receives a bill of exchange for collection is bound to demand payment of the maker, and to cause notice of nonpayment to be given to all of the indorsers. Branch Bank *v.* Knox & Co., 1 Ala. 148.

Failure of a bank when a note is given it for collection to demand payment of the maker, and to cause notice of nonpayment to be given to all indorsers, is negligence rendering it liable. Thompson *v.* Bank (S. C.), 3 Hill 77, 30 Am. Dec. 354.

A promissory note indorsed by A., the payee, and B., the then owner thereof, was, before maturity, placed in the branch of the Louisiana State Bank at Baton Rouge, whose cashier indorsed and forwarded it to the mother bank at New Orleans for collection. It was duly protested for nonpayment by the notary of the mother bank, who mailed notices of protest for the indorsers to the cashier of the branch bank. A., upon whom reliance was principally placed, died, and his executors were qualified before the maturity of the note; but neither they nor B. was served by the branch bank with notice of protest. Held, that the bank was liable for any loss thereby sustained by the holder of the note. Bird *v.* Louisiana State Bank, 93 U. S. 96, 23 L. Ed. 818.

Bank's default cured by notice given through other channels.—A bank receiving a bill for collection, or as collateral security only, is bound to follow the usual course of business, and give notice of nonpayment to the indorser; but if the indorser have knowledge of the nonpayment, or for other reasons the notice be unnecessary, the bank will not be liable for a neglect to notify. West Branch Bank *v.* Fulmer, 3 Pa. 399, 45 Am. Dec. 651.

In an action by the owners of a note against a banking firm at whose office the note was made payable, for neglect in not demanding payment from the maker, and in not giving notice of the nonpayment thereof to the indorser, by reason whereof he was discharged and plaintiffs lost their debt, it is a sufficient defense to show that the maker had no funds in the banking office when it fell due, and that notice of dishonor was actually received in due time by the indorser. Hallowell & Co. *v.* Curry, 41 Pa. (5 Wright) 322.

the depositor's possession.[57]

§ 171 (6) Liability of Transmitting Bank for Default of Correspondent.—As to the liability of a transmitting bank for default or negligence of its correspondent or subagents in failing to collect negotiable paper transmitted to them for collection, the same conflict of authorities is found to exist as upon the question of the liability of the transmitting bank for failure of its correspondents or subagents to pay over the proceeds of collections made by them. Thus, according to one line of decisions, where a bank receives foreign paper for collection, in the absence of an agreement to be responsible at all events, it fully discharges its duty by sending such paper to a competent, reliable agent, with proper instructions for its collection, and it is not liable to its customer for any negligence or default of its correspondent or subagent as to the collection of such paper where there was no negligence in the selection of the agent.[58] According to these au-

57. Liability for failure to present and notify of nonpayment in case of paper left on special deposit.—Bohl *v.* Carson, 11 C. C. A. 16, 63 Fed. 26.

58. Transmitting bank held not liable where proper care shown in selection of correspondent or subagent.—*Illinois.*—Ætna Ins. Co. *v.* Alton City Bank, 25 Ill. 243, 79 Am. Dec. 328; Waterloo Milling Co. *v.* Kuenster, 158 Ill. 259, 51 N. E. 906, 29 L. R. A. 794; Anderson *v.* Alton Nat. Bank, 59 Ill. App. 587; Carlinville Nat. Bank *v.* Wilson, 78 Ill. App. 339.

Indiana.—Irwin *v.* Reeves Pulley Co., 20 Ind. App. 101, 48 N. E. 601, 50 N. E. 317.

Iowa.—Guelich *v.* National State Bank, 56 Iowa 434, 9 N. W. 328, 41 Am. Rep. 110, distinguishing Hoover *v.* Wise, 91 U. S. 308, 23 L. Ed. 392.

Kentucky.—Second Nat. Bank *v.* Merchants' Nat. Bank, 111 Ky. 930, 23 Ky. L. Rep. 1255, 65 S. W. 4, 55 L. R. A. 273, 98 Am. St. Rep. 439.

Massachusetts.—Dorchester, etc., Bank *v.* New England Bank (Mass.), 1 Cush. 177.

Mississippi.—Third Nat. Bank *v.* Vicksburg Bank, 61 Miss. 112, 48 Am. Rep. 78.

Missouri.—Daly *v.* Butchers', etc., Bank, 56 Mo. 94, 17 Am. Rep. 663; American Exch. Nat. Bank *v.* Metropolitan Nat. Bank, 71 Mo. App. 451.

Nebraska.—Bedell *v.* Harbine Bank, 62 Neb. 339, 86 N. W. 1060.

Pennsylvania.—Mechanics' Bank *v.* Earp, 4 Rawle 384.

Tennessee.—Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Givan *v.* Bank, 52 S. W. 923, 47 L. R. A. 270.

A bank which receives checks to be transmitted to another place for collection without compensation fully discharges its duty by sending them in due season to a solvent and competent correspondent, with proper instructions for their collection, and is not liable for any loss occasioned by the negligence of such correspondent. Anderson *v.* Alton Nat. Bank, 59 Ill. App. 587.

A bank receiving for collection a draft payable at a distant place, and transmitting it to a competent and proper correspondent at that place, is not liable for loss through the negligence of the correspondent, but the latter is liable directly to the owner of the draft. Guelich *v.* National State Bank, 56 Iowa 434, 9 N. W. 328, 41 Am. Rep. 110, distinguishing Hoover *v.* Wise, 91 U. S. 308, 23 L. Ed. 392.

Where a bank receives for collection a draft payable in another state, and forwards it to a proper correspondent at the place where it is payable, in case of default by its correspondent it is not liable to the owner unless by some after act it makes itself responsible. Daly *v.* Butchers', etc., Bank, 56 Mo. 94, 17 Am. Rep. 663.

Defendants left with the plaintiff bank for collection time drafts on T. at the city of A., to which were attached bills of lading taken to defendants' instead of T.'s order, and indorsed by defendants to the order of plaintiff. Defendants themselves designated a bank at A., through which the drafts should be collected, but

thorities the agent selected becomes the agent of the owner of the paper, and not of the bank transmitting it.[59] According to the other line of decisions, however, where a bank receives for collection from a customer paper which, by the exercise of proper diligence, might have been collected, it becomes, in the absence of any express or implied contract to the contrary, liable for any neglect of duty whereby the collection of the paper is defeated, whether such neglect arose from the default of the receiving bank's own officers or from that of its correspondent or agent to whom it may have sent the check for collection.[60] In some decisions a distinction is made between cases

gave no further instructions. Plaintiff sent the drafts to the bank at A., without special directions, and that bank, instead of holding the bills of lading until the drafts should be paid, surrendered them on acceptance of the drafts by T., who got the merchandise from the carrier, and, becoming insolvent, failed to pay the drafts. Plaintiff did not assign the bills of lading to the bank at A. Held that, though the bank at A. was negligent in surrendering the bills, it was defendants' agent, as well as plaintiff's, and that plaintiff was not liable for such negligence; defendants' remedy being against the bank at A., or by suit to recover the merchandise if it could be traced, or by an action against the carrier for delivering the merchandise to T., when the bills of lading showed the title to be in plaintiff, to whose order defendants had indorsed the bills as their agent. Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618.

Notwithstanding consideration received for service.—A bank with which is deposited a foreign draft for collection, which the owner knew could be collected only by transmission to a subagent, is not liable for the default of the subagent, if due care has been exercised in his selection, although the bank was to receive a consideration for the services. Irwin *v.* Reeves Pulley Co., 20 Ind. App. 161, 48 N. E. 601, 50 N. E. 317.

Where a bank receives bills merely for transmission to its correspondent to be collected, it is not liable for any negligence of the correspondent in attending to the collection. Mechanics' Bank *v.* Earp (Pa.), 4 Rawle 384.

The fact that the cashier of a bank indorsed drafts which were deposited in the bank for transmission elsewhere for collection does not make the bank liable for the laches of the collecting bank in failing to give advice of nonpayment. Mechanics' Bank *v.* Earp (Pa.), 4 Rawle 384.

Home bank can not, by voluntarily paying claim, maintain action against subagent.—In August, 1870, a bill was sent for collection to the L. Bank, bearing date June 1, 1870, and payable three months after date at the K. Bank. This bill was sent to the K. Bank, which delivered it to a notary to be protested, and by mistake it was returned to the L. Bank unprotested, September 2d. The L. Bank voluntarily paid the amount of the bill to the New York bank, which had sent it to be collected. Held, that the L. Bank could not maintain an action on the case for damages against the K. Bank and the notary. Bank *v.* First Nat. Bank, 67 Tenn. (8 Baxt.) 101, 35 Am. Rep. 691.

59. Correspondent or subagent held to be agent of the owner of paper.—Carlinville Nat. Bank *v.* Wilson, 78 Ill. App. 339. And see cases cited in preceding text.

Where a bank receives a check for transmission and collection, in the absence of an agreement to be responsible at all events, it fully discharges its duty by sending the check to a competent, reliable agent, with proper instructions for its collection. Then the agent selected becomes the agent of the owner of the check, and not of the bank sending it. Carlinville Nat. Bank *v.* Wilson, 78 Ill. App. 339.

Where a check payable in another place is deposited with a bank for collection, the duty of the bank so receiving the check in the first instance is to seasonably transmit the same to a suitable bank or other agent at the place of payment for collection; the bank so selected under such circumstances being the agent of the owner of the check. Bank *v.* Floyd, 142 N. C. 187, 55 S. E. 95.

60. Transmitting bank held liable for negligence of correspondents or agents.—*United States.*—Kent *v.* Dawson Bank, Fed. Cas. No. 7,714, 13 Blatchf. 237.

Georgia.—Bailie *v.* Augusta Sav.

where an agent for a consideration agrees to collect a bill of exchange and he employs another agent for the purpose, and where he simply accepts one for collection without any agreement for consideration and employs an-

Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74. See, also, Comer *v.* Dufour, 95 Ga. 376, 22 S. E. 543, 30 L. R. A. 300, 51 Am. St. Rep. 89.

Michigan.—Simpson *v.* Waldby, 63 Mich. 439, 30 N. W. 199.

Minnesota.—Streissguth *v.* National German-American Bank, 43 Minn. 50, 44 N. W. 797, 7 L. R. A. 363, 19 Am. St. Rep. 213.

New Jersey.—Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. 588; Davey *v.* Jones, 42 N. J. L. 28, 36 Am. Rep. 505.

New York.—Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459, Seld. Notes 12, affirming 8 Barb. 396; Commercial Bank *v.* Union Bank, 11 N. Y. 203, affirming 19 Barb. 391; McBride *v.* Illinois Nat. Bank, 138 App. Div. 339, 121 N. Y. S. 1041; Allen *v.* Merchants' Bank, 22 Wend. 215, 34 Am. Dec. 289; State Nat. Bank *v.* Thomas Mfg. Co., 17 Tex. Civ. App. 214, 42 S. W. 1016.

An undertaking to "collect" is not merely an undertaking to select a suitable agent, and transmit the paper to him to collect as agent for the owner, but is an undertaking to respond for any default of the agent selected. Kent *v.* Dawson Bank, Fed. Cas. No. 7,714, 13 Blatchf. 237.

A bank which assumes the duty of a collecting agent is absolutely liable for any negligence or default of a correspondent. Davey *v.* Jones, 42 N. J. L. 28, 36 Am. Rep. 505.

A bank held liable for negligence of its correspondent in the collection of a draft. Harter *v.* Bank, 92 S. C. 440, 75 S. E. 696.

A stipulation on a deposit slip held not to exempt a bank from liability for its negligence in the collection of a draft or waive the rights of the depositor under the law merchant. Harter *v.* Bank, 92 S. C. 440, 75 S. W. 696.

A bank receiving a check for collection is liable, under the commercial law, to the depositor for any loss occasioned by the conduct of any subagent employed by it to assist in making the collection; but there is no privity of contract between the depositor and the subagent on which the depositor can recover against the subagent for its negligence resulting in loss. Martin *v.* Hibernia Bank, etc., Co., 127 La. 301, 53 So. 572.

Civ. Code La., art. 3008, makes an attorney in fact answerable for the acts of a person substituted by him to manage in his stead, under certain conditions; article 3009 provides that, even where the attorney in fact is answerable for his substitute, the principal may, if he thinks proper, act directly against the substitute. Held that, to authorize an action by a principal against a subagent of the agent, such subagent must have been appointed by the agent to manage in the agent's stead, and, where a bank receiving a check for collection employed a subagent to assist in the collection, the subagent was not a substitute within the Civil Code, and the depositor could not sue such subagent for neglect in presenting the check which resulted in its loss. Martin *v.* Hibernia Bank, etc., Co., 127 La. 301, 53 So. 572.

Where a bank receiving a check for collection gave the depositor credit for the amount thereof and, after indorsing the check in blank, forwarded it to another bank for collection and credit, which was duly given, and the second bank, after indorsing the check in blank, forwarded it to its correspondent "for credit," which was given, and the third bank forwarded the check to the payee bank for payment, which was refused because of insolvency of such bank, in the absence of notice that the receiving bank was merely acting as a collecting agent, there was no privity between such bank and the third bank, and consequently no subagency expressed or implied on which an action could be based by the depositor against the third bank for its negligence in not sending the check to another bank for presentment. Martin *v.* Hibernia Bank, etc., Co., 127 La. 301, 53 So. 572.

H. & Co., of New York, drew a draft on L. & Co., of Baltimore, and sold it to a New York bank, which latter bank sent the draft to its correspondent, a Baltimore bank, for collection. Through the negligence of the Baltimore bank, the draft was not collected, and, L. & Co. having failed in business, the draft was protested, and returned to the bank in New York, which notified H. & Co. of the fact of the dishonor, who, ignorant of the fact of the negligence, paid the amount of the

other agent for the purpose. In the former instance, the act of subagent is held to be the act of the original agent and not of the principal, while in the latter instance, the subagent is the agent of the principal, and not of the original agent.[61]

draft. On a suit brought by the New York bank, for the use of H. & Co., against the Baltimore bank, held, that as the amount of the draft was paid by H. & Co. under a mistake that entitled them to a return of the money, the plaintiff should be regarded as having received it for their use, and as holding it subject to their order. Merchants' Bank *v.* Bank, 24 Md. 12.

Where an owner of a bill indorses it, and sends it to a bank for collection, the bank, having a special interest in it and in the proceeds thereof, can sustain an action against such agent as it may employ to collect it for omitting to pay over the proceeds, or for default in charging the parties. Commercial Bank *v.* Union Bank, 11 N. Y. 203.

It will be assumed, in absence of a special agreement, that no agreement exists exempting a bank to which a note is forwarded for collection by another bank from liability for loss caused by its failure to discharge its duty as agent of the forwarding bank. McBride *v.* Illinois Nat. Bank, 138 App. Div. 339, 121 N. Y. S. 1041.

Liability for negligence or delay of correspondent in making presentment.—A bank in one place which receives for collection a note payable in another is responsible for its correspondent's failure to make proper presentment. First Nat. Bank *v.* Moore, 8 Am. Law Rec. 97; S. C., 4 Wkly. L. Bull. 291.

A country bank sent an indorsed bill of exchange, payable in New York, to a bank at Albany, for collection, and the Albany bank, indorsing it, sent it to a bank in New York for the same purpose. Held, that the Albany bank alone was answerable to the country bank for any negligence in presenting the bill by which the indorser is released from his liability, and the New York bank was answerable to the Albany bank. Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459, Seld. Notes 12, reversing 8 Barb. 396.

A bank receiving for collection checks payable at a distant city, and sending them to a bank in such city, is liable for the negligence of such bank, whereby the checks are unpaid because of delay in presenting them. Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. 588.

Bank liable to its correspondent bank and not to original bank of deposit.—Where a bank in the state receives for collection a draft payable at another bank within the state, but transmits the draft to a foreign bank in the course of collection, which in turn transmits it to the bank at which it is payable, the last-named bank is responsible for its negligence in collection only to the foreign bank. First Nat. Bank *v.* Mansfield Sav. Bank, 6 O. C. D. 452, 10 O. C. C. 233.

Where a bank receives for collection a draft which it transmits to another bank, and is thence sent to a third bank, the bank first receiving the draft can not recover from the bank last receiving it for the latter's negligence in failing to make the collection. First Nat. Bank *v.* Mansfield Sav. Bank, 6 O. C. D. 452, 10 O. C. C. 233.

61. Liability as dependent upon question of consideration for collection.—Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770.

The exchange which is usually charged by banks for the transmission of money from one place to another is not a sufficient consideration to support an implied undertaking to answer for the default of a correspondent selected to make collections for customers according to the course of business of banks. First Nat. Bank *v.* Sprague, 34 Neb. 318, 51 N. W. 846, 15 L. R. A. 498, 33 Am. St. Rep. 644.

Where a bank receives for collection a note or bill, payable at a distant point, with the understanding that such collection is an accommodation only, or that it shall receive no compensation therefor beyond the customary exchange, and transmits such paper to a reputable and suitable correspondent at the place of payment, with proper instructions for the collection and remittance of the proceeds thereof, it will not be liable for the default of such correspondent in failing to remit, since in such case the holder will be held to have assented to the employment of the correspondent, so as to make it his agent. First Nat. Bank *v.* Sprague, 34 Neb. 318, 51

§ 171 (7) Liability Where Checks or Drafts, Received in Payment, Are Not Paid.—General Rule as to Liability of Collecting Agent Receiving Other than Money in Payment.—As has been already seen, a bank holding paper for collection has no right, in the absence of special authority, or well-established usage, to accept anything but money as payment thereof, and if it receives checks or drafts in payment, it assumes the risk of the payment of such checks or drafts, and is liable to the owner for the amount thereof.[62]

Liability Limited to Actual Loss Occasioned by Negligence.—Where a note which has been surrendered in exchange for a check, has, upon the dishonor of the check, been recovered without its vitality or security having been in any way impaired, there would seem to be no reason why the bank should be liable at all to the owner of the note, unless to the extent of any actual loss that might have been occasioned by its act.[63]

N. W. 846, 15 L. R. A. 498, 33 Am. St. Rep. 644.

Where a bill payable at a distant place is deposited with the bank for collection without compensation, the bank's sole obligation is to forward it in due season to the bank, or other suitable agent, at the place of payment, with instructions to take the necessary measures to obtain payment. Allen *v.* Merchants' Bank (N. Y.), 15 Wend. 482.

Receiving bank held liable, though no charge made for collection.—A bank receiving claims for collection at distant places is liable for any negligence whereby the collection of the claim was defeated; and it makes no difference that the bank does not charge anything for the collection. The benefits which the bank derives generally in the making of such collections, from the use of the funds while in its custody, the advantages which may arise from business association, and the profits on exchange, are a valuable consideration for the undertaking and sufficient to uphold the liability incident thereto. Bailie *v.* Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74, distinguishing Merchants' Nat. Bank *v.* Guilmartin, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322. See ante, "Relation between Bank and Depositor for Collection," § 156.

62. General rule as to liability of bank accepting checks or drafts in payment of paper held for collection.—See ante, "Taking Things Other than Money in Payment," § 161 (3).

63. Liability limiting actual loss occasioned to owner of paper.—Interstate Nat. Bank *v.* Ringo, 72 Kan. 116, 83 Pac. 119, 3 L. R. A., N. S., 1179, 115 Am. St. Rep. 176. See post, "Measure of Damages," § 175 (6).

Where a bank holding a note for collection surrendered it to the maker in exchange for his worthless check upon another bank, but upon the dishonor of the check regained possession of the note as a subsisting obligation against all makers and indorsers, and no actual prejudice resulted to the owner from the transaction, which took place after the close of banking hours upon one day and before their opening on the next, no liability was thereby created against the collecting bank in favor of the owner of the note. Interstate Nat. Bank *v.* Ringo, 72 Kan. 116, 83 Pac. 119, 3 L. R. A., N. S., 1179, 115 Am. St. Rep. 176.

A bank holding a note for collection surrendered it to the maker in exchange for his worthless check upon another bank, but upon dishonor of the check regained possession of the note as a subsisting obligation against all makers and indorsers, no actual prejudice resulting to the owner from the transaction, which took place after the close of banking hours upon one day and before their opening on the next. Upon being orally promised payment by the bank on which the check was drawn, it gave the owner of the note credit on its books for the amount, and mailed to the owner a statement to that effect, adding that the credit was subject to collection. Notice of the nonpayment of the check was given to the owner of the note by telephone early the next morning. The collecting bank had on deposit funds of the bank on

Negligence in Presenting for Payment Checks or Drafts Taken in Payment of Original Paper.—Where a bank to which paper is entrusted for collection presents the same for payment, and receives a check or draft, instead of money in payment of such paper, it is its duty to present such check or draft for payment, or in the case of a check, for certification, as soon as, with reasonable diligence, it can do so, and delay in so doing is at its peril.[64]

which the check was drawn and charged the amount of the check against such deposit and refused to pay it out until indemnified against loss in so doing. Held, that the collecting bank did not become liable to the owner of the note. Interstate Nat. Bank *v.* Ringo, 72 Kan. 116, 83 Pac. 119, 3 L. R. A., N. S., 1179, 115 Am. St. Rep. 176.

64. **Duty as to prompt presentation of checks or drafts taken in payment of original paper.**—First Nat. Bank *v.* Fourth Nat. Bank, 89 N. Y. 412, affirming 24 Hun 241; Nunnemaker *v.* Lanier (N. Y.), 48 Barb. 234; Noble *v.* Doughten, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A., N. S., 1167.

Where a bank receiving a draft for collection presents it to the drawee, and takes the latter's check, it must immediately present the check for payment. First Nat. Bank *v.* Fourth Nat. Bank, 89 N. Y. 412, affirming 24 Hun 241.

Where a collecting bank presents a draft and demands the money on the same, but accepts a check, this places in its hands the means of procuring the money at once. It should present the check for payment or certification as soon as possible in the exercise of reasonable diligence. First Nat. Bank *v.* Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618, reversing 16 Hun 332.

Where a check was indorsed to a bank, and by it sent to another bank for collection, and the latter bank presented it for payment on the date of its receipt to the drawee, which then had funds on deposit to meet it and was ready to pay it, but, instead of taking cash, surrendered the check for the drawee's own check on another bank, it was liable to use the utmost diligence to collect the second check, or bear any loss which might be occasioned by delay in case the drawer should become insolvent. Noble *v.* Doughten, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A., N. S., 1167.

What constitutes due diligence in presentation of check or draft received in payment.—The rule seems to be well settled, generally, in reference to the time within which checks must be presented for payment, that if the bank on which the check is drawn be in the same place where the payee receives it, it should be presented for payment within banking hours on the day it is received, or, at latest, within banking hours on the following day. There would seem, however, to be a well recognized qualification of this rule where the check is taken by a collecting agent for another to whom the drawer of the check is indebted, and for which he gives the collecting agent his check, and it has been held that when a check is taken instead of money, by one acting for others, a delay of presentment for a day or for any time beyond that within which with proper and reasonable diligence it can be presented, is at the peril of the party thus retaining the check and postponing presentment as between him and the persons in interest, whom he represents. If a custom can exist in law and does exist in fact, authorizing such delay at the risk of the absent principal, it must be shown; it can not be presumed to exist without evidence. Smith *v.* Miller, 43 N. Y. 171, 3 Am. Rep. 690; Morris *v.* Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11.

Where a bank, on presenting a draft which it has for collection, receives a check drawn on a bank in same place, it is bound to present the check on the same day, and failing in this, is liable to the drawer thereof for the loss occasioned thereby, the bank drawn on having suspended at the end of the day. Morris *v.* Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11.

Where a banking corporation to whom a draft has been delivered for collection receives in payment therefor the check of the company on which the draft is drawn, upon a bank, and neglects to present the same at the bank during the business hours of the next day thereafter, and on presentation the following day it is dis-

Liability to Drawer of Check.—It has been held that when a bank holding a draft for collection takes a check from the drawee, on presentation of the draft, as a conditional payment, to become operative as a payment in fact, only when paid by the drawee, the taking of such check becomes a transaction between the drawer of the check and the bank; the bank becomes the agent of and owes the drawer of the check the duty to act promptly in the collection of the check, and failing in such duty, owes to him the amount of the check and interest, where the bank on which such check was drawn fails before the check was presented.[65]

honored in consequence of the failure of the company, it will be held liable to the party of whom it received the draft. Nunnemaker *v.* Lanier (N. Y.), 48 Barb. 234.

A check was indorsed by the holder to a bank, which reindorsed it to another bank for collection. The latter bank presented it for payment at a time when the drawer had funds on deposit to meet it. The drawee was ready to pay it in money, but the bank, having possession of the check, instead of taking cash, surrendered it for the drawee's own check on another bank. The presentment was made and a substituted check taken before noon of a business day closing at 3 p. m. The substituted check could have been collected within twenty minutes. It was not collected at all, but on the following day an attempt was made to collect it through the clearing house. The drawer failed at 2:45 p. m. on that day, and the check was thrown out. Held, that no diligence was used in attempting to collect it. Noble *v.* Doughten, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A., N. S., 1167.

Where after the indorsement of a check by an accommodation indorser it was cashed by a bank and duly sent for collection to its correspondent in the city where the bank upon which the check was drawn was located, and there, together with a number of other checks, was duly presented to the drawee for payment, and the runner of the correspondent accepted in payment of all these checks a small sum of money and a check of the drawee upon another bank in the same city, but was held by the runner or the bank he represented for two or more hours during which time the drawee failed, in consequence of which the check last-mentioned was dishonored, held, that under these facts the bank which cashed the original check could not hold the accommodation indorser liable for the amount thereof; and this is true although after the drawee's check had been dishonored the original check was reclaimed and duly protested. Comer *v.* Dufour, 95 Ga. 376, 22 S. E. 543, 30 L. R. A. 300, 51 Am. St. Rep. 89.

A bank, for the accommodation of a customer, received for collection a coupon from a bond payable in another state. In accordance with its custom, and with knowledge of the owner, the bank transmitted the coupon to a dealer in bonds who had sold the bonds in question to said owner, and who was familiar with the best agencies for collecting such securities, and he transmitted the coupons to a bank for collection. By reason of the failure of the collecting bank before a draft sent in payment of the coupons could be presented for payment, the full amount of the coupons was not received by the owner. Held, that the forwarding bank was not liable for the loss. Lee *v.* Bank, 1 Chest. Co. Rep. 109.

Sufficiency of presentment through clearing house.—Where a collecting agent, upon presenting a draft, receives the drawee's check on a local bank for the amount, it is not laches, in the presentment of such check, to present it through the clearing house, the day after it is received, if this be proven to be the usage of the place. Turner *v.* Bank, 42 N. Y. (3 Keyes) 425, 4 Abb. Dec. 434.

65. Liability to drawer of check given in payment of draft.—Morris *v.* Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11.

A check given by a drawee of a draft to a collecting bank on presentation of the draft, being only conditional payment, leaving the drawer of the check liable to the drawer of the draft, where the bank on which the check was drawn failed before the check was presented, payment thereafter by the drawer of the check to the collecting bank of the amount

§ 171 (8) Notes, Checks, or Drafts Lost in Course of Transmission.—It is clearly the duty of a bank which undertakes to act as a collecting agent for its customers or for other banks, to ascertain within a reasonable time whether paper entrusted to it for collection and transmitted by it to a correspondent has been received by such correspondent; and if not to advise its customer of such fact,[66] and it is liable for loss resulting from its failure to do so.[67] Where the practice exists among banks to send checks or drafts directly to the drawee, such practice being attended with some obvious additional peril, does not weaken, if, indeed, it does not increase, the diligence required of the collecting bank in respect to inquiry and notice.[68] A mere private usage or custom of the bank not to inquire with re-

of his debt will not prevent his suing the collecting bank for failure to make timely presentment of the check. Morris *v.* Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11.

66. General rule as to duty of bank transmitting paper to ascertain receipts thereof by its correspondent.—First Nat. Bank *v.* First Nat. Bank, Fed. Cas. No. 4,810, 4 Dill. 290.

After defendant had sent one of the notes for collection, and failed to hear from it after maturity, it was negligent in sending the other note to the same bank without having made any inquiry as to the former note. Second Nat. Bank *v.* Merchants' Nat. Bank, 111 Ky. 930, 23 Ky. L. Rep. 1255, 65 S. W. 4, 55 L. R. A. 273, 98 Am. St. Rep. 439.

67. Bank held liable for negligence in not sooner discovering loss.—Plaintiff deposited a check, drawn by M. upon a bank at P., with defendant for collection, which was credited in plaintiff's account. Defendant forwarded it by mail on the 2d of the month. It should have reached P. on the 3d, and an answer on that day would have reached defendant on the 4th. The check was lost. Defendant did not discover the loss until the 16th, and it notified plaintiff on the 18th that the check had not arrived at P., and, if not found, it would require a duplicate. M. had funds with the drawee sufficient to meet the check, until the 20th, when he became insolvent, and subsequently defendant charged the check back to plaintiff. In an action to recover the amount of the check, held, that defendant was chargeable with negligence in not sooner discovering the loss and notifying plaintiff thereof, and the latter, having sustained damage by reason thereof, was entitled to recover. Shipsey *v.* Bowery Nat. Bank, 59 N. Y. 485, reversing 36 N. Y. Super. Ct. 501.

While defendant bank was not negligent in sending to another bank for collection notes against a corporation of which the latter bank's cashier was the secretary and treasurer, yet, upon failing to hear from its correspondent immediately after the maturity of the notes, defendant should have made inquiry, and have notified its customer of the cause of the trouble, the time being one of great financial stress; and failing to do this until after the lapse of several weeks, and until after its correspondent had failed, defendant is liable for the loss resulting from its correspondent's failure to present the notes for payment, or to protest them for nonpayment. Second Nat. Bank *v.* Merchants' Nat. Bank, 111 Ky. 930, 23 Ky. L. Rep. 1255, 65 S. W. 4, 55 L. R. A. 273, 98 Am. St. Rep. 439.

68. Application of rule where paper transmitted to drawee.—First Nat. Bank *v.* First Nat. Bank, Fed. Cas. No. 4,810, 4 Dill. 290.

Defendant bank received from plaintiff bank a sight draft for collection on January 10, drawn on a third bank in which the drawee had funds, and transmitted it directly to the drawee by mail the same day. The draft was lost in the mails, and never reached the drawee, which failed and suspended payment on January 29th. Receipt of the draft was not acknowledged by the drawee, and defendant made no inquiries about it until February 9th, supposing it had been paid, and failed to notify plaintiff of its nonpayment until February 11th. Held that, by failure to seasonably ascertain that the draft had miscarried, and to give plaintiff notice of its nonpayment, defendant became liable for the amount thereof. First Nat. Bank *v.* First Nat. Bank, Fed. Cas. No. 4,810, 4 Dill. 290.

gard to remittances in the interim between monthly statements of accounts between it and its correspondents, will not excuse failure to make proper inquiry, where such custom was not known to the customer, and is not of such a nature that he was bound to take notice of it.[69] Where a bank holding paper for collection transmits the same to a correspondent in the usual method, and with the knowledge of the owner, it would seem that it is not liable to the owner if such paper be lost in transmission through the mail.[70] Where a note is deposited for collection with no other direction as to the address of the bank at which payable than that contained in the note, the collecting bank is authorized to send the note to such address, and is exonerated from liability in case of its loss in transmission.[71]

§ 171 (9) Failure to Apply Deposit to Note Due from Depositor.—Where a bank receives money on deposit, and afterwards a note payable at that bank by the depositor is placed in the bank by the payee for collection, but at the time the note becomes due there are no funds of the maker in the bank, the bank is not bound to appropriate to the part payment of the note funds afterwards received at the bank to the credit of the maker of the note.[72] Defendants received from plaintiff for collection a note on a third person, who had, at that time, funds on deposit with defendants. The payer instructed defendants to pay the note from said funds, if the payee would accept without exchange or interest. Defendants notified plaintiff of these conditions, but he failed to assent thereto. Afterwards the maker withdrew his account. Held that, as the depositor's fund had not been actually appropriated to the payment of the note, defendants were not liable for failure to withhold sufficient to satisfy the note.[73]

69. First Nat. Bank v. First Nat. Bank, Fed. Cas. No. 4,810, 4 Dill. 290, in which it was held that the usage or custom set up by the defendant, to the effect that it would not require to make inquiries concerning such remittances prior to the receipt of the regular monthly statements of accounts between the banks, was not established by the evidence.

70. **Where paper lost in usual course of transmission by mail.**—A note of a party in Mexico was left with a New York banker for collection, and by him transmitted to his Mexican agent, who wrote that he had presented it to the maker, who declared it a forgery; that the best course, in his opinion, would be now to send it to Havana, where the maker had just gone, and to try there again to collect it. The note was accordingly so sent by public mail, but, on the way, was lost. The owner of the note, in New York, was kept constantly informed of the course of the business, and apparently approved of it. Held, that a verdict for the owner, in a suit against the banker for the value of the note, was unwarranted by the evidence, and that a new trial should be granted. Jacobsohn v. Belmont, 20 N. Y. Super. Ct. 14.

71. **Sufficiency of transmission to address of bank contained in note.**—Where a note payable at the "Bank of Kent, Kent, N. Y.," was deposited with another bank for collection, without any other direction as to the post-office address of the Bank of Kent, such other bank was authorized to send the note to the address designated in the note, and was exonerated from liability on its failure to reach the Bank of Kent. Chapman v. Union Bank (N. Y.), 32 How. Prac. 95.

72. **Failure to apply deposit to note due from depositor.**—Merchants', etc., Bank v. Meyer, 56 Ark. 499, 20 S. W. 406.

73. Bellows v. Norton, 59 Tenn. (12 Heisk.) 319.

§ 171 (10) Permitting Paper to Be Renewed.—Where a bank which has taken a solvent bill for collection is, before its maturity, instructed to have it renewed, on condition that a solvent indorser shall be given on the new bill, and the bank allows the renewal with such indorser, surrendering the former bill to the acceptor, and reporting by its cashier that the bill has been renewed according to instructions, such bank will be liable for damage sustained by the holder because of the acceptor becoming insolvent pending the extended term of credit.[74]

§ 171 (11) Failure to Collect Interest.—Where a bank receiving for collection a certificate of deposit "for collection when due" gives a receipt therefor showing the date, maker's name, amount, rate of interest, and maturity, but is not instructed as to the time of collection, and proceeds at once to collect the face of the amount and pay the same to the depositor, such bank is not liable for failure to collect interest on such certificate.[75]

§ 171 (12) Waiver of Right of Action against Bank, or Ratification of Bank's Acts.—One who entrusts paper to a bank for collection may, by his conduct, waive his right of action against the bank for its negligence in the collection of such paper, or ratify the acts of the bank in making collection.[76]

74. **Negligence in permitting renewal of paper.**—Central Georgia Bank *v.* Cleveland Nat. Bank, 59 Ga. 667.

75. **Failure to collect interest on certificate of deposit.**—Plaintiff left with defendant a certificate of deposit "for collection when due," and took a receipt therefor showing the date, maker's name, amount, rate of interest, and maturity, but gave no instructions as to the time of collection, and was not informed by the defendant as to the usual course of business in such cases. The certificate was in fact payable on demand, but to draw interest only if held until maturity. Defendant proceeded at once to collect its face amount, and paid the same to plaintiff. Held, that defendant was not guilty of either negligence or violation of instructions, in not collecting interest for the six months, and was not liable therefor. Ide *v.* Bremer County Bank, 73 Iowa 58, 34 N. W. 749.

76. **Acceptance of proceeds as ratifying collection.**—Where the owner of a check, which had been collected without her authority by a bank, accepted, with knowledge of the facts, part of the proceeds of the collection, and a note for the balance of her claim arising out of the transaction, she thereby ratified the collection, and the bank was, hence, not liable to her. Hughes *v.* Neal Loan, etc., Co., 97 Ga. 383, 23 S. E. 823.

Ratification of act of bank in sending check to drawee bank.—Where a bank, employed to collect a check on another bank, forwarded the check directly to the drawee bank, and accepted in payment of the check drafts on a third bank, which drafts were in turn accepted by the owner of the check for whom the collection was being made, the acceptance of the drafts by the owner was a ratification of the act by the collecting bank in taking the drafts, and hence precluded him from suing the collecting bank for its conduct in sending the checks directly to the drawee bank, as the drafts so ratified and accepted were the product of the act. Winchester Milling Co. *v.* Bank, 120 Tenn. 225, 111 S. W. 248.

Waiver of negligence in delivering goods where bill of lading attached to draft.—See, generally, ante, "Surrender of Collateral before Making Collection," § 161 (6).

Where plaintiffs inclosed draft to defendant bank for collection, with bill of lading attached, for books shipped in care of defendant, with instructions to allow the drawee "ten days in which to examine the books," and defendant delivered the books at once to the drawee for examination,

§ 172. Failure to Fix Liability of Indorser or of Drawer of Note, Check or Draft—§ 172 (1) In General.—It being the duty of a bank receiving paper for collection, in case of nonpayment of the same, to return such paper with the liability of the parties thereto unimpaired,[77] it should, upon failure to make collection of a note, check or draft, take the necessary steps to fix the liability of the indorser or drawer of such paper, and for failure to do so it is liable to the owner of the paper,[78] for the actual loss

without requiring him to pay the draft, and defendant, upon the drawee's refusal, after ten days, to pay the draft or return the books, notified plaintiffs of that fact, and requested further instructions, plaintiffs, by replying that they had written the drawee to pay the draft at once, and that they were at a loss to understand his action, as their dealings with him theretofore had been satisfactory, waived defendant's negligence, if any, in delivering the books for examination without requiring payment of draft. Flood *v.* First Nat. Bank, 24 Ky. L. Rep. 661, 69 S. W. 750.

Withdrawal of paper as waiver of neglect in demanding payment, etc.—The withdrawal from a bank of a bill of exchange which had been sent in for collection, after the bank had failed to demand payment and notify indorsers of nonpayment, is not a waiver of the holder's right of action against the bank for such neglect. Branch Bank *v.* Knox & Co., 1 Ala. 148.

Subsequent payment by drawer of draft as relieving from liability for negligence in collection.—Where a bank becomes liable for negligence in failing to collect a draft, and returns it protested to the payee, the subsequent payment by the drawer to the payee, made in ignorance of the negligence, will not relieve the bank from liability to the payee for the use of the drawer. Merchants' Bank *v.* Bank, 24 Md. 12.

Instructions to protest as ratification of failure to present in proper time.—A draft specifying no time of payment was forwarded to defendants for collection. They presented it for acceptance the day after its receipt. The day following they notified indorser of its receipt, requesting telegraph instructions if protest was desired. Indorser telegraphed to protest, on receipt of which defendants demanded payment, which being refused, the draft was protested, the indorser (plaintiff) subsequently remitting defendants the protest fees. Held, that instructions to protest, and payment of fees therefor, were no ratification of defendants' presentment for acceptance and failure to present for payment within a proper time. First Nat. Bank *v.* Price, 52 Iowa 570, 3 N. W. 639.

Question of ratification for jury.—In an action against a bank for negligence in failing to protest a note left with it for collection, evidence that defendant's cashier handed plaintiff a renewed note in lieu of the old one, saying that the old note was lost, and that plaintiff retained the renewed note some time, is not conclusive of plaintiff's ratification of the bank's action, but is for the jury. Roanoke Nat. Bank *v.* Hambrick, 82 Va. 135.

77. Duty to return uncollected paper with liability of parties unimpaired.—National Revere Bank *v.* National Bank, 172 N. Y. 102, 64 N. E. 799.

United States.—Bank *v.* Triplett, 1 Pet. 25, 7 L. Ed. 37; Bird *v.* Louisiana State Bank, 93 U. S. 96, 23 L. Ed. 818; Carpenter *v.* National Shawmut Bank, 187 Fed. 1, 109 C. C. A. 55; Woolen *v.* New York, etc., Bank, Fed. Cas. No. 18,026, 12 Blatchf. 359.

78. General rule as to liability for failure to fix liability of indorser or drawer of notes, checks, drafts, etc.—*Alabama.*—Bank *v.* Huggins, 3 Ala. 206.

Indiana.—Chapman *v.* McCrea, 63 Ind. 360; Locke *v.* Merchants' Nat. Bank, 66 Ind. 353.

Kansas.—Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324.

Kentucky.—Louisville Banking Co. *v.* Asher, 112 Ky. 138, 23 Ky. L. Rep. 1180, 65 S. W. 133, 99 Am. St. Rep. 283, rehearing denied in 23 Ky. L. Rep. 1661, 65 S. W. 831.

Louisiana.—Miranda *v.* City Bank, 6 La. 740, 26 Am. Dec. 493; Canonge *v.* Louisiana State Bank, 3 Mart., N. S., 344; Durnford *v.* Patterson, 7 Mart., O. S., 460, 12 Am. Dec. 514.

Massachusetts.—Fabens *v.* Mercantile Bank, 23 Pick. 330, 34 Am. Dec. 59.

Minnesota.—Jagger *v.* National German-American Bank, 53 Minn. 386, 55 N. W. 545; West *v.* St. Paul Nat. Bank,

sustained,[79] unless the parties sought to be charged have waived such steps.[80]

54 Minn. 466, 56 N. W. 54; Ft. Dearborn Nat. Bank *v.* Security Bank, 87 Minn. 81, 91 N. W. 257.

Nebraska.—Steele *v.* Russell, 5 Neb. 211.

New York.—Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459, Seld. Notes 12; Walker *v.* Bank, 9 N. Y. 582, affirming 13 Barb. 636; Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Kirkham *v.* Bank, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714; National Revere Bank *v.* National Bank, 172 N. Y. 102, 64 N. E. 799; Hitchcock *v.* Bank, 57 App. Div. 458, 68 N. Y. S. 234; McBride *v.* Illinois Nat. Bank, 138 App. Div. 339, 121 N. Y. S. 1041; Coghlan *v.* Dinsmore, 22 N. Y. Super. Ct. 453; Smedes *v.* Bank, 20 John. 372; Bank *v.* Smedes, 3 Cow. 662.

Ohio.—Bank *v.* Butler, 41 O. St. 519, 52 Am. Rep. 94; City Nat. Bank *v.* Clinton County Nat. Bank, 49 O. St. 351, 30 N. E. 958; Huff *v.* Hatch, 2 Disn. 63, 13 O. Dec. 39; White *v.* Third Nat. Bank, 4 Wkly. L. Bull. 791, 7 O. Dec. 666.

Pennsylvania.—Bellemire *v.* Bank, 1 Miles 173.

South Carolina.—Thompson *v.* Bank, 3 Hill 77, 30 Am. Dec. 354; Harter *v.* Bank, 92 S. C. 440, 75 S. E. 696.

Texas.—First Nat. Bank *v.* St. Charles Sav. Bank (Civ. App.), 37 S. W. 768.

Virginia.—Roanoke Nat. Bank *v.* Hambrick, 82 Va. 135.

Wisconsin.—Merchants' State Bank *v.* State Bank, 94 Wis. 444, 69 N. W. 170.

"The collecting bank is liable for any neglect of duty occurring in the process of collection, in consequence of which any of the parties to the paper are discharged. Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489." National Revere Bank *v.* National Bank, 172 N. Y. 102, 64 N. E. 799.

Where a note in the hands of a bank, an agent, for collection, is dishonored at maturity by the maker, it is the duty of the bank to take the usual and proper action required to charge the indorsers. City Nat. Bank *v.* Clinton County Nat. Bank, 49 O. St. 351, 30 N. E. 958.

If, by reason of its neglect to do so an indorser is discharged, it becomes liable to its principal for the resulting damages. City Nat. Bank *v.* Clinton County Nat. Bank, 49 O. St. 351, 30 N. E. 958.

Where a bank, the holder for collection of a promissory note, by its negligence discharges an indorser, the latter is not estopped to set up his discharge, though the bank had at the time on deposit funds of the makers, which it afterwards paid out on the faith of an extension of time granted to the makers by the indorser, if, at the time the extension is granted, the indorser was ignorant of his discharge, and that the bank had indemnity within its control. City Nat. Bank *v.* Clinton County Nat. Bank, 49 O. St. 351, 30 N. E. 958.

Where the bank failed to fix the liability of the indorser on notes held for collection, it can not excuse itself because not made a party to the suit against the indorser, unless it can show legal notice to the latter. Miranda *v.* City Bank, 6 La. 740, 26 Am. Dec. 493.

Undertaking implied from acceptance for collection.—When a bank receives commercial paper for collection, there is an implied undertaking on its part that, in case of its dishonor, it will take all steps necessary to protect the holder's rights against all previous parties to the paper. Jagger *v.* National German-American Bank, 53 Minn. 386, 55 N. W. 545.

The general custom of banks to use money collected on a note is a sufficient consideration to hold them liable for any neglect by which indorsers are discharged. Thompson *v.* Bank (S. C.), 3 Hill 77, 30 Am. Dec. 354.

79. Liable for actual loss sustained.—Bank *v.* Huggins, 3 Ala. 206.

Where a bank neglects to fix the liability of the parties to a note or bill left with it for collection, it is liable to the owner for the actual damage sustained; and it rests with such owner to show that the parties discharged are solvent, and that the party or parties who remain liable are unable to pay. Bank *v.* Huggins, 3 Ala. 206.

80. Waiver by parties sought to be charged.—Woolen *v.* New York, etc., Bank, Fed. Cas. No. 18,026, 12 Blatchf. 359; First Nat. Bank *v.* St. Charles Sav. Bank (Tex. Civ. App.), 37 S. W. 768.

The liability of the bank for any neglect of duty by an agent employed

§ 172 (2) Duty of Collecting Bank to Protest Paper.—It may be stated as a general rule that a bank or other agent who receives paper for collection must not only use due diligence in presenting the same for acceptance, if necessary, and in presenting it for payment when due, and must give notice of dishonor in case acceptance or payment is refused, but it is also required to protest, in case of nonacceptance, or nonpayment, if protest is not forbidden, and to send the protest to the holder.[81] So, also, a

by it, by which any of the parties are discharged may be varied by express contract or by implication arising from general usage. Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489, affirming 29 N. Y. Super. Ct. 337.

Facts held not to show waiver.—The Adams Express Company was sued for damages for failing to take the steps necessary to charge indorsers on a note which it had received for collection. Before maturity the maker had paid to the indorsers a part of the note on their promise to pay the note at maturity, and give him further credit. The payment and promise were unknown to plaintiff, the holder of the note, till after he had commenced his action against defendant express company. Held, that the facts did not amount to a waiver, on the part of the indorsers, of demand and notice of nonpayment, which would exonerate the defendant from any consequences of its neglect to make such demand and give such notice. Coghlan *v.* Dinsmore, 22 N. Y. Super. Ct. 453.

81. General rule as to duty of bank to protest paper in case of nonacceptance or nonpayment.—*United States.*—Merchants', etc., Bank *v.* Stafford Nat. Bank, Fed. Cas. No. 9,438, 44 Conn. 564; Georgia Nat. Bank *v.* Henderson, 46 Ga. 487, 12 Am. Rep. 590.

Indiana.—Chapman *v.* McCrea, 63 Ind. 360.

Kentucky.—Louisiana Banking Co. *v.* Asher, 112 Ky. 138, 23 Ky. L. Rep. 1180, 65 S. W. 133, 99 Am. St. Rep. 283, rehearing denied 23 Ky. L. Rep. 1661, 65 S. W. 831.

Louisiana.—Canonge *v.* Louisiana State Bank, 3 Mart., N. S., 344; Frazier *v.* New Orleans, etc., Banking Co., 2 Rob. 294.

New York.—Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459, Seld. Notes 12, affirming 8 Barb. 396; Walker *v.* Bank, 9 N. Y. 582, affirming 13 Barb. 636; National Revere Bank *v.* National Bank, 54 App. Div. 342, 66 N. Y. S. 662, affirmed in 172 N. Y. 102, 64 N. E. 799; McBride *v.* Illinois Nat. Bank, 138 App. Div. 339, 121 N. Y. S. 1041; Kirkham *v.* Bank, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714.

Ohio.—White *v.* Third Nat. Bank, 7 O. Dec. 666, 4 Wkly. L. Bull. 791.

South Dakota.—Morris *v.* Union Nat. Bank, 13 S. Dak. 329, 83 N. W. 252, 50 L. R. A. 182.

Texas.—First Nat. Bank *v.* St. Charles Sav. Bank (Civ. App.), 37 S. W. 768.

Virginia.—Roanoke Nat. Bank *v.* Hambrick, 82 Va. 135.

Wisconsin.—Merchants' State Bank *v.* State Bank, 94 Wis. 444, 69 N. W. 170.

When a bank receives paper for collection, it becomes the owner's agent for that purpose, and must present it for acceptance and payment, and, if not paid when presented, must take steps by protest and notice to charge the drawer and indorser, and will be liable to the owner for damage resulting from its neglect to do so, in absence of agreement exempting it therefrom. McBride *v.* Illinois Nat. Bank, 138 App. Div. 339, 121 N. Y. S. 1041.

Where a bank failed to demand payment, or to protest for nonpayment a note sent to it for collection on which it was liable as indorser, and which had been placed on the footing of a bill of exchange, it became liable to the holder. Louisville Banking Co. *v.* Asher, 112 Ky. 138, 23 Ky. L. Rep. 1180, 65 S. W. 133, 99 Am. St. Rep. 283, rehearing denied 23 Ky. L. Rep. 1661, 65 S. W. 831.

Plaintiff bank sent to defendant bank, for collection, drafts drawn by W. on the K. Bank, and defendant forwarded them to such bank, which, in payment, sent defendant drafts drawn by it on defendant. Defendant merely protested these, the account with it being overdrawn, and sent them to plaintiff. Held that, though the K. Bank was insolvent, defendant, having made no effort to obtain possession of the drafts sent it for collection, and not having had them protested and notice of protest given, was liable for the amount thereof. National Revere Bank *v.* National Bank, 54 App.

bank receiving a note for collection is liable for its neglect in protesting and

Div. 342, 66 N. Y. S. 662, affirmed in 172 N. Y. 102, 64 N. E. 799.

A bank is liable for negligence in not protesting for nonacceptance a draft drawn on E. C. H., and accepted, "Empire Mills, by E. C. H., Treas'r." Walker *v.* Bank, 9 N. Y. (5 Seld.) 582, affirming 13 Barb. 636.

A bill of exchange was drawn by the Empire Mills on E. C. H. at four months. It was indorsed by the payee and by two others, and was then discounted by plaintiff for the benefit of the drawer. Plaintiff forwarded the bill to defendant bank for presentment while it yet had several months to run, and the drawee wrote across the face of the bill, "Accepted. Empire Mills, by E. C. H. Treas." Held, that such acceptance bound neither the drawee nor the "Empire Mills," and hence defendant, having omitted to protest the bill for nonacceptance, was liable to plaintiff, on the insolvency of the drawer and indorsers, for the amount of the bill. Walker *v.* Bank, 9 N. Y. (5 Seld.) 582, affirming 13 Barb. 636.

A national bank has power to receive a note for collection, or protest it not paid, and hence it is liable for neglect to protest. White *v.* Third Nat. Bank, 7 O. Dec. 666, 4 Wkly. L. Bull. 791.

Bankruptcy of maker as excusing failure.—A bank with whom a note is left by a bona fide indorsee thereof for collection is liable to him for loss arising from a failure seasonably to protest the note and notify the indorser. So held where, within ninety days after maturity, the maker was adjudged a bankrupt. Chapman *v.* McCrea, 63 Ind. 360.

In an action by one bank against another to recover for a failure to collect a note payable at the latter, an answer admitting a failure to protest the note, but averring the subsequent bankruptcy of the maker, a composition by him with his creditors without receiving a discharge, and his then ownership of valuable property, does not present a bar to the cause of action. These facts, if at all available, would only go to mitigate the damages. Locke *v.* Merchants' Nat. Bank, 66 Ind. 353.

Misfortune or accident as excusing neglect.—Plaintiff, as indorsee of notes due August 4th, sent them to defendant bank for collection. Prior to their receipt by defendant, the bank building was burned, but on August 1st the bank resumed business, and notified the maker of the notes. Held, that the defendant, having undertaken the collection of the notes, was not excused from liability for its negligence in not protesting the notes by reason of the confusion consequent upon the fire. Merchants' State Bank *v.* State Bank, 94 Wis. 444, 69 N. W. 170.

Liability independent of consideration.—It is not ultra vires for a national bank to agree to receive a note for collection or protest if not paid, and if it neglect to protest it is liable on the contract, though there was no consideration therefor, the owner having relied on the bank's voluntarily undertaking to do it. White *v.* Third Nat. Bank, 7 O. Dec. 666, 4 Wkly. L. Bull. 791.

Construction of agreement as to "prompt advice" as protests.—An agreement between two banks in different cities acting as agents for each other that "prompt advice shall be given of the acceptance and payment of all remittances and of protests for nonpayment or nonacceptance," does not contemplate such speedy advice as to enable the party transmitting paper to give notice to indorsers, after receiving advice from the other party. Frazier *v.* New Orleans, etc., Banking Co. (La.), 2 Rob. 294.

Ordinary and reasonable diligence in discharge of duty as exonerating bank.—Where a bank receives a note from the holder, and specially undertakes to protest it, the bank is not liable for damages resulting from failure to give notice to the proper party, if the officers of the bank exercise ordinary and reasonable diligence in the discharge of the duty intrusted to them. Mount *v.* First Nat. Bank, 37 Iowa 457.

A note payable on Sunday was left at defendant's bank, before maturity, for collection, with instructions to protest the same in case of nonpayment. The note was protested on the Thursday following its maturity, which, in an action on the note, was held to be too late to hold the indorser. Held, that the bank was bound to exercise a reasonable degree of skill, only, and the question of law involved being one of serious doubt and difficulty, owing to the condition of the statutes relating to holidays and days of grace, the bank was not liable to the holder

giving notices before the indorser.[82] The ordinary duty of a bank to protest paper for nonpayment may be waived,[83] or the action of the bank in failing to protest may be ratified by the owner of the paper.[84] It has been held that a bank is not liable for an omission to protest notes deposited with it for safe-keeping and not collection.[85]

§ 172 (3) Liability for Default or Negligence of Correspondents, Subagents, or Notaries.—Liability for Negligence of Correspondents or Subagents.—With regard to the liability of a bank holding paper for collection, for the default or negligence of its correspondents or subagents in failing to fix the liability of parties to such paper, the same conflict of authority is found as exists upon the question of the bank's liability for the failure of its correspondents or subagents to pay over the proceeds of a collection, or their negligence in failing to make a collection.[86] Thus, according to the decisions in New York, and some other jurisdictions, a bank receiving paper for collection, payable either at the place of location, or at a distant place, and engaging an agent to collect it, is liable to the owner for the failure of such agent to fix the liability of the parties to such paper.[87]

of the note for the damages sustained by reason of the release of the indorser. Morris *v.* Union Nat. Bank, 13 S. Dak. 329, 83 N. W. 252, 50 L. R. A. 182.

82. Liability for protesting and giving notices before indorser of note.—Canonge *v.* Louisiana State Bank (La.), 3 Mart., N. S., 344.

83. Allegations in answer held to state a good defense of waiver.—In an action against a bank for damages for its failure to protest certain drafts sent it for collection, an allegation in the answer that defendant had previously notified plaintiff not to send it any more drafts "protest"; that drafts thereafter received from plaintiff were not marked to be protested, and were not protested; but that many of such drafts had been collected after maturity, and the proceeds remitted to plaintiff, before the sending of those in controversy—states a good defense of waiver. First Nat. Bank *v.* St. Charles Sav. Bank (Tex. Civ. App.), 37 S. W. 768.

84. Evidence held to authorize submission to jury of question of waiver.—In an action against a bank for negligence in failing to protest a note placed with it for collection, it is sufficient if the declaration avers it was so placed before its maturity, though the date of the placing is not specified. The fact that cashier handed plaintiff, in lieu of an old note which should have been protested, a renewed note, saying former was lost, and plaintiff retained latter some time, is not conclusive of plaintiff's ratification of the bank's action, but evidence from which the jury might or might not infer such ratification. Roanoke Nat. Bank *v.* Hambrick, 82 Va. 135.

85. No liability for failure to protest paper left for safe-keeping.—New Orleans Canal, etc., Co. *v.* Escoffie, 2 La. Ann. 830.

86. See ante, "Negligence or Default of Agents or Correspondents," § 170; "Liability of Transmitting Bank for Default of Correspondent," § 171 (6).

87. Bank held liable for failure of agents or correspondents to fix liability of parties.—Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459, Seld. Notes 12, affirming 8 Barb. 396; Allen *v.* Merchants' Bank (N. Y.), 22 Wend. 215, 34 Am. Dec. 289; Titus *v.* Merchants' Nat. Bank, 35 N. J. L. (6 Vr.) 588; First Nat. Bank *v.* Moore, 4 Wkly. L. Bull. 291, 8 Am. Law Rec. 97; McBride *v.* Illinois Nat. Bank, 138 App. Div. 339, 121 N. Y. S. 1041.

Unless there be some agreement to the contrary, a bank, receiving for collection a bill of exchange, is liable for any damage arising from the default of its correspondents, or the agents of such correspondents, whereby the indorsers are released from liability. Allen *v.* Merchants' Bank (N. Y.), 22 Wend. 215, 34 Am. Dec. 289.

Where a bank remits to its correspondent a bill left with it for collection, it is liable for the neglect of the

In other jurisdictions, however, it is held that where a bank receives a bill for collection and transmits it to its correspondent, who neglects to fix the liability of the drawer and indorsers, such bank is not liable, unless it is negligent in the selection of the correspondent.[88]

Liability for Default or Negligence of Notary.—In some jurisdictions, where a bank receives paper for collection, it is held to be liable for the default or neglect of its notary to take the proper steps to bind the parties thereto.[89] In these jurisdictions it is held that the notary is the

correspondent to make timely demand, if payment is defeated through such neglect. Titus *v.* Mechanics' Nat. Bank, 35 N. J. L. (6 Vr.) 588.

A bank in one place which receives for collection a note payable in another is responsible for its correspondent's failure to make proper presentment, by reason of which an indorser is discharged. First Nat. Bank *v.* Moore, 4 Wkly. L. Bull. 291, 8 Am. Law Rec. 97.

88. Bank held not liable in absence of negligence in selection of agent or correspondent.—Bank *v.* Triplett (U. S.), 1 Pet. 25, 7 L. Ed. 37; Guelich *v.* National State Bank, 56 Iowa 434, 9 N. W. 328, 41 Am. Rep. 110; Third Nat. Bank *v.* Vicksburg Bank, 61 Miss. 112, 48 Am. Rep. 78; Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324.

This was also the rule as laid down by the earlier New York decisions. Allen *v.* Merchants' Bank (N. Y.), 15 Wend. 482.

Where a bill is deposited in a bank to be transmitted to another bank for collection, the latter becomes the agent of the holder, to whom it is directly liable for neglect to fix the liability of the drawer. Bank *v.* Triplett (U. S.), 1 Pet. 25, 7 L. Ed. 37.

89. Bank held liable for default or negligence of notary.—*Kansas.*—Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324.

Missouri.—Gerhardt *v.* Boatman's Sav. Inst., 38 Mo. 60, 90 Am. Dec. 407.

New Jersey.—Davey *v.* Jones, 42 N. J. L. 28, 36 Am. Rep. 505.

New York.—Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489, affirming 29 N. Y. Super. Ct. 337, 1 Abb. Prac., N. S., 381; Hitchcock *v.* Bank, 57 App. Div. 458, 68 N. Y. S. 234; Downer *v.* Madison County Nat. Bank, 6 Hill. 648.

South Carolina.—Thompson *v.* Bank, 3 Hill L. 77, 30 Am. Dec. 354.

In the state of New York the doctrine obtains that bankers, to whom notes are intrusted for collection, are responsible for the failure of agents employed by them in the presentation of the notes to the maker and in protesting them when not paid, though the agents are notaries exercising a public office and especially charged with the performance of such duties. Britton *v.* Niccolls, 104 U. S. 757, 26 L. Ed. 917; Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722, 5 S. Ct. 141.

A bank which assumes the duty of a collecting agent is absolutely liable for any negligence or default of a notary. Davey *v.* Jones, 42 N. J. L. 28, 36 Am. Rep. 505.

A bank is liable for the negligence of the notary employed by it to give notice of nonpayment to the indorsers of a note left with it for collection. Downer *v.* Madison County Bank (N. Y.), 6 Hill 648.

Where a bill of exchange drawn in New York on a person resident in Philadelphia is deposited for collection in a New York bank, is received for that purpose, and is duly transmitted to its correspondent bank in Philadelphia, the notary of which fails to protest the bill for nonacceptance, whereby a New York indorser is discharged, the New York bank is liable for the loss. Allen *v.* Merchants' Bank (N. Y.), 22 Wend. 215, 34 Am. Dec. 289.

Where a bank, with which a note is left for collection, places it in the hands of a notary public for demand and protest, and the notary fails to give notice of nonpayment, whereby the indorsers are discharged, the bank will be liable. The fact that the notary is a public officer will not excuse the bank, especially as the services of a notary were not requisite, the note not being a foreign bill of exchange. Thompson *v.* Bank (S. C.), 3 Hill L. 77, 30 Am. Dec. 354.

The failure of the attorney employed by a bank, to which a note is sent for collection, to protest the note, and give notice to the indorsers of nonpayment, whereby they are discharged, renders

agent of the bank, and not of the depositor or owner of the paper, and the bank is therefore liable for any neglect of duty by him, by which any of the parties are discharged.[90] Though this liability may be varied by express contract or by implications arising from general usage, the fact that it is usual for banks to resort to a notary for such service, and that the owner, on depositing the note, said that he wanted it "protested" if not paid, are not evidence that the undertaking of the bank was simply to hand the note to a notary.[91] In other jurisdictions, however, it is held that a bank which places paper in the hands of a competent and reputable notary for protest, is not liable for any loss on account of the negligence of the notary.[92]

the bank liable to the holder. Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324.

Where the holder and owner of a promissory note delivered it to a bank for collection, and such bank delivered it to a notary public for demand, protest, and notice, which demand, protest, and notice were improperly made, whereby the indorsers were entirely discharged, the bank is responsible on the note to the owner thereof. Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324.

Where a notary public in the employ of a bank protested notes left for collection, without allowing days of grace, by reason of which improper protest the indorsers were relieved from liability, the bank was liable to the owner of the notes for whatever damages he sustained thereby. Hitchcock *v.* Bank, 57 App. Div. 458, 68 N. Y. S. 234.

90. Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489, affirming 29 N. Y. Super. Ct. 337, 1 Abb. Prac., N. S., 381.

If a bank, having received a promissory note for collection, employs a notary to present proper notices to charge the parties, the notary is the agent of the bank, and not of the depositor or owner of the paper, and the bank is liable for any neglect of duty by him, by which any of the parties are discharged. Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489, affirming 29 N. Y. Super. Ct. 337, 1 Abb. Prac., N. S., 381.

The plaintiff kept his regular deposit account with the defendant, a banking corporation, and delivered to it a promissory note, made by C. and indorsed by B. for collection. The note was not paid at maturity, and the defendant delivered the note to a notary for demand and protest, by whose neglect the indorser was discharged. The maker was insolvent. The notary was employed by the defendant to do all its notarial business, and gave bond to it for the faithful discharge of his duties. Held, that the notary in this instance was not acting in the character of an independent officer, in the discharge of a duty devolved on him by law, but as agent of the defendant, and the defendant was responsible for his negligence. Gerhardt *v.* Boatman's Sav. Inst., 38 Mo. 60, 90 Am. Dec. 407.

Liability of express company for negligence of notary employed by it.—If an express company receives for collection, for a compensation, a bill of exchange drawn in one state and payable in another, and delivers the same to a notary for demand and protest on the day before such demand and protest should be made, and such notary makes demand and protest one day before the maturity of the bill, whereby the drawer and indorsers are discharged, the acceptor being insolvent, the express company will be liable to the holder for the amount of the bill and interest. American Exp. Co. *v.* Haire, 21 Ind. 4, 83 Am. Dec. 334.

91. Evidence insufficient to show understanding relieving bank from liability.—Ayrault *v.* Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489, affirming 29 N. Y. Super. Ct. 337, 1 Abb. Prac., N. S., 381.

92. Bank held not liable for negligence of notary.—*Iowa.*—First Nat. Bank *v.* German Bank, 107 Iowa 543, 78 N. W. 195, 44 L. R. A. 133, 7 Am. St. Rep. 216.

Maryland.—Citizens Bank *v.* Howell, 8 Md. 530, 63 Am. Dec. 714.

Massachusetts.—Warren Bank *v.* Suffolk Bank, 10 Cush. 582.

Mississippi.—Tiernan *v.* Commercial Bank, 7 How. 648, 40 Am. Dec. 83; Agricultural Bank *v.* Commercial Bank, 7 Smedes & M. 592; Bowling *v.* Arthur, 34 Miss. 41.

Nebraska.—Wood River Bank *v.* First Nat. Bank, 36 Neb. 744, 55 N. W. 239;

According to this latter line of authorities the notary public, being a public

Williams *v.* Parks, 63 Neb. 747, 89 N. W. 395, 56 L. R. A. 759.

Ohio.—First Nat. Bank *v.* Butler, 41 O. St. 519, 52 Am. Rep. 94.

Pennsylvania.—Bellemire *v.* Bank, 1 Miles 173.

Tennessee.—Bank *v.* First Nat. Bank, 67 Tenn. (8 Baxt.) 101.

Wisconsin.—Stacy *v.* Dane County Bank, 12 Wis. 629.

United States.—Britton *v.* Niccolls, 104 U. S. 757, 26 L. Ed. 917.

"In the supreme courts of Connecticut, Maryland, Illinois, Wisconsin, and Mississippi, the doctrine of the supreme court of New York in the case reversed, and of the supreme court of Massachusetts has been approved and followed. In the New York case, in the court of errors, it was conceded that the general liability of the collecting bank might be varied and limited by express agreement of the parties, or by implication arising from general usage; and in some of the cases in other states, proof of such general usage of bankers in the employment of notaries was permitted, and a release thereby asserted from liability of the bank for any neglect by them." Britton *v.* Niccolls, 104 U. S. 757, 26 L. Ed. 917.

In Louisiana, according to some of the earlier decisions, a bank receiving a note, for collection, is liable for the neglect of its notary to make protest or give due notice in order to bind the indorsers. Montillet *v.* Bank (La.), 1 Mart., N. S., 365; Canonge *v.* Louisiana State Bank, 3 Mart., N. S., 344; S. C., 7 Mart. N. S. 583; Pritchard *v.* Louisiana State Bank, 2 La. 415; Miranda *v.* City Bank, 6 La. 740, 26 Am. Dec. 492; Oakey *v.* Bank, 17 La. 386.

According to other, and later decisions, where a bank in which a note has been deposited for collection, in case of nonpayment, places it for protest, in the hands of a notary to whom its own business is uniformly entrusted, it will not be responsible for the failure of the notary to protest the note or to notify the proper parties. Baldwin *v.* Bank, 1 La. Ann. 13, 43 Am. Dec. 72; Hyde *v.* Planters' Bank, 17 La. 560, 36 Am. Dec. 621; Frazier *v.* New Orleans, etc., Banking Co. (La.), 2 Rob. 294.

To whom bank liable.—A bank receiving a note for collection is the agent of the holder or depositor, to whom alone and to no other parties to the note is it responsible. So where a note is deposited for collection in bank, and its notary fails to give notice of protest to the first indorser, who is thereby discharged, the second indorser, who takes it up, has no recourse against the bank. McCullock *v.* Commercial Bank, 16 La. 566.

In an action against a bank for negligence in not duly demanding of the maker payment of a note left by the plaintiffs with them for collection, the defense being that the note was duly placed by the defendants in the hands of a competent notary public for demand and protest, and that the negligence, if any, was on his part, the defendants having been the collecting agent for the plaintiffs for more than ten years, and having invariably placed their notes in the hands of a notary for demand and protest, with the knowledge of the plaintiffs, evidence is admissible for the defendants of an invariable usage among the banks in Boston, including the defendants, when notes are sent to them for collection, to keep the same for payment until the close of banking hours, and, if not then paid, to put them in the hands of a notary for demand and protest, and that the defendants did this in the present case; and, if these facts be established, the defendants are not responsible for the negligence of the notary. Warren Bank *v.* Suffolk Bank (Mass.), 10 Cush. 582.

Employment of notary by express company holding note for collection.—An express company which receives a note for collection may, in the absence of any direct notice to the contrary, assume that a notary public, resident at the place of the maker, is competent, and it discharges its obligation to the holder by placing the note in the notary's hands in due time to make proper presentment and protest. Stacy *v.* Dane County Bank, 12 Wis. 629.

Presumption as to competency of notary.—In an action against a bank for negligence in not making necessary demand and protest of a note, left with the bank for collection, the bank, by showing the delivery of the note to a notary public for demand and protest in due time, is, prima facie, exonerated from liability. It is not sufficient for the plaintiff to prove, in general terms, that the notary was a man of dissipated habits. To rebut such prima facie case, he must prove that the notary was drunk at the time the note was given to him, or that his habits were so universally intemperate as to disqualify him for the discharge of

officer, is the agent of the owner, and not of the bank employing him.[93] Where, however, a bank contrary to custom, on receiving a note for collection, does not employ a notary to protest for nonpayment, but employs

an official act. Agricultural Bank *v.* Commercial Bank (Miss.), 7 Smedes & M. 592.

Sufficient if ordinary care is employed in selection of notary.—Where a draft is sent to a bank for collection, and payment is refused, and the bank places it in the hands of its assistant cashier, who is also a notary public, for protest, if it exercised ordinary care in the selection of the notary it is not liable if such notary failed to serve due notice of protest on the drawee. First Nat. Bank *v.* German Bank, 107 Iowa 543, 78 N. W. 195, 44 L. R. A. 133, 70 Am. St. Rep. 216.

As, under the statutes of Iowa, a notary public is authorized to give notice of protests, the selection, by a bank to whom a draft is sent for collection, of a notary to serve protest on the drawee, shows such prudence and diligence as would exempt it from liability on failure of notary to properly perform his duty. First Nat. Bank *v.* German Bank, 107 Iowa 543, 78 N. W. 195, 44 L. R. A. 133, 70 Am. St. Rep. 216.

Liability for negligence of president of bank who is notary public.—As a general rule, where a bank delivers a note or bill to a notary public for demand, protest, and notice, it will not be liable for the default of the latter. Still where a bill remains in a bank to be protested for nonpayment by the president and manager thereof, who is a notary public, and who, though aware of the instructions to the contrary, delays noting for protest or giving notice, in consequence of which the indorsers are discharged, such notary will be held to be the agent of the bank, and the latter will be liable for his negligence. Wood River Bank *v.* First Nat. Bank, 36 Neb. 744, 55 N. W. 239.

An instruction sent with a note forwarded to a bank for collection to protest means that the notary to whose attention it is called shall take the necessary steps to bind the indorsers. Williams *v.* Parks, 63 Neb. 747, 89 N. W. 395, 56 L. R. A. 759.

Where a bank intrusted the duty to protest a note sent it for collection to a notary, it was not bound to make an examination to see whether that was done. Williams *v.* Parks, 63 Neb. 747, 89 N. W. 395, 56 L. R. A. 759.

93. **Notary considered as agent of owner of paper.**—Bowling *v.* Arthur, 34 Miss. 41.

Where A. presented a note for collection to certain bankers, who handed it to a reputable notary for presentment and demand, held, that they were not liable for any neglect of the notary, who, being a public officer, was alone liable to the holder. Britton *v.* Niccolls, 104 U. S. 757, 26 L. Ed. 917.

The owner of a domestic note left it with a bank for collection, and if not collected to fix the liability of an indorser. It not having been paid at maturity, the bank, according to a general usage of the place, handed it to a reputable notary for presentment and protest. It was held that the notary was the subagent of the owner, and that the bank was not answerable for a default of the notary in making presentment for payment, whereby the liability of the indorser was released. Bank *v.* Butler, 41 O. St. 519, 52 Am. Rep. 94. This decision was based, in part at least, upon the nature of the office of notary public in Ohio, the court making the following comments thereon: "In this state, the office of notary public is established by statute. Careful provision is made for the appointment of the officer. He receives a commission, and is required to give bond and take an official oath. He is also required to have an official seal, and keep a register which is declared a public record, with provision for its perpetual preservation. One of his duties is 'to receive, make and record notarial protests,' and his instruments of protest are declared prima facie evidence of the facts therein certified. All bankers, cashiers, tellers or clerks of banks are disqualified to hold the office; and directors, stockholders, attorneys, agents, and all other persons holding official relations to any bank, are incompetent to act as notary in instances where such bank is interested."

Burden of proof on bank to show that no damage resulted from negligence.—A bank, receiving a note to collect, is responsible for the notary's omission to give notice to the indorser; and the onus is on it as agent to show that no damage resulted from such neglect, to be relieved from its liability. Miranda *v.* City Bank, 6 La. 740, 26 Am. Dec. 493.

one who is not a notary to give such notice, and he neglects to do so, whereby an indorser is discharged, the bank is liable to the indorser for the amount of the note.[94]

§ 172 (4) Recovery Back by Indorser of Payment Made in Ignorance of Bank's Negligence.—Where the indorser of a note, in ignorance of the fact that proper demand has not been made on the maker, pays the amount of the note to the bank holding it for collection, he may, upon discovering his mistake and demanding repayment before the money has been paid over to the holder, recover the amount from the bank, though after such demand the money has been paid to the holder.[95]

§ 173. Collection of Lost or Stolen Paper.—Where checks payable to the order of a certain person are stolen, the name of such person forged thereon, and negotiated to a party who deposits them in a bank which collects the same and pays the same to the depositor, the person to whose order they were payable can recover back the amount of the checks in an action for conversion.[96] This is in accordance with the general rule that a person or corporation who converts a promissory note or check to his or its own use is liable in damages for the conversion, in an amount equal to the amount due on the promissory note or check.[97]

§ 174. Collection of Forged or Altered Paper.—In General.—In cases involving a forgery the loss must be borne by the party through whose means or negligence the fraud was made successful.[98] In case of commercial paper being paid without previous inspection, it is, no doubt, the duty of the party paying to use diligence in making the inspection as soon as he has the opportunity, and in giving notice of the forgery if one be discovered; and if by his failure to do so the party receiving is prejudiced, such negligence will be a good answer to the claim for restitution.[99] Where the payment is made without presentation, and accepted subject to future examination of the paper, the ordinary rules respecting money paid by mistake and negligence and its consequences should be applied.[1]

94. **Liability where one not a notary is employed to protest.**—Bellemire *v.* Bank (Pa.), 1 Miles 173.

95. **Recovery back by indorser of payment in ignorance of bank's failure to demand payment of owner.**—Garland *v.* Salem Bank, 9 Mass. 408, 6 Am. Dec. 86.

96. **Collection of lost or stolen paper.**—Salomon *v.* State Bank, 28 Misc. Rep. 324, 59 N. Y. S. 407.

Collection of lost or stolen paper.—Twenty-four small checks payable to plaintiff's order were stolen, plaintiff's name forged thereon, and negotiated to a party who deposited them in a bank, which collected them and paid the proceeds to the depositor. Held, that plaintiff could recover of the bank the amount of the checks in an action for conversion. Salomon *v.* State Bank, 28 Misc. Rep. 324, 59 N. Y. S. 407.

97. Salomon *v.* State Bank, 28 Misc. Rep. 324, 59 N. Y. S. 407.

98. **General rule as to liability for loss in case of forgery.**—National Council *v.* Hibernian Banking Ass'n, 137 Ill. App. 175.

99. **Duty to inspect at earliest opportunity and give notice of forgery.**—Allen *v.* Fourth Nat. Bank, 59 N. Y. 12, affirming 37 N. Y. Super. Ct. 137.

1. **Payment made and accepted subject to future examination of paper.**—Allen *v.* Fourth Nat. Bank, 59 N. Y. 12, affirming 37 N. Y. Super. Ct. 137.

Plaintiffs received a certificate of

Liability of Bank Collecting Forged or Raised Draft.—Since the case of Price *v.* Neal,[2] the general rule has been, and is, that, when the drawee of a check, draft, or bill of exchange pays the same to a bona fide holder, such drawee can not recover the money back upon discovering such check, draft, or bill to be a forgery. The drawee is presumed to know the signature of the drawer, and if, when the check or bill is presented to the drawee for payment, he pays the same, and it afterwards turns out to be a forgery, he can not recover the money back from the person to whom he paid it.[3] When the drawee is a bank, there is a much stronger reason for holding it to know the signature of its depositors and customers than in the case of a private individual, because banks keep a book in which are preserved the genuine signatures of their depositors, customers, and correspondents.[4] Where a bank to which pay-

deposit issued by O. & Co. from their correspondent for collection. Both plaintiff's and O. & Co. were private bankers in New York, and had accounts with defendant bank, through which they cleared, and, by a custom between defendant and O. & Co., defendant paid all their paper, and rendered daily accounts, for which they would give checks and receive the paper, which accounts were subject to credit for paper returned by O. & Co. as not good, during banking hours on the same day. Plaintiffs deposited the certificate with defendant, and its amount was entered to their credit, charged to O. & Co., and included in defendant's daily accounts with them, for which defendant received their check; but subsequently, on the same day, O. & Co. discovered the certificate to be a forgery, and returned it to defendant, who thereupon gave them credit therefor, and charged it to plaintiffs, giving them immediate notice; whereupon, on the same day, plaintiffs, in their notice to their correspondent of the receipt of the certificate, notified it of the forgery, but claimed to be entitled to the proceeds of the certificate, it having been voluntarily paid by the makers. Held, that the payment made by O. & Co. was not absolute, but conditioned on the validity of the paper, on inspection, according to their arrangement with defendant; and, having immediately returned the paper on discovering the forgery on the same day, plaintiffs were not entitled to the proceeds so paid. Allen *v.* Fourth Nat. Bank, 59 N. Y. 12, affirming 37 N. Y. Super. Ct. 137.

2. 3 Burrows 1354 (decided by Lord Mansfield in 1762).

3. **General rule as to payment of forged check or bill by drawee.**—First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748.

Plaintiff, who was the agent of the steamboat Magnolia, received a letter purporting to come from the clerk of the boat, informing him that a draft drawn by the clerk, and accepted by the captain, was placed in the City Bank of New Orleans for collection. He immediately went and paid the draft, and took it up. On the same day the holder called, and the clerk of the bank paid him the money, charging no commissions and making no entries of the transaction in the books of the bank. Plaintiff afterwards learned that the letter and the draft were both forgeries. Held, that the action of the plaintiff relieved the bank from any liability which might have attached for receiving what was not due. Stephenson *v.* Mount, 19 La. Ann. 295.

4. **Application of general rule where drawee is a bank.**—First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748, citing National Park Bank *v.* Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; Smith *v.* Mercer, 6 Taunt. 76; Wilkinson *v.* Johnson, 3 Barn. & C. 428; National Bank *v.* National Mechanics' Banking Ass'n, 55 N. Y. 211, 14 Am. Rep. 232; Frank *v.* Chemical Nat. Bank, 84 N. Y. 209; Levy *v.* Bank (Pa.), 4 Dall. 234, 1 Bin. 27, 1 L. Ed. 814; Northwestern Nat. Bank *v.* Bank, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102; Commercial, etc., Nat. Bank *v.* First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554; Deposit Bank *v.* Fayette Nat. Bank, 90 Ky. 10, 11 Ky. L. Rep.

ment of a draft has been made under mistake of fact, as where such draft has been fraudulently altered, is the owner of such draft, it will be liable upon discovery of the facts, to refund the amount mispaid, provided its condition has not in the meantime changed so that this would be unjust.[5] If, however, the bank is not the owner of the draft, but merely holds it for collection as the agent of another, and presents it for payment as such, it can not be required to repay, provided it has paid the proceeds over to its principal before notice of the mistake.[6] In such cases

803, 13 S. W. 339; First Nat. Bank *v.* First Nat. Bank, 151 Mass. 280, 24 N. E. 44; National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612; Ellis *v.* Trust Co., 4 O. St. 628.

Presentation for payment of a check by a bank which is the indorsee "for collection" does not justify the drawee bank in relaxing any of its vigilance in determining whether or not the name of the drawer is genuine. First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748.

"In the cases in which it has been held that the indorsement is a guaranty, to the effect that the name of the drawer is genuine, the indorsements were unrestricted, and therefore indicated an absolute transfer and sale of the paper. But when the indorsement is for collection only, as in this case, it indicates on its face that the indorser remains the owner of the paper, and that his successive indorsees are only his agents for the sole purpose of collecting the paper and remitting the proceeds to him. Such a restricted indorsement does not authorize a subsequent indorsee to negotiate the paper. His only power is to collect it, and the drawee bank is bound by the notice in the indorsement. Such an indorsement is not a guaranty that the name of the drawer is genuine, but only that the names of the indorsers then on the paper are genuine. Mechanics' Bank *v.* Valley Packing Co., 4 Mo. App. 200, reversing 70 Mo. 643; Northwestern Nat. Bank *v.* Bank, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102. In the case now under consideration the drawer's name was a forgery, but the name of the payee indorsed on the check was genuine, having been written by the cashier at the request of the payee." First Nat. Bank *v.* First Nat. Bank, 58 O. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748.

5. Duty of bank owing altered paper to refund amount mispaid.—National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612; National Bank *v.* National Mechanics' Banking Ass'n, 55 N. Y. 211, 14 Am. Rep. 232; White *v.* Continental Nat. Bank, 64 N. Y. 316.

6. Liability of bank acting merely as collecting agent.—United States *v.* American Exch. Nat. Bank, 70 Fed. 232, distinguishing Onondaga County Sav. Bank *v.* United States, 12 C. C. A. 407, 64 Fed. 703. See, also, Armstrong *v.* Commercial Bank, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533; White *v.* National Bank, 102 U. S. 658, 26 L. Ed. 250; Sweeny *v.* Easter (U. S.), 1 Wall. 166, 17 L. Ed. 681; Wells, etc., Co. *v.* United States, 45 Fed. 337; National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612.

A bank being the indorsee of a draft for $8, which had been fraudulently raised to $1,800, sent it to defendant bank for collection, which collected of plaintiff bank, the drawee, and paid the proceeds to the indorsee bank, which paid the $1,800 to the payee. Held, that defendant was not liable to plaintiff for the amount the draft had been raised, as it acted only as agent. National Park Bank *v.* Seaboard Bank, 44 Hun 49, 7 N. Y. St. Rep. 406, affirmed in 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612.

A draft on plaintiff bank, which had been fraudulently altered, was received by the E. Bank for collection only, and was indorsed and forwarded by it to defendant for collection for its account. The amount of the draft was credited by defendant to the E. Bank, and was afterwards paid by plaintiff to defendant. All sums to the credit of the E. Bank at the time of payment were paid by defendant to the E. Bank before the alteration was discovered. Held, that defendant was not liable to plaintiff for the amount thus erroneously paid to it. National Park Bank *v.* Seaboard Bank, 114 N. Y. S. 28, 20 N. E. 632, 11 Am. St. Rep. 612.

The payee of a forged draft indorsed it to defendants for collection, and be-

the indorsement by the collecting agent, who has no proprietary interest, does not import any guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal, as stated upon the face of the draft; and as this relation is evident upon the draft itself, the payor can not claim to have been misled by the indorsement of the agent, or any right to rely upon that indorsement as a guaranty of the genuineness of the payee's indorsement.[7] Where a bank, as agent of the holder, collects a draft, the amount of which has been raised, it will be liable to the drawee for the amount overpaid, unless it has actually paid over the proceeds to the holder. The fact that the same has been credited to the owner's account is not sufficient to afford relief.[8] A bank to which a

fore it was paid by the drawees defendants stamped it "Paid," with their names attached. Held, that the drawee could not sue defendants for money had and received on the ground that payment was made to them under mistake, they being merely the agents of the payee. Vogel *v.* Ball, 69 Tex. 604, 7 S. W. 101.

A check drawn on plaintiff was indorsed, "For collection," and handed defendant to be collected. The same day, defendant's agent indorsed it in his own name, and presented it to plaintiff, and received the money, which was delivered by defendant to the party from whom it received the check. It was subsequently discovered that the check had been raised before it came to the hands of defendant's correspondent. Held, that defendant was not liable to plaintiff as for money paid under mistake. National City Bank *v.* Westcott, 118 N. Y. 468, 23 N. E. 900, 16 Am. St. Rep. 771.

7. United States *v.* American Exch. Nat. Bank, 70 Fed. 232.

A customer of a bank deposited with it a bank draft on a bank in another city, and paid the customer the amount of the draft, and sent it to its correspondent "For collection." It was paid by the drawee bank. Held that, by its indorsement "For collection," the bank only guarantied the genuineness of the payee's signature, of which the drawee bank had notice, and was not liable to the drawee bank for the amount of the draft, which proved to be a forgery. Northwestern Nat. Bank *v.* Bank, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102.

The defendant as collecting agent of the Bellaire Bank of Ohio collected at the subtreasury, New York, a pension draft on which the payee's name was forged after her death. The defendant in making the collection indorsed the draft as collecting agent of the Bellaire Bank, as appeared by the terms of its indorsement, and on collection at once paid over the money to the principal, without notice of the forgery, before this action was commenced. Held, that the defendant was not liable. United States *v.* American Exch. Nat. Bank, 70 Fed. 232.

"In the case of Onondaga County Sav. Bank *v.* United States, 12 C. C. A. 107, 64 Fed. 703, as I find upon examination of the record on appeal, no question like the present arose. The Onondaga Bank was in the same situation as the Bellaire Bank in the present case. It had cashed the forged draft and was collecting the money for its own benefit as owner of the draft. Its indorsement imported a guaranty of the prior signatures; and the defendant's remedy here is against the Bellaire Bank." United States *v.* American Exch. Nat. Bank, 70 Fed. 232.

A bank receiving a draft for collection is not liable, where it turns over the proceeds of such draft to its customer, even though the indorsement which made the collection possible was a forgery. National Council *v.* Hibernian Banking Ass'n, 137 Ill. App. 175.

Where a "raised" check is deposited with a bank for collection, and indorsed by it by a restrictive indorsement, in such manner that the indorsement conveys no representation that the collecting bank is the owner, and no such representation is made otherwise, and it is paid by the drawee, and the funds are paid by the collecting bank to the payee, the collecting bank can not be held liable by the drawee. Crocker-Woolworth Nat. Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169.

8. Actual payment of proceeds to principal essential to relieve from liability.—United States Nat. Bank *v.*

draft is indorsed and sent for the purpose of collecting it as agent of the indorser, and which transacts the business without disclosing its agency, may be regarded and charged as principal by those with whom it thus deals.[9] It will be no answer that it is the uniform custom of banks to transact such business without disclosing their agency.[10]

Liability of Bank Collecting Check with Forged Indorsement.—Where a bank accepts a check bearing a forged indorsement, and places it to the credit of one presenting it, and has it collected, it has been held that it is liable to the true owner, though it acts in good faith and without knowledge of the forgery.[11]

National Park Bank, 59 Hun 495, 13 N. Y. S. 411, 37 N. Y. St. Rep. 35, affirmed 129 N. Y. 647, 29 N. E. 1028. See, also, National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612; Bank *v.* Union Bank, 3 N. Y. 230.

Facts held to show payment of proceeds.—A bank, being the indorsee of a draft which had been fraudulently raised, sent it to defendant bank, which collected it of plaintiff bank, the drawee, and gave the indorsee bank credit on its account for the amount thereof. When plaintiff discovered that the draft was raised, and gave defendant notice of such fact, defendant had made remittances to the indorsee bank in a sum exceeding the amount the check had been raised, though the sum it held to its credit exceeded such sum. Held, that defendant, as agent of the indorsee bank, had paid it for the draft. National Park Bank *v.* Seaboard Bank, 44 Hun 49, 7 N. Y. St. Rep. 406, affirmed in 114 N. Y. 218, 20 N. E. 632, 11 Am. St. Rep. 612.

9. Liability of bank failing to disclose agency.—Canal Bank *v.* Bank (N. Y.), 1 Hill 287.

10. Custom no defense.—Canal Bank *v.* Bank (N. Y.), 1 Hill 287.

Where plaintiffs, as agents, received a draft and forwarded it for collection, not disclosing the agency, and, on its being paid at maturity, paid over the amount to defendant, who had become entitled thereto by purchase, and the draft proved to be a forgery and plaintiffs were compelled to refund to the drawee, they were entitled to receive back from defendant the money so paid. Little *v.* Derby, 7 Mich. 325.

Liability to drawer limited to original amount of draft.—Where a bank receives a raised draft, and then collects the same from the drawee, it is not liable to the drawer as for money had and received, for the amount collected beyond the originai amount of the draft, as such excess was rather the money of the drawee. National Bank *v.* Manufacturers', etc., Bank, 122 N. Y. 367, 25 N. E. 355.

11. Liability of bank collecting check with forged indorsement.—Farmer *v.* People's Bank, 100 Tenn. 187, 47 S. W. 234.

"In Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. Rep. 900, the well settled rule was that 'a check drawn in favor of a particular payee or order is payable only to the actual payee upon his genuine indorsement; and if the bank mistake the identity of the payee, or pay upon a forged indorsement, it is not a payment in pursuance of authority, and it will be responsible.' To the same effect in Chism *v.* First Nat. Bank, 96 Tenn. 641, 36 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863. The logic of this holding, it would seem, must necessarily be that one coming into possession of such paper, either unindorsed or with a forged indorsement of the payee's name, could not successfully resist the title of the true owner, or, if it has been converted into money, a demand for its proceeds. In such a case the rule of law is stated by Morse, in his work on Banks and Banking (volume 1, § 248): 'If a negotiable instrument, having a forged indorsement, come into the hands of a bank, and is collected by it, the proceeds are held for the rightful owner of the paper, and may be recovered by them, although the bank gave value for the paper, or has paid over the proceeds to the party depositing the instrument for collection.' Cases involving facts similar to these upon which this controversy turns have been considered by a number of courts of the highest respectability, and the rule announced by Mr. Morse has been applied to them." Farmer *v.*

Negligence of Collecting Bank with Regard to Altered Paper.—Where, after being warned by the cashier that a check might have been raised, a depositor leaves such check with the bank, and the same is credited to the depositor and is also credited to the receiving bank by the correspondent to whom it is sent for collection, and such check is afterwards returned by the bank on which it was drawn as being raised, and the correspondent bank charges it up to the depositor's bank, which, in turn charges it to the depositor, the latter can not recover the amount of the bank, on the ground of negligence, or because of the credit to his account.[12]

Effect of Entering Credit of Forged Check.—Where a bank to which a forged check has been forwarded for collection credits the person sending it with the amount thereof, without actually remitting the money, it may, on discovering the forgery, charge back such amount to such person.[13]

Right of Bank to Reimburse Itself for Money Collected on Forged Check and Paid to Depositor.—Where a bank collects and pays the amount of a forged check to a customer, who has accepted the check, in good faith, indorsed the same and deposited it for collection, and repays such amount to the bank on which the check was drawn, on discovery of the forgery, the collecting bank may reimburse itself from any fund belonging to the customer subsequently coming into its hands.[14]

People's Bank, 100 Tenn. 187, 47 S. W. 234.

Where a check is not delivered to the payee, but his name is indorsed by another, who deposits it with a bank, which collects the proceeds, the payee's ratification by a demand on the bank for the proceeds makes the check his property, and entitles him to recover the proceeds, over an objection of want of privity between the parties. Farmer *v.* People's Bank, 100 Tenn. 187, 47 S. W. 234.

12. Negligence of collecting bank with regard to altered paper.—A depositor brought to his bank a check, which the cashier, simply from its amount, and not from any appearance of fraud, advised him not to take, as it might be raised, but said it could be deposited for collection, and, if it was not returned, they would suppose it all right. It was left and credited to the depositor, who, two days later, without making further inquiry, completed the sale in which it was offered in payment. The bank's correspondent credited it with the check, but about a month later it was returned by the bank on which it was drawn as being raised, and the correspondent charged it up to the depositor's bank, which charged it to the depositor. Held, that the depositor could not recover the amount of the bank, on the ground of negligence. Rapp *v.* National Security Bank, 136 Pa. 426, 20 Atl. 508.

"If it had been shown that the defendant bank had misled the plaintiffs, and that the latter had acted upon the faith of it, to their injury, we would have had a different case before us. It is true the cause was argued upon that theory, but the facts are not so. The plaintiffs had no right to be misled by the mere credit of the check as cash. They made no inquiry at the bank after depositing the check until it was dishonored, but sold the goods, and cashed the balance of the check, not only without due caution, but in the face of warning not to do so. Under such circumstances, they can not throw their loss upon the bank." Rapp *v.* National Security Bank, 139 Pa. 426, 20 Atl. 508.

13. Effect of entering credit of forged check.—Birmingham Nat. Bank *v.* Bradley, 103 Ala. 109, 15 So. 440, 49 Am. St. Rep. 17.

14. Reimbursement from funds of customer for money advanced on forged check.—Plaintiff accepted in good faith a check in which the in-

§ 174½. Suits by Collecting Bank to Enforce Payment of Paper Transmitted by Correspondent.—Where a bank in one state sends to a foreign bank a note and mortgage received as the successor of another bank, given for a loan made by the old bank, with a written guarantee of the payment of such note, and the foreign bank discounts the note and places the proceeds to the credit of its correspondent, the foreign bank may, upon the direction of its correspondent, maintain a suit to enforce payment in the federal courts, subject to all defenses that would have been good against the old bank.[15]

§ 174¾. Action against Bank for Collection of Forged Paper.—After the lapse of six years an action by the United States to recover the amount of a draft paid on a forged signature will not lie against the banker who innocently collected the same.[16]

§ 175. Actions for Negligence or Default—§ 175 (1) Nature and Form of Remedy.—The liability of a bank negligently failing to collect paper received for collection is enforceable in assumpsit for breach of its implied undertaking to use diligence in making the collection,[17] or in case for damages resulting from negligence in the performance of duties imposed by law.[18] Under some circumstances, the proper form of procedure is by suit against the bank as for money had and received,[19] to

dorsement of the payee's name was a forgery, and, after indorsing the same, delivered it to defendant bank for collection. Defendant collected the check and paid the money to plaintiff, but, on subsequently discovering the forgery, paid back such amount to the bank on which the check was drawn, without notifying plaintiff of the forgery, or that it had paid back the sum collected. Held, that any fund belonging to plaintiff, subsequently coming into possession of defendant, could be legally applied to the reimbursement of the latter for the amount advanced on the check, plaintiff being chargeable with notice of the forgery. Green *v.* Purcell Nat. Bank, 1 Ind. T. 270, 37 S. W. 50.

15. **Defenses in suit by collecting bank.**—A bank in Ohio sent to its correspondent in New York a note and mortgage received as the successor of another bank, given for a loan made by the old bank, with a written guaranty of payment of the note. The New York bank discounted the note, and placed the proceeds to the credit of the Ohio bank, which subsequently directed suit to enforce payment in the United States circuit court in Ohio. Held, that the New York bank could maintain the suit subject to all defenses that would have been good against the old bank. Lanier *v.* Nash, 121 U. S. 404, 30 L. Ed. 947, 7 S. Ct. 919.

16. **Laches held to bar action to recover collection of forged draft.**—United States *v.* Cooke, Fed. Cas. No. 14,855, 9 Phila. 468.

17. **Enforcement of bank's liability by action in assumpsit.**—Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246.

18. **Enforcement in case.**—Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246; Bank *v.* First Nat. Bank, 67 Tenn. (8 Baxt.) 101.

19. **Suit for money had and received.**—Where a collecting bank is negligent in transmitting a check for collection direct to the drawee bank, whereby the drawee, though in disregard of its special agreement, is enabled to debit the drawer of the check and credit the collecting bank and control of the check is lost by the collecting bank, and it is never returned to the depositor, such depositor, may, in assumpsit upon the common counts as for money had and received, recover the full amount of the check. Pinkney *v.* Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012.

A bank agreed to collect a draft for a specified compensation and sent the

sustain which action it is sufficient that something has been received by the defendant, which, under the circumstances of the case, ought, as between the parties, to be regarded as money.[20] This action lies by a customer against a banker for a balance on settlement, or on proof that a certain sum has been received in so many different payments, and that a certain sum has been paid out in so many payments.[21]

§ 175 (1½) Who May Sue.—In General.—An action against a bank for negligence in collection of a draft is properly nonsuited where the plaintiff does not appear to have been the owner of the draft at the time of the cause of action sued for, or at any time subsequent.[22]

Pledgors of Note.—Where a debtor transferred a note as collateral security for the payment of a sum of money owing by him, the amount of the note, when paid, to be applied towards satisfaction of the creditor's demand, and, if not paid, the note to be returned to the debtor, the debtor may maintain an action on the case in his own name for breach of duty against a bank with which the note was left by the creditor for collection, and which neglected to give notice of nonpayment to previous parties, whereby the debt was lost, although the note was left for collection by the creditor, and no mention whatever made of the party who had transferred the note.[23]

Right of Bank Accepting Paper for Collection to Sue Subagent for Negligence.—In those jurisdictions where it is held that the principal or home bank receiving paper for collection discharges its duty to the holder, where it uses due care in the selection of a correspondent or subagent to whom it transmits the paper for collection, and that the latter thereupon becomes the agent of the holder or payee,[24] if a debt be lost by negligence of an agent to whom a bill of exchange is sent for collection,

same to its correspondent for collection, which received a check in payment thereof, which was subsequently dishonored. The correspondent notified the bank of the payment and the bank gave the holder of the draft credit for the amount thereof. Held, that the holder was entitled to sue the bank for money had and received. Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770.

20. Pinkney *v.* Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012.

21. Pinkney *v.* Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012.

22. Nonsuit where plaintiff not shown to be owner of draft.—Morris *v.* First Nat. Bank, 201 Pa. 160, 50 Atl. 1000.

Where in a suit by partners against a bank to recover for bank's delay in presenting a draft, it appeared that the draft was drawn by the partners to the order of one of them, and indorsed by him individually for deposit in a bank which sent it to defendant for collection, and on its return unpaid the first bank charged it back to his account, and one witness stated that the bank to which the draft was first given was the agent for the partners, but his attention was not directed to the matter of ownership as between the firm and the individual partner, the evidence was insufficient to show plaintiffs the owners of the drafts. Morris *v.* First Nat. Bank, 201 Pa. 160, 50 Atl. 1000.

23. Pledgor of note.—Bank *v.* McKinster, 11 Wend. (N. Y.) 473.

24. See ante, "Nature of Agency Created by Such Appointment," § 162 (2); "Negligence or Default of Agents or Correspondents," § 170; "Liability of Transmitting Bank for Default of Correspondent," § 171 (6).

the principal or home bank (having complied with its duty and not being liable to the holder) can not, by voluntarily discharging the claim of the payee, maintain an action on the case for negligence against the subagent.[25] Such right accrues only to the holder or payee of the bill under the circumstances.[26]

§ 175 (2) Pleading—§ 175 (2a) Declaration, Petition or Complaint.—Showing as to Relation of Principal and Agent between Plaintiff and Defendant.—In an action against a bank for loss resulting from the failure of the bank to collect paper entrusted to it for collection, the declaration, petition, or complaint should show the existence of the relation of principal and agent between the plaintiff and defendant.[27]

Allegations as to Damages Resultant from Negligence of Bank.—In an action against a bank for negligent failure to collect paper entrusted to it for collection, or for failure to fix the liabilities of the parties thereto in case of failure to collect, the complaint must allege that the plaintiff suffered damages from the defendant's negligence,[28] and the omis-

25. **Principal bank can not sue subagent where latter regarded as agent of holder.**—Bank *v.* First Nat. Bank, 67 Tenn. (8 Baxt.) 101.

26. **Holder or payee proper party plaintiff.**—Bank *v.* First Nat. Bank, 67 Tenn. (8 Baxt.) 101.

27. **Showing as to relation of principal and agent between plaintiff and defendant.**—In an action against a bank for failure to promptly present a draft drawn by plaintiffs on an insolvent firm, an allegation in the declaration that plaintiffs drew the draft, delivered it to a certain collection agency, procured its indorsement, and "caused said draft, so indorsed, to be sent by mail, together with a statement of their account," to the bank for collection, shows such a direct relation of principal and agent between plaintiffs and defendants as will justify a recovery. Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

An allegation in a declaration in a suit against a bank for its alleged negligent failure to collect a draft drawn by the plaintiffs upon a debtor in favor of a collection agency, and by it indorsed to the bank for collection, that the plaintiffs drew the draft, delivered it to the collection agency, procured its indorsement, and caused it to be sent to the bank for collection, with a statement of plaintiffs' account, is consistent with the claim that the collection agency merely acted under the direction of the plaintiffs in the transaction. Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

28. **Necessity for allegation as to resultant damages.**—Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246; Morris *v.* Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11; Farmers' Bank, etc., Co. *v.* Newland, 97 Ky. 464, 17 Ky. L. Rep. 329, 31 S. W. 38.

A complaint which alleges that plaintiff deposited with the bank a check for collection, that the bank agreed to use good faith in the selection of subagents for collection, that the bank sent the check for collection to the drawee bank, which suspended without paying, and that defendant bank by proper agency could have collected the check, is bad on demurrer, for failing to allege that plaintiff suffered damages from failure to collect. Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246.

A complaint which alleges a deposit of the check for collection; that the check was presented by the bank, but was dishonored, of which dishonor the bank failed to give plaintiff any notice until nine days later, when it mailed him a notice which he received two days later, at which time the drawee bank had failed; and that because of want of timely notice plaintiff was deprived of an opportunity to collect the check—is bad on demurrer, for failing to allege that plaintiff suffered damages from the failure to collect. Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246.

In an action against a bank for

sion of such allegation will render a complaint bad on demurrer.[29] Since the liability of a bank with which a check is deposited for collection, for negligence in not collecting it and not giving notice of nonpayment, is only for such amount as the depositor will lose thereby, he must allege and prove this.[30] A complaint in an action against a bank negligently failing to collect a check received for collection which sets up the common counts is fatally bad.[31] A complaint which alleges a deposit by the owner of the check of the amount sued for, and that he demanded of the bank payment of the same, is bad on demurrer.[32]

failure to collect a certificate intrusted to it for collection, a petition alleging that the defendant did not present the certificate promptly, and that it surrendered the certificate to the payor, is defective, if it fails to aver that defendant could have collected the certificate, or that the surrender of the certificate to the payor prevented such collection, or that the payor, after receiving the certificate, refused to surrender it, or to state facts to show that defendant's alleged negligence caused plaintiff to lose his claim against the payor. Farmers' Bank, etc., Co. *v.* Newland, 97 Ky. 464, 17 Ky. L. Rep. 329, 31 S. W. 38.

29. Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246; Morris *v.* Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11.

Petition held to state cause of action.—A petition alleging that defendants undertook to collect certain notes for plaintiff, that they failed to exercise due diligence, and that by reason thereof plaintiff sustained damages, states a cause of action. Coleman *v.* Spearman, etc., Co., 68 Neb. 28, 93 N. W. 983.

Declaration held to show loss resulting from defendant's negligence.—In an action against a bank for failure to promptly present a draft drawn by plaintiffs on an insolvent firm, the declaration alleged that defendants, with knowledge that by diligence they could collect the draft, negligently and fraudulently retained it, and when notified to hand it to attorneys neglected and refused to do so until after the drawee became insolvent, so that it was impossible to collect the claim; and that by reason of the negligence and fraud of defendants plaintiffs lost all opportunity to collect their account, and were greatly injured. Held, that the declaration did not fail to show that defendants' failure to perform their duties resulted in loss to plaintiffs, and that it was unnecessary to negative complainants' knowledge of the drawee's impending failure, or their own negligence. Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

30. Hendrix *v.* Jefferson County Sav. Bank, 153 Ala. 636, 45 So. 136.

31. Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246.

32. Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246.

"The mere failure of collection of the check does not demonstrate the loss to the owner of the demand for which it was given, or any part of such demand. The owner should say to the bank: 'You took this check for collection. Certain duties were thereby devolved upon you in respect of efforts to collect, or in respect of notice to me of its dishonor. You failed to perform those duties. From such failure resulted the nonpayment of the check. Because of its nonpayment, I have suffered damages in the sum of so many dollars. For these damages you are liable to me, and must account in this action.' In other words, a complaint in the common counts, or for money deposited, or for the amount of the check, averring the bank's unwarranted failure to collect it, or negligence operating to deprive the owner of opportunity to collect it—averments which, if proved, and this theory of liability were sound, would entitle the plaintiff to recover the full face value of the check, though his demand may have been satisfied in whole or in part from other sources, though he had suffered no damages or only nominal damages from the defendant's derelictions—would either not, by intendment or expressly, present the facts of this case (which is true of the common counts and of special counts 5 and 6), or claim a recovery of the facts of this case upon an inadmissible theory and in an amount which those facts

Setting Out Contracts the Breach of Which Is Complained of.—In an action to recover on a contract to collect a draft for reward to be paid, it is only necessary to set out so much of the contract, the breach of which is complained of.[33]

Effect of Unnecessarily Alleging Express Instructions as to Duty Implied from Relation of Parties.—When a bank receives commercial paper for collection there is an implied undertaking on its part that, in case of its dishonor, it will take all steps necessary to protect the holder's rights against all previous parties to the paper; and an allegation in a complaint that the holder instructed the bank to do so only states what the law implies, and changes neither the issues nor the burden of proof.[34]

Allegations as to Consideration for Bank's Undertaking.—In an action against a bank for the conversion of a note received by it for collection, and wrongfully given to another, whereby it was lost, it is not necessary to allege and prove that defendant undertook the collection for a consideration.[35]

Allegation as to Time of Deposit with Bank for Collection.—In an action against a bank for negligence in failing to protest a note placed with it for collection, a declaration which avers that the note was so placed before maturity is sufficient, without stating the date of placing.[36]

Allegations as to Solvency of Drawer of Draft.—An allegation that the drawer of a draft remained in reputable credit, and continued to do business, and to pay all demands presented against him, up to and including a certain day, warrants the conclusion that he was solvent and able to pay said draft.[37]

§ 175 (2b) Answer.—In an action by the owner of a note deposited with a bank for collection, and by it sent to another bank, against the bank to which it was transmitted, for failure to fix the liability of an indorser,

do not justify (which is true of counts 7 and 8). Hence it is that we deem it unnecessary to discuss rulings below bearing upon the first six counts of the complaint. None of them is supported by the evidence." Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246.

33. **Setting out contract, etc.**—American Exp. Co. *v.* Pinckney, 29 Ill. 392.

34. **Effect of alleging express instructions in accordance with implied undertaking.**—Jagger *v.* National German-American Bank, 53 Minn. 386, 55 N. W. 545.

35. **Allegations as to consideration.**—Keyes *v.* Bank, 52 Mo. App. 323.

Where a promissory note is indorsed, and delivered to a bank for collection, there is an implied undertaking, on the part of the bank, to charge the indorsers by a notice of nonpayment; and, if they neglect to do this, the holder may maintain an action against them for the neglect. And a count for such neglect is good without setting forth any other or special consideration. Bank *v.* Smedes (N. Y.), 3 Cow. 662.

Generally, as to the consideration for a bank's undertaking to collect paper deposited with it for that purpose, see ante, "Consideration for Bank's Undertaking," § 156 (2).

36. **Allegation as to date of placing note with bank.**—Roanoke Nat. Bank *v.* Hambrick, 82 Va. 135.

37. **Allegations warranting conclusion that drawer was solvent and able to pay.**—Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

the defendant can not avoid liability on the ground that the transmitting bank is indebted to it, without specially pleading the matter.[38] In an action against a bank for failure to fix the liability of the indorser of a note left with it for collection, part payment of which note has been realized from the foreclosure of a mortgage given to secure it, the defendants can not, in mitigation of damages, attack such foreclosure for fraud, so as to charge plaintiff with the value of the fund without setting up in their answer the facts constituting the fraud.[39] Insolvency does not mean a total want of property, and therefore, in an action for damages for negligence in presenting a draft for collection and giving notice of acceptance thereof, an answer alleging that the drawer was insolvent, but not negativing the possibility that the drawer might have secured assistance of friends or himself have secured plaintiff, was insufficient.[40] In an action for negligence of an agent in presenting a draft for acceptance, no error was committed in sustaining a demurrer to an answer which merely pleaded facts in mitigation of damages; such facts being admissible under the general denial.[41] In an action for damages for negligence in failing to collect a draft, an answer alleging an agreement or understanding that defendant might hold such draft a reasonable time without notice of nonacceptance or nonpayment must be interpreted by rules of the law merchant and the custom of banks as to what constitutes a reasonable time.[42] In an action to recover damages for the failure of defendant to perform properly its duty as collecting agent of the plaintiff in the collection of a draft, an answer pleading a custom of defendant and plaintiff applicable

38. Matter of defense to be specially pleaded.—Colton *v.* Union Bank, 15 La. 369.

39. Borup *v.* Nininger, 5 Minn. 523 (Gil. 417).

40. Answer merely alleging insolvency of drawer insufficient.—Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

In an action by an indorsee for failing to present for acceptance a draft, sent for collection, an answer alleged that, at the time the draft was drawn, the drawer had no money or property in the hands of the drawee; that he had no reasonable ground to believe that the drawee would accept and pay the same; and that he was at that time indebted to the drawee in a considerable sum. Held, that since the allegations did not negative the idea that it would be accepted for accommodation, or that the drawer intended to arrange for its acceptance, and its payment at maturity, the facts alleged did not show a want of right to draw. Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

41. Answer demurrable as merely pleading facts admissible under general denial.—Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

Where the complaint avers that a draft was received for collection by a bank, which undertook, as required by the law merchant and the custom of banks, to promptly present the draft for acceptance, a defense that the requirements of the law merchant had been dispensed with by agreement is provable under a general denial. Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

42. Construction of answer alleging agreement that defendant might hold paper a reasonable time.—Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

An averment that a draft was to be presented within a reasonable time will be taken to mean within the time limited by the law merchant and by custom of banks. Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

only to papers sent by plaintiff against the drawee, but containing no averment that plaintiff constituted defendant its continuing agent, is too limited to control positive requirements of law; it appearing that in all former cases, collections were made and remitted.[43] The elementary rule of pleading that a plea which professes to answer the whole of a complaint or of any court thereof is bad on demurrer if it is an answer to a part only, is applicable in an action against a bank for negligently losing paper sent to it for collection.[44]

§ 175 (2c) Sufficiency of Pleadings to Raise Issue.—In an action against a bank for loss resulting from its negligence in the collection of paper entrusted to it, the usual rule applies that pleadings must definitely present the issue to be tried and determined between the parties, and that the court can consider only what is put in issue by the pleading; and the pleadings in such action must plainly raise the issue as to defendant's liability for nonperformance of its duty to the plaintiff.[45]

§ 175 (3) Evidence—§ 175 (3a) Presumptions and Burden of Proof.—As to Negligence of Defendant.—The basis of a defendant bank's liability to the plaintiff for its failure to collect paper being its negligence, this is an element in the plaintiff's cause of action, which it is incumbent on him to establish.[46]

As to Special Agreement Relieving Defendant from Ordinary Duties.—In an action against a bank for loss resulting from its negligent

43. Insufficiency of answer pleading custom of plaintiff and defendant.—Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

44. Plea bad as answering part only of complaint.—Where the sender of transfers of land certificates sues a bank for negligently losing them, and claims as damages the expense of prosecuting suits to establish them, the bank's plea, professing to answer the whole complaint, alleging that the sender was negligent in not recording them, whereby such expense was rendered necessary, is bad on demurrer, as it fails to show that the sender was not entitled to nominal damages at least. First Nat. Bank *v.* First Nat. Bank, 116 Ala. 520, 22 So. 976.

45. Pleadings held to raise issue as to defendant's liability for failure to give notice of nonpayment or make inquiry.—As plaintiff bank alleged in its petition that defendant bank was guilty of gross negligence in the collection of the notes, and that no notice was given plaintiff of their nonpayment, or to what bank they had been sent, until a certain date, and that the notes were not presented for payment and not protested, and that by reason thereof the money was lost, and defendant denied these allegations, and pleaded affirmatively that it exercised reasonable care throughout the transaction, the issue as to defendant's liability for failing to make inquiry of its correspondent and to notify plaintiff as to the cause of the delay was presented. Second Nat. Bank *v.* Merchants' Nat. Bank, 111 Ky. 930, 23 Ky. L. Rep. 1255, 65 S. W. 4, 55 L. R. A. 273, 98 Am. St. Rep. 439.

46. Burden of proof as to defendant's negligence.—Davis *v.* First Nat. Bank, 118 Cal. 600, 50 Pac. 666.

Where an action is based on the negligence of a bank in failing to return a draft or the failing to collect the same, in order to recover substantial damages the plaintiff is required to show that he has suffered such damages by the negligence of the defendant. The burden is on him. Fox *v.* Davenport Nat. Bank, 73 Iowa 649, 35 N. W. 688.

One who seeks to recover on the ground of negligence in making a collection assumes the burden of proving not only the negligence, but that the negligence has occasioned him loss. Hilsinger *v.* Trickett (O.), 99 N. E. 305.

failure to collect paper deposited with it, if it is claimed that there was any special agreement, express or implied, which relieved the defendant from any of the ordinary duties growing out of the nature of the transaction, it assumes the burden of proof in that respect.[47]

As to Diligence in Fixing Liability of Parties.—A bank, sued for damages arising from its negligence in failing to fix the liability of parties to paper received for collection, has the burden of showing that the necessary steps were taken to fix such liability.[48] In an action against a bank receiving paper for collection for negligence in failing to preserve the liability thereon of all the parties prior to its principal, the cause of action is established by the failure of the defendant to perform the duty that it assumed when it undertook to collect the paper; that is, of giving proper notice of its nonpayment, and the plaintiff need not prove the insolvency of the maker of the paper.[49]

Presumption in Case of Loss of Paper.—The burden is upon a bank losing paper sent to it for collection to show that it was not negligently lost.[50]

47. **Burden of proof as to special agreement relieving bank from ordinary duties incident to collection.**—National Revere Bank *v.* National Bank, 172 N. Y. 102, 64 N. E. 799, affirming 54 App. Div. 342, 66 N. Y. S. 662.

48. **Burden of proof on bank to show diligence in fixing liability of parties to paper.**—Harter *v.* Bank, 92 S. C. 440, 75 S. E. 696, in which case the bank was sued for its negligence in failing to notify an indorser of the dishonor of a draft received for collection, and it was held that the bank had the burden of showing that the necessary steps were taken to fix the liability of the indorser.

Burden of proof as to proper demand by notary.—In an action against a bank on a note taken for collection for failure to protest, the burden of proof rests with the bank to show that the notary made the proper demand on the maker of the note, either at his place of business or at his residence. Ellsworth *v.* Gunton, Fed. Cas. No 18,294, 2 Hayw. & H. 21.

49. **Insolvency of maker need not be proved.**—Howard *v.* Bank, 95 App. Div. 342, 88 N. Y. S. 1070.

Where defendant bank, having a note for collection, had it protested, but failed to notify an indorser of its nonpayment, though it had the indorser's address, with the request that he be notified, and the death of the maker shortly thereafter precluded an action against him, and his estate had not been administered on, there was evidence to justify a finding that the plaintiff had been unable to collect the amount from the maker, and that, in consequence of the neglect of the defendant, the plaintiff had sustained damage to the amount that he would have been able to collect from the indorser, had the bank performed its duty, and the payee need not prove the insolvency of the maker. Howard *v.* Bank, 95 App. Div. 342, 88 N. Y. S. 1070.

50. **Presumption in case of loss of paper by bank.**—First Nat. Bank *v.* First Nat. Bank, 116 Ala. 520, 22 So. 976.

The loss by a bank of a bill sent to it to collect throws upon the bank losing the bill the burden of proof to explain the negligence. Chicopee Bank *v.* Philadelphia Bank (U. S.), 8 Wall. 641, 19 L. Ed. 422.

An instruction was given that if a note intrusted to the defendants was lost by them, and it is not shown under what circumstances the loss occurred, the presumption is that it was lost by carelessness. Held, that the presumption of carelessness is so strong that this court would not be inclined to reverse the judgment against the defendant on account of such instruction, even if the presumption were not a legal conclusion. American Exp. Co. *v.* Parsons, 44 Ill. 312.

Necessity for proof of execution and contents of papers negligently lost.—Plaintiff, suing a bank for the expenses incurred in substituting what

As to Loss Resulting from Negligence.—In an action based on the alleged negligence of a bank, preventing the collection of paper entrusted to it, it is only necessary to show a reasonable probability that with due care the collection would have resulted. The burden then rests on the defendant to show that there was no damage.[51]

Burden of Proof as to New Matter Pleaded as a Special Defense.—In actions against banks for negligence in failing to collect paper, the usual rule of pleading applies, that the burden is on the defendant to prove new matter pleaded as a special defense,[52] such as a plea in confession and avoidance.[53]

Presumption as to Title in Holder.—In a suit by the holder of a negotiable note against the bank to which the paper was sent for collection for failing to present it for payment, and failing to notify the in-

purported to be transfers of land certificates, which the bank negligently lost, need not prove the execution and contents of the certificates. First Nat. Bank *v.* First Nat. Bank, 116 Ala. 520, 22 So. 976.

51. Sufficient to show probability that due care would have resulted in collection.—Dern *v.* Kellogg, 54 Neb. 560, 74 N. W. 844, citing First Nat. Bank *v.* Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; First Nat. Bank *v.* First Nat. Bank, Fed. Cas. No. 4,810, 4 Dill. 290; Fahy *v.* Fargo, 63 Hun 625, 17 N. Y. S. 344, 43 N. Y. St. Rep. 589.

In an action against a bank for negligently holding a draft unpaid after maturity, it is not necessary for the plaintiff to prove with certainty that, but for the misconduct of the bank, payment would have been obtained. The fact that all the time the bank held the draft the merchant continued to conduct his business, and had property, subject to execution, to the value of many times the debt, is sufficient to charge the bank, prima facie, with the amount of the draft. Dern *v.* Kellogg, 54 Neb. 560, 74 N. W. 844.

"It is claimed that there was no proof of damages; that is, that it was not shown that, had the bank been diligent, the drafts could have been collected. In such cases it is usually impossible to show with certainty that, if due care had been observed, collection would have been made. The law is not so rigid in its requirements for the protection of a negligent agent." Dern *v.* Kellogg, 54 Neb. 560, 74 N. W. 844.

In a suit against a bank for its alleged negligent failure to collect a draft drawn by plaintiff on a debtor in favor of a collection agency, and by it indorsed to the bank for collection, testimony showing the insolvency of the debtor after the giving of a mortgage, or at least after the seizure of the property thereunder, four days later and the return of the draft unpaid, in the absence of any proof on the part of the bank that there was an opportunity to collect it, raises a sufficient presumption of loss to go to the jury, subject to the right of defendant to show that the loss, if any, was due to other causes. Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

Facts held not to negative loss from negligence.—That the drawer of a draft sustained no loss by delay of a bank to which the draft was sent for collection, of 24 to 36 hours, in notifying him of the insolvency of the drawee, is not shown by the fact that upon receipt of notice he instituted attachment suits for the collection of other claims against the drawee, as he might possibly have found other property upon which to levy if notice had been promptly given. National Bank *v.* American Exch. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527.

52. Burden of proof as to new matter pleaded as special defense.—Gray's Harbor Commercial Co. *v.* Continental Nat. Bank, 74 Mo. App. 633.

53. Matters pleaded by way of confession and avoidance.—In a suit for failure to present a draft for payment, the defense that the draft was received and presented by telephone to the drawee is a confession and avoidance, and the burden is on the defendant to prove it. Gray's Harbor Commercial Co. *v.* Continental Nat. Bank, 74 Mo. App. 633.

dorser of its dishonor, the present holder is presumed to have been the holder at the maturity of the paper.[54]

Presumption as to Purpose of Transaction by One Bank to Another.—Where a bank sends drafts to another bank, which had a correspondent at the place of payment, while the bank sending the drafts had none, it will be presumed, in the absence of proof, that the drafts so forwarded were sent and received for collection, the previous course of business between the two banks tending to confirm the inference.[55]

Presumption as to Solvency of Parties.—In an action against a bank for failure to collect drafts or to take steps to charge the indorser, in the absence of proof to the contrary, it will be presumed that the indorser was solvent.[56] In at least one case, however, it has been held that in an action against a bank for negligence in failing to collect a draft sent to it for collection, the burden is on plaintiff to show that the drawee was solvent, and the draft collectible.[57]

Presumption as to Source of Funds Claimed to Have Been Left with Defendant to Pay Bill.—The drawer of an accepted bill of exchange, which had been left with defendant for collection, brought suit to recover damage in the amount of protest fees which he had been obliged to pay, alleging that he had, before maturity of the bill, left with defendant's teller funds for the purpose of paying the bill, which defendant failed to apply thereto. There was no evidence showing who had furnished the funds. It was held, that, in the absence of such evidence, it must be presumed that the funds were furnished by the acceptor, to whom alone the bank would be liable for such neglect.[58]

§ 175 (3b) Admissibility of Evidence.—Parol Evidence.—Evidence of the contents of a card posted in a bank, offering to make collections in accordance with the terms specified therein, is admissible in an action against the bank for negligence in failing to collect a claim received in accordance with its offer, after the bank had failed to produce the card on notice to do so.[59] So, also, in such an action, parol evidence is admissible to explain the meaning of short entries thereof in the depositor's bank

54. Presumption as to title in holder.—Georgia Nat. Bank *v.* Henderson, 46 Ga. 487, 12 Am. Rep. 590.

55. Presumption as to purpose of transmission.—National Revere Bank *v.* National Bank, 172 N. Y. 102, 64 N. E. 799, affirming 54 App. Div. 342, 66 N. Y. S. 662.

56. Presumption as to solvency of indorser.—National Revere Bank *v.* National Bank, 172 N. Y. 102, 64 N. E. 799, affirming 54 App. Div. 342, 66 N. Y. S. 662.

In an action against bankers or collecting agents to recover damages for their neglect to present a note intrusted to them for collection, or give notice of nonpayment to the indorsers, the burden of proof is on the defendants to show the insolvency of the indorsers, if they rely on that fact as a defense. Coghlan *v.* Dinsmore, 22 N. Y. Super. Ct. 453.

57. Burden on plaintiff to show solvency of drawee of draft.—Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

58. Presumption that funds for payment of bill were furnished by the acceptor.—Thatcher *v.* State Bank, 7 N. Y. Super. Ct. 121.

59. Evidence of contents of placard posted in bank.—Wingate *v.* Mechanics' Bank, 10 Pa. 104.

book.[60] In an action against a bank for damages for delay in the transmission of a draft with bill of lading attached, evidence is admissible to show what the word "notify" in the bill of lading made to plaintiff, consignee, "notify J.," was understood and recognized among carriers having possession of the shipment in question as indicating that the party thus to be notified was entitled to receive the shipment on presentation of the bill of lading, though not indorsed by the consignee and accompanied by the draft to which it was attached.[61]

Evidence as to Solvency of Indorser.—In an action against a bank for failure to fix the liability of the indorser of paper placed with the bank for collection, plaintiff may show the indorser's solvency at any time between the maturity of the note and the commencement of the action.[62]

Evidence as to Insolvency of Maker.—In an action against a bank for failure to protest a note left for collection, and hold the indorser, the question of the insolvency of the maker is material as affecting the measure of damages.[63] Such insolvency may be shown prima facie by proof of general reputation, within a reasonable time after maturity of the note.[64] The execution against the original maker, with a return of the sheriff that no property was found, together with a certificate of the recorder that the maker of the note had no property standing in his name in the parish of his domicile, are admissible in evidence to show that the maker of the note was insolvent.[65] Where the death of the maker has precluded an action against him for the amount of the note, testimony of a witness as to the indebtedness of the maker at the time of his death, the names of the creditors, and the amounts of the debts, is competent on the question of the plaintiff's ability to collect from the maker.[66]

Evidence as to Instructions or Information by Plaintiff to Bank or Its Agent.—In an action against a bank to recover for a loss on a note left with it for collection, caused by its failure to notify the indorser, there being two persons of the same name, it is competent for plaintiff to show that he directed his agent, who left the note at the bank, to inform the bank of the indorser's residence.[67] In such an action against bankers, employed to collect a note, for negligence in failing to notify an indorser, it is proper for plaintiff to show what instructions he gave defendants at any time before they sent the note to their correspondent; as it was their duty to convey such instructions to their correspondent, from which they

60. Parol evidence to explain entries in depositor's bank book.—Wingate *v.* Mechanics' Bank, 10 Pa. 104.

61. Explanation of words used in bill of lading.—Stoner *v.* Zachary, 122 Iowa 287, 97 N. W. 1098.

62. Evidence as to solvency of indorser.—Borup *v.* Nininger, 5 Minn. 523 (Gil. 417).

63. Evidence as to insolvency of maker.—West *v.* St. Paul Bank, 54 Minn. 466, 56 N. W. 54; Howard *v.* Bank, 95 App. Div. 342, 88 N. Y. S. 1070.

64. West *v.* St. Paul Bank, 54 Minn. 466, 56 N. W. 54.

65. Eichelberger *v.* Pike, 22 La. Ann. 142.

66. Howard *v.* Bank, 95 App. Div. 342, 88 N. Y. S. 1070.

67. Evidence as to instructions given by plaintiff to defendants.—Nininger *v.* Knox, 8 Minn. 140 (Gil. 110).

could not be absolved by any custom.[68] Where, in an action against a bank for failure to give notice of protest of a note to the indorser, the principal question is as to whether plaintiff, on delivering the note to the agent of the defendant, gave him the address of the indorser, and this is denied, the usual rule applies that where the evidence offered tends directly to weaken, contradict or impeach the statement of a witness, it is competent by way of rebuttal, and it is error to exclude it.[69] Where two persons of the same name resided in towns a short distance apart, one of whom was an indorser on a promissory note, notice of nonpayment of which was sent to the other, it was held, in an action against bankers who had the note for collection, for negligence in not notifying the indorser, that it was competent to show that the bankers were acquainted with the indorser, as tending to strengthen the proof that they knew him to be the indorser.[70]

Evidence of Ownership.—The protest of the bank notary recognizing the plaintiff as depositor, and the fact that he is last indorser, are sufficient circumstances, in an action against a bank for neglect in the collection of a note, to show that the plaintiff is the real owner and depositor of a note placed in bank for collection.[71]

Evidence as to Diligence or Negligence of Plaintiff after Return of Paper by Bank.—In an action against a bank for the amount of an accepted draft, it was error to exclude letters written by plaintiff to the acceptors during the two months following the return of the draft, tending to show diligence by plaintiff in an effort to collect it during such time.[72] Where the plaintiff alleges that the claim was lost owing to the subsequent insolvency of the debtor, evidence is admissible which tends to show that when such debtor was pushed, as by the filing of attachment suits against him, claims could still be collected.[73]

68. Borup *v.* Nininger, 5 Minn. 523 (Gil. 417).

69. **Evidence admissible in rebuttal.**—In an action by the payee of a note, against the bank with which he deposited it for collection, for its failure to give notice of protest to the indorser, the crucial question being whether, when plaintiff delivered the note to defendant through L., its collection clerk, he gave L. the card on which he had written the address of the indorser, evidence that an indorsement of the address on the note, following the abbreviated form thereof on the card, was in the handwriting of L., is not only competent and material, but admissible on rebuttal; it contradicting the testimony of L. that he received no information as to the address of the indorser, and that he did not have possession of the note after it was protested, the indorsement having been made after the protest. Howard *v.* Bank, 104 App. Div. 534, 93 N. Y. S. 1042.

70. **Evidence as to defendant's acquaintance with indorser.**—Borup *v.* Nininger, 5 Minn. 523 (Gil. 417).

71. **Evidence of ownership.**—Thompson *v.* Bank (S. C.), 3 Hill L. 77, 30 Am. Dec. 354.

72. **Letters by plaintiff to acceptors, after return of draft by bank.**—Diamond Mill Co. *v.* Groesbeck Nat. Bank, 9 Tex. Civ. App. 31, 29 S. W. 169.

73. **Evidence as to attachments sued out by other creditors after suit commenced.**—In an action against a bank for negligence in reference to making a collection, whereby plaintiff alleged the claim was lost, owing to the subsequent insolvency of the debtor, it is proper for defendant to show that, after the plaintiffs had begun suit, at-

§ 175 (3c) Weight and Sufficiency of Evidence.—As to Receipt of Papers by Bank.—The receipt by a bank of papers sent to it by mail is sufficiently shown by a postal card acknowledging such receipt in the usual form.[74]

As to Collection by Bank.—In an action against a bank for collections made by it and not accounted for, where the plaintiff proves that the items sued for were received by the bank for collection, and were not returned or accounted for, the omission to prove that any amount was collected by the bank is supplied by the testimony of a third person, as a witness for the bank, that the items in controversy were included in the amount which he had collected and failed to deposit in the bank, providing such third person acted for the bank, and not for the plaintiff, in making the collection.[75] In an action against a bank claiming that the bank received payment of a note and mortgage sent to it for collection, in money, and holds such money in trust for the plaintiff, the bank having failed, the testimony of one witness that payment was made to the bank in money, and not by a certificate of deposit held by the person making it against the bank, and the testimony of another witness that he thinks the payment was so made, though contradicted by a testimony of a clerk in the bank that if the money had been first procured on the certificate, and then paid over, it would have been marked on the certificate register, and that the cash account would not have balanced, as it did, is sufficient to prove that the payment was made in money.[76]

As to Loss Arising from Defendant's Negligence.—In an action against a bank for fraudulently and negligently refusing to turn over to attorneys a draft in their hands for collection on receiving an order from the drawers so to do until it obtained a mortgage to secure its own claim, evidence of the drawee's insolvency after the giving of such mortgage to defendants, and the return of plaintiffs' claim unpaid, in the absence of

tachments were sued out by various creditors against the debtor, and that bonds were given to release the attached property in several of such cases. Finch *v.* Kartse, 97 Mich. 20, 56 N. W. 123.

In a suit against a bank for its negligent failure to collect a draft drawn by plaintiff on a debtor in favor of a collection agency, and by it indorsed to the bank for collection, the files and records in attachment suits commenced against the debtor after the suit against the bank was instituted, in which bonds to pay any judgments which might be obtained were given, and the property thereby released, were admissible as tending to rebut the claim of the inability of the plaintiffs to collect their account. Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

74. **Evidence of receipt of papers by bank.**—Plaintiff sent certain papers to a bank by mail, and in reply received a postal card acknowledging receipt, in the handwriting of a clerk, who was under the cashier's direction. The card was a printed form used by the bank in acknowledging the receipt of papers, and had the cashier's name printed upon it. Held sufficient to show that the papers were received by the cashier. First Nat. Bank *v.* First Nat. Bank, 116 Ala. 520, 22 So. 976.

75. **Omission to prove collection supplied by testimony of witness for bank.**—Manhattan Life Ins. Co. *v.* First Nat. Bank, 20 Colo. App. 529, 80 Pac. 467.

76. **Action against bank to enforce trust—Sufficiency of evidence as to receipt of money.**—Wallace *v.* Stone, 107 Mich. 190, 65 N. W. 113.

proof by defendants that there was further opportunity to collect the debt, raised sufficient inference of loss to go to the jury.[77] Evidence that a bank had been in the habit for a long time of allowing a customer to overdraw, he making the amount good the next day, and that the bank paid his checks down to the day of his failure, including some drawn after the one given to defendant, a collecting bank, justifies a conclusion that the check given to defendant, if presented the day before the failure of such customer, would have been paid, though the customer's account was largely overdrawn on that day.[78]

§ 175 (4) Instructions.—In an action against a bank for negligence in the collection of a draft deposited with it for collection, it has been held that it is not sufficient to instruct the jury that if the bank, through the negligence, fails to return the draft or its proceeds, a prima facie case of negligence is made out, but the court should instruct the jury as to what facts would constitute negligence.[79] In an action against a bank for failure to promptly present a draft drawn by plaintiffs on an insolvent firm, it was error to instruct the jury that they had no right to consider whether the draft would have been paid by the drawee if promptly presented by defendants.[80] Where plaintiff gave a bank for collection a draft drawn by a bank in another state upon a bank in a third state, and upon being told that he must be identified, he replied that he knew no one there but that his signature was at the bank drawing the draft, upon which the collecting bank sent the draft to the drawing bank for identification of the indorser, and it was there lost, it is error for the court, in an action against the collecting bank for negligence, to instruct that "under the evidence there was no need of the defendant forwarding the draft to any place for the purpose of having the signature identified." Such instruction neutralizes the effect of another instruction that if the jury found that the draft was sent by the plaintiff's consent, the defendant is not liable for resulting loss.[81] In an action against a bank for negligence in failing to present a draft for payment, an instruction submitted to the jury, as a fact bearing on the

77. **Evidence raising inference of loss.**—Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

78. First Nat. Bank *v.* Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618.

79. **Instruction as to what facts would constitute negligence.**—Plaintiff gave a bank for collection a draft drawn by a bank in another state upon a bank in a third state. He was told that he must be identified, and he replied that he knew no one there, but that his signature was at the bank drawing the draft. The collecting bank thereupon sent the draft to the drawing bank for identification of the indorsement, and it was there lost. Held, in an action against the collecting bank for negligence, that it was not sufficient to instruct the jury that if the bank, through its negligence, failed to return the draft or its proceeds, a prima facie case of negligence was made out, but that the court should instruct the jury as to what facts would constitute negligence. Davis *v.* First Nat. Bank, 118 Cal. 600, 50 Pac. 666.

80. **Instruction erroneous as taking question from jury.**—Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

81. **Instruction bad as preventing consideration of question of plaintiff's consent to action of bank.**—Davis *v.* First Nat. Bank, 118 Cal. 600, 50 Pac. 666.

issue of negligence, the question of the "doubtful credit" of the drawees, without requiring them to find that defendant had knowledge of it at the time. Held, that the words "doubtful credit" are very comprehensive, and, when used without words of limitation or qualification, are understood to relate to reputation or standing in the community, as distinguished from the estimate of particular individuals. In that sense the doubtful credit of a party is a matter of fact of which persons in the community may be presumed to have knowledge.[82]

§ 175 (5) Questions for Jury.—In General.—In actions against banks for loss occasioned by their negligence in the collection of paper entrusted to them, the usual and well-settled rule applies that, where different persons might draw different conclusions from the same facts, the whole matter, including inferences to be drawn, should be left to the jury, and, of course, to the judge, when he tries the issue of facts, instead of a jury.[83]

Question of Defendant's Negligence.—Where a bank has received paper for collection, the question as to whether or not the bank has used due diligence in endeavoring to collect the same is for the jury.[84] Where no actionable negligence on the part of the bank in collecting paper entrusted to it is shown, it is not error for the court to instruct a verdict for such bank.[85] Whether a bank has used due diligence to charge the indorser of a note is a question of fact for the jury;[86] but what constitutes

82. Instruction submitting question of "doubtful credit" of drawer, without requiring jury to find that defendant had knowledge thereof.—Merchants' Bank *v.* Bank, 24 Md. 12.

83. General rule as to province of jury.—Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

84. Question of defendant's negligence one for jury.—Fox *v.* Davenport Nat. Bank, 73 Iowa 649, 35 N. W. 688; Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123; Krafft *v.* Citizens' Bank, 139 App. Div. 610, 124 N. Y. S. 214; Thompson *v.* Bank (S. C.), 3 Hill L. 77, 30 Am. Dec. 354; Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373; Diamond Mill Co. *v.* Groesbeck Nat. Bank, 9 Tex. Civ. App. 31, 29 S. W. 169. See, also, Sprague *v.* Farmers' Nat. Bank, 63 Kan. 12, 64 Pac. 967.

In an action against a bank for the amount of an accepted draft on T. & Co., sent for collection, and which it held a month, and returned uncollected, the petition alleged that by the use of reasonable diligence defendant could have collected it; that it negligently held it without trying to collect it; that plaintiff's agent would have collected the draft a week before it was returned, but for defendant's representations; that on the day the draft was returned the acceptors stopped payment, and that, after plaintiff learned that the draft was not collected, he made all reasonable efforts to collect it, but failed. The issue as to whether defendant was negligent was made by the evidence. Held, that it was error to refuse to submit such issue to the jury on plaintiff's request. Diamond Mill Co. *v.* Groesbeck Nat. Bank, 9 Tex. Civ. App. 31, 29 S. W. 169.

85. Instruction of verdict for bank where no actionable negligence shown.—Farmers' Nat. Bank *v.* Merchants' Nat. Bank (Tex. Civ. App.), 136 S. W. 1120.

Evidence in an action involving the question of negligence in not collecting a draft held to show no negligence of plaintiff bank, with which it was deposited for collection, or of the bank to which plaintiff forwarded it. Farmers' Nat. Bank *v.* Merchants' Nat. Bank (Tex. Civ. App.), 136 S. W. 1120.

86. Question of diligence in charging indorser.—Thompson *v.* Bank (S. C.), 3 Hill L. 77, 30 Am. Dec. 354.

sufficient notice of dishonor is a question of law.[87] Where the holder of a note left it at a bank for collection, and neglected to give the residence of the maker, it was a question for the jury, in an action against the bank for neglect to make demand, whether the bank, in the exercise of due diligence, should not have inquired of the indorsers the maker's residence.[88] Where plaintiff alleged that defendant bank, after procuring the acceptance of a draft, negligently failed to collect it, or return it until the acceptors had become insolvent, it was not error to refuse to submit to the jury the question of defendant's negligence in not presenting or collecting the draft, and merely to submit the question of negligence in not returning it.[89]

Question as to Damages Arising from Negligence.—As to whether or not the plaintiff in an action against a bank for negligence in collection has sustained the burden of proof resting upon him to show that he has suffered substantial damages by the negligence of the defendant, is a question for the jury,[90] and it is error for the court to charge the jury that "there is no question but that, under the conceded facts, and undisputed evidence, the defendant is presumptively liable."[91]

Question of Defendant's Good Faith Towards Its Principal.—It is a question of fact for the jury whether a bank holding paper for collection has acted in good faith towards its principal in defending his rights or giving him an opportunity to do so.[92]

87. **What constitutes notice of dishonor a question of law.**—Thompson *v.* Bank (S. C.), 3 Hill L. 77, 30 Am. Dec. 354.

88. **Negligence in making demand.**—Ayrault *v.* Pacific Bank, 29 N. Y. Super. Ct. 337.

Where the holder of a note had left it at a bank for collection, and neglected to give the residence of the maker, the mere fact that there was no evidence that the indorsers, whose residence the bank knew, knew the residence of the maker, was not sufficient to justify the legal inference that inquiry of them by the bank would have been useless. Ayrault *v.* Pacific Bank, 29 N. Y. Super. Ct. 337.

89. Fox *v.* Davenport Nat. Bank, 73 Iowa 649, 35 N. W. 688.

90. **Question as to damages resulting from negligence.**—Fox *v.* Davenport Nat. Bank, 73 Iowa 649, 35 N. W. 688.

91. The draft was drawn and sent to defendant October 20th. It was accepted and made payable October 25th. It was not paid, and was returned November 30th. The acceptors became insolvent December 1st. It did not appear that the acceptors were solvent at all times between October 20th and December 1st, or that plaintiff could have collected the draft had it been returned. The court charged that "there is no question but that, under the conceded facts and undisputed evidence, the defendant is presumptively liable." Held, that the question of liability was for the jury, and the instruction was erroneous. Fox *v.* Davenport Nat. Bank, 73 Iowa 649, 35 N. W. 688.

Instruction that defendant is presumptively liable erroneous.—Fox *v.* Davenport Nat. Bank, 73 Iowa 649, 35 N. W. 688.

92. **Question of bank's good faith towards the principal in defending his rights, etc.**—Whether defendant bank, to whom a draft was sent by plaintiff's assignor for collection, acted negligently or in bad faith regarding garnishment proceedings wherein the proceeds of the draft were attached, towards plaintiff's assignor in regard to notice and defense of the proceedings, held for the jury. Krafft *v.* Citizens' Bank, 139 App. Div. 610, 124 N. Y. S. 214.

Where a bank having a note for collection protested it, but failed to notify an indorser, and the holder brought an unsuccessful action against

Question as to Estoppel of Customer by Statement Influencing Selection of Agent.—Where the proceeds of certain drafts deposited with plaintiff for collection were lost by reason of the failure of the bank to which the drafts were sent for collection, whether plaintiff was induced to send the draft to such bank for collection by reason of defendant's statements, and whether such statements were calculated to cause plaintiff to change its ordinary course of business and select such collecting bank, held for the jury.[93]

§ 175 (6) Measure of Damages.—The damages which the holder of a bill, note or draft, is entitled to recover of a bank guilty of negligence of default as a collecting agent, is the actual loss occasioned by such negligence or default.[94] While the face of the bill, note, or draft is, prima

the indorser, in a subsequent action against the bank, held a question for the jury whether there had been misrepresentation or a request on the part of the bank, inducing the plaintiff to bring the former action. Howard *v.* Bank, 115 App. Div. 326, 100 N. Y. S. 1003.

Where a bank, receiving a note for collection, neglected to present it for payment on its maturity, and after maturity, and while holding it for collection, took from the maker a chattel mortgage to itself, and assisted another creditor to obtain a mortgage covering all the debtor's property, by reason of which the note was rendered uncollectible, it was error for the court to take from the jury the question of the bank's liability for the amount of the note. Sprague *v.* Farmers' Nat. Bank, 63 Kan. 12, 64 Pac. 967.

Where the evidence in a suit against a bank for its alleged negligent and fraudulent failure to collect a draft sent to it for collection shows that the bank, with full knowledge of the situation, and being personally interested to an extent involving the entire property of the debtor, disobeyed the instructions of the creditors to return the draft immediately if not paid, and, when directed to hand it to certain attorneys to be put in suit, neglected so to do until it had secured a mortgage, which practically made such action useless, the case should be submitted to the jury not only upon the question of negligence as commonly understood—i. e., carelessness—but also upon the theory that the delay was intentional, to enable the bank to secure to itself property which the creditors might otherwise have reached. Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

93. **Estoppel of customer by statements influencing action of bank in selecting agent.**—First Nat. Bank *v.* Quinby (Tex. Civ. App.), 131 S. W. 429.

Where, in a suit to recover the proceeds of certain drafts deposited with plaintiff for collection, plaintiff claimed that it was induced by defendant to send the draft to a collecting agent by whose failure the loss was sustained, an instruction that the burden of proof was on plaintiff to show a special agreement between it and defendant, whereby it became plaintiff's duty at defendant's instance to send the drafts to such collecting agent, and, in the absence of such proof, plaintiff could not recover, was erroneous. First Nat. Bank *v.* Quinby (Tex. Civ. App.), 131 S. W. 429.

94. **Bank liable only for actual loss occasioned by negligence.**—First Nat. Bank *v.* Henry, 159 Ala. 367, 49 So. 97; Second Nat. Bank *v.* Bank, 99 Ark. 386, 138 S. W. 472; First Nat. Bank *v.* Fourth Nat. Bank, 89 N. Y. 412; S. C., 77 N. Y. 320, 33 Am. Rep. 618; Becker & Co. *v.* First Nat. Bank, 15 N. Dak. 279, 107 N. W. 968; First Nat. Bank *v.* Fourth Nat. Bank, 6 C. C. A. 183, 56 Fed. 967.

If a bank violates instructions or is guilty of negligence or misconduct and fails to collect a claim sent to it for collection, it will be liable only for the actual loss caused by its negligence or misconduct. Becker & Co. *v.* First Nat. Bank, 15 N. Dak. 279, 107 N. W. 968.

Where a bank holding a draft for collection has negligently failed to collect it of the drawee, but the payee's remedy is fully preserved against the drawer, who is solvent, the payee can recover only actual damages of the

facie, the measure of the damage which the party interested therein has sustained,[95] yet the collecting bank may, notwithstanding its default or

collecting bank. First Nat. Bank *v.* Fourth Nat. Bank, 89 N. Y. 412.

The E. Bank, on May 8, 1888, mailed to the L. Bank for collection a certificate of deposit issued by P. & Co. On May 9th the L. Bank received the certificate, and negligently mailed it directly to P. & Co., with a request to remit. On June 1st the L. Bank credited the E. Bank with the item in the account current for May, and wrote that nothing had been heard from P. & Co. after repeated inquiries, and requested that the matter be investigated, and a duplicate or a remittance obtained from P. & Co. On June 22d, having received no answer to this letter, the L. Bank wrote the E. Bank that repeated letters about the item had remained unanswered, that the L. Bank had written the E. Bank for a duplicate, and that the L. Bank now charged the E. Bank with the item, which was accordingly done in the account current for June. No further correspondence was had on the subject, and thereafter the item was omitted from the monthly accounts current. P. & Co. continued in good credit until after January 1, 1889, when they failed. Held, that the L. Bank was not responsible to the E. Bank for more than nominal damages. First Nat. Bank *v.* Fourth Nat. Bank, 6 C. C. A. 183, 56 Fed. 967.

In order that the payee of a draft may recover from a bank, to which he sent a draft for collection, more than nominal damages for the bank's delay in not presenting a check received in payment of the draft until the failure of the drawee, the payee must show that the drawer of the draft is insolvent, the bank having duly protested the draft and notified the drawer of nonpayment. First Nat. Bank *v.* Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618.

95. Face or amount of bill, note, etc., prima facie measure of damage.—*Alabama.*—First Nat. Bank *v.* Henry, 159 Ala. 367, 49 So. 97.

Arkansas.—Second Nat. Bank *v.* Bank, 99 Ark. 386, 138 S. W. 472.

Illinois.—American Exp. Co. *v.* Parsons, 44 Ill. 312.

Minnesota.—Borup *v.* Nininger, 5 Minn. 523 (Gil. 417); Ft. Dearborn Nat. Bank *v.* Security Bank, 87 Minn. 81, 91 N. W. 257.

Missouri.—Gray's Harbor Commercial Co. *v.* Continental Nat. Bank, 74 Mo. App. 633.

North Dakota.—Commercial Bank *v.* Red River, etc., Nat. Bank, 8 N. Dak. 382, 79 N. W. 859.

Pennsylvania.—Wingate *v.* Mechanics' Bank, 10 Pa. 104.

In an action against an express company for the loss of a note delivered to it for collection, and negligently lost, the amount expressed in the note is prima facie the measure of damages. American Exp. Co. *v.* Parsons, 44 Ill. 312.

Where, in an action by the payee of a draft against the collecting bank for failure to collect, the payee proved that in an action by him in another state against the drawer the latter had been adjudged relieved from liability by the collecting bank's receiving the drawee's check, which was not presented in time to be paid, the payee is entitled to recover the full amount of the draft, though this court might have decided the question of the drawer's liability differently. First Nat. Bank *v.* Fourth Nat. Bank, 89 N. Y. 412.

Plaintiff deposited a check with defendant bank for collection. The check was presented to the drawee through the clearing house, but payment was refused. Defendant protested the check, but retained it. Defendant again presented the check, and made it its own, by accepting a cashier's check for it. The drawee suspended, without having paid the check, and plaintiff sued defendant for its amount. Held, that defendant could not claim the benefit of a partial payment made by the drawer to plaintiff on account of the check after it had been protested. Fifth Nat. Bank *v.* Ashworth, 123 Pa. 212, 16 Atl. 596, 2 L. R. A. 491.

In an action against bankers to recover damages for their neglect to present a note sent to them for collection, it appeared that before the maturity of the note the maker, who was indebted to the indorsers, paid them a part of the amount of the note upon their promise to pay the note at maturity, and give him further credit, and this transaction was unknown to the other parties. Held, that this payment was not available as a defense, pro tanto, in favor of the collecting agents, it not being a payment for the use or benefit of the holder of the

breach of duty, show the actual damage which has been sustained by the interested party, or may show that no damage has been actually suffered by him in defense of such action brought against it.[96] This general rule as to measure of damages is applicable where the collecting bank fails to

note. Coghlan *v.* Dinsmore, 22 N. Y. Super. Ct. 453.

In an action against a collecting bank for failure to present a draft for payment, since no pecuniary benefit could have accrued to the defendant, the measure of damages is the face value of the draft, without interest. Gray's Harbor Commercial Co. *v.* Continental Nat. Bank, 74 Mo. App. 633.

Amount of paper with interest.—Where an agent for the collection of commercial paper is guilty of negligence with respect to such agency, the measure of damages is, prima facie, the amount of the paper, with interest. Commercial Bank *v.* Red River, etc., Nat. Bank, 8 N. Dak. 382, 79 N. W. 859.

In an action against a bank for undertaking to collect a note payable in another state, under an agreement to collect it for 7 per cent, and for neglecting to give information of nonpayment, and to return the note, it appearing that at the time of trial the note was barred by the statute of limitations, and that the bank had never until then returned it to the depositor, and there was no evidence of the insolvency of the maker, it was held that the measure of damages was the amount due on the face of the note, with interest, less the 7 per cent to be paid for collection. Wingate *v.* Mechanics' Bank, 10 Pa. 104.

96. Right of bank to show actual damage sustained or to show no damage actually suffered.—*Alabama.*—First Nat. Bank *v.* Henry, 159 Ala. 367, 49 So. 97.

Arkansas.—Second Nat. Bank *v.* Bank, 99 Ark. 386, 138 S. W. 472.

Indiana.—Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

Iowa.—Freeman *v.* Citizens' Nat. Bank, 78 Iowa 150, 42 N. W. 632, 4 L. R. A. 422.

Minnesota.—Borup *v.* Nininger, 5 Minn. 523 (Gil. 417); Ft. Dearborn Nat. Bank *v.* Security Bank, 87 Minn. 81, 91 N. W. 257.

New York.—First Nat. Bank *v.* Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Mott *v.* Havana Nat. Bank, 22 Hun 354; Howard *v.* Bank, 95 App. Div. 342, 88 N. Y. S. 1070.

North Carolina.—Stowe *v.* Bank, 14 N. C. 408.

Texas.—People's Nat. Bank *v.* Brogden, 98 Tex. 360, 83 S. W. 1098.

"The negligence of the agent being established, it is a question of damages, and the agent may show, notwithstanding his fault, that his principal has suffered no damages; and the recovery can then be for nominal damages only. He may show, in reduction of the damages, that if he had used the greatest diligence, the bill would not have been accepted or paid, or that his principals holds collaterals, or has an effectual remedy against the prior parties to the bill." First Nat. Bank *v.* Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618.

Where the seller of a consignment of apples, shipped to his order, sent a bank a draft on the purchaser with bill of lading attached, and the bank surrendered the bill, taking a draft from the insolvent purchaser for collection as a means of collecting the draft of the seller, and the draft was never paid, in an action by the seller against the bank the measure of damages was not the face of the draft, but the market price of the apples when the purchaser took possession. People's Nat. Bank *v.* Brogden, 98 Tex. 360, 83 S. W. 1098.

Where the seller of a consignment of apples shipped to his order sent a draft attached to a bill of lading drawn on the buyer, who was insolvent, to defendant bank for collection, and, the apples proving defective, the bank, as a means of collecting the draft, accepted the buyer's draft on a third person, to whom the apples were resold, and thereupon delivered the bill of lading to the buyer to enable him to make delivery, the bank was not liable for the amount of the draft drawn by the seller, it never having been paid, but was only liable for the value of the apples at the time and place the buyer was enabled to convert the same by the bank's delivery of the bill of lading. People's Nat. Bank *v.* Brogden (Tex. Civ. App.), 84 S. W. 601.

fix the liability of the indorser of a note, or bill,[97] or of the drawer of a draft, or check.[98] The amount of the recovery in an action against a bank

97. Measure of damages for failure to fix liability of indorser.—A bank receiving a note or bill for collection, and failing to use ordinary diligence and take the necessary steps to fix the liability of the parties thereto, is liable for its amount, and costs of suit against them. Durnford *v.* Patterson (La.), 7 Mart. 460, 12 Am. Dec. 514; Pritchard *v.* Louisiana State Bank, 2 La. 415; Armington *v.* Gaslight, etc., Co., 15 La. 414, 35 Am. Dec. 205; Toole *v.* Durand (La.), 7 Rob. 363.

The measure of damages, in an action against bankers intrusted with the collection of a note, through whose negligence an indorser is discharged from liability, is prima facie the face of the note, which may be mitigated by proof of the solvency of the maker, insolvency of the indorser, that it was otherwise secured, or any fact tending to lessen the actual loss. Borup *v.* Nininger, 5 Minn. 523 (Gil. 417).

Where the note is secured by a mortgage, from which a part of the amount is realized, the damages, for failure of the collecting bank to charge the indorser, are the face of the note, less the amount realized from the mortgage, without reference to the amount plaintiff may have paid for it. Borup *v.* Nininger, 5 Minn. 523 (Gil. 417).

Where the maker of notes was insolvent, and the indorsers were discharged by reason of a bank's failure to properly protest the notes, the measure of the owner's damages for such failure was the principal and interest of the notes, with the protest fees, and not the expenses of a suit on the notes against the indorsers, since the owner was not compelled to look to them before seeking redress from the bank. Hitchcock *v.* Bank, 57 App. Div. 458, 68 N. Y. S. 234.

Where a bank receiving a note for collection failed to fix the liability of the indorser thereon, it is not liable to the owner for costs of an unsuccessful suit against such indorser, unless it induced the bringing of the suit by a false representation that the necessary steps to charge them had been taken. Ayrault *v.* Pacific Bank, 1 Abb. Prac., N. S., 381.

In an action against a bank for neglecting to protest a note left with it for collection, whereby the indorser has been released, the defendant may show that the creditor holds collateral security for the payment of the debt, which may be resorted to in diminution of the damages. Mott *v.* Havana Nat. Bank (N. Y.), 22 Hun 354.

In an action against a bank for failure to hold the indorser on a note left for collection, the fact that lands mortgaged by the maker to plaintiff to secure the note are worth more than she bid them in for at foreclosure sale is not available in mitigation of damages. West *v.* St. Paul Bank, 54 Minn. 466, 56 N. W. 54.

In an action by the owner of a note against a bank in which it was placed for collection, for failure to fix the liability of an indorser, the mere fact that the indorser was in embarrassed circumstances, and unable to meet all his liabilities, falls far short of establishing the insolvent condition required to constitute a defense to the action. Steele *v.* Russell, 5 Neb. 211.

98. Measure of damages for failure to fix liability of drawer of draft.—Where a bank neither collects a draft sent to it for collection, nor notifies the drawer in due time of its nonpayment, whether the bank is liable for the full amount of the draft is a question of fact dependent on the probability of collection, if the bank had used due diligence in pressing the drawee, or in notifying the drawer of nonpayment. Selz *v.* Collins, 55 Mo. App. 55.

The liability of an express company for failure to notify the drawer of a draft which they undertook to collect that it was dishonored, in season to preserve the holder's remedy against the drawer, is limited to nominal damages, unless there is evidence that, had due notice been given, payment of the draft could have been enforced from the drawer. Lienau *v.* Dinsmore, 10 Abb. Prac., N. S., 209, 3 Daly 365, 41 How. Prac. 97.

In an action by the holder of a bill of exchange against a bank for not giving notice of nonpayment by the acceptor, defendant holding the bill for collection, whereby the drawer was discharged, defendant may show the drawer's insolvency in mitigation of damages. Stowe *v.* Bank, 14 N. C. 408.

Where the drawer of a draft, by reason of having no funds in the drawee's hands or no right to draw,

for its negligent failure to collect a check received for collection is not necessarily the amount of the check, for the owner may secure all or a part of the debt for which the check was given, as by subsequent voluntary or enforced payment by the drawee bank when solvent, or by dividends when insolvent.[99] Where a bank sent a check to another bank for collection, and because of its negligence the drawer and indorser thereof were discharged, the measure of damages is prima facie the face value of the check, subject to reduction by showing the insolvency of the person discharged from liability.[1] In an action against a bank for damages because of its failure to promptly return a draft sent to it for collection when the same was not paid at its maturity, it appeared that the drawee had property open to an attachment to an amount larger than the draft, and that while the bank held the draft for a month after maturity the drawee failed and made an assignment. Held, that plaintiff's damages were not remote as a matter of law.[2] A bank negligently losing transfers of land certificates sent to it to collect the sum for which they were given as collateral security is liable for the expenses of prosecuting suits to establish them, though such expenses would not have been necessary if the sender had recorded them before sending.[3]

remains liable on his indorsement of the draft without presentment, demand, or notice, a bank to which the draft is sent for collection, by negligence in presenting the same for acceptance, becomes liable only for nominal damages, unless the drawer has become insolvent since the time at which the indorsee would have received notice of the nonacceptance had the draft been presented at the proper time, in which case it may become liable for the loss caused by its negligence. Citizens' Nat. Bank *v.* Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

99. Measure of damages for failure to collect check.—Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A., N. S., 246.

1. Ft. Dearborn Nat. Bank *v.* Security Bank, 87 Minn. 81, 91 N. W. 257.

Defendant bank cashed a check on a nonresident bank, and sent it to plaintiff for collection. Plaintiff credited defendant's account, and, being unable to collect the check, sued for money had and received. Plaintiff failed to protest the check, whereby the indorser and the drawer were discharged. Held, that defendant was damaged prima facie to the full amount of the check. Ft. Dearborn Nat. Bank *v.* Security Bank, 87 Minn. 81, 91 N. W. 257.

2. Damages for failure to return draft held not too remote as matter of law.—Lord *v.* Hingham Nat. Bank, 186 Mass. 161, 71 N. E. 312.

3. Liability of bank losing transfers of land certificates.—First Nat. Bank *v.* First Nat. Bank, 116 Ala. 520, 22 So. 976.

One sending transfers of land certificates to a bank to collect the sum for which they were given as collateral security may recover of the bank for negligently losing them, the expenses of procuring substitutes, consisting of legal advice, an investigation of land-office records, a trip to a distant city to obtain a portion of them from the only person able to give them, and the costs, expenses, and attorney's fees paid in prosecuting litigation to establish the other portion. First Nat. Bank *v.* First Nat. Bank, 116 Ala. 520, 22 So. 976.

CHAPTER XI.

E. Loans and Discounts.

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E. LOANS AND DISCOUNTS.

§ 175½. In General.—Discount.—A note is discounted by a bank when the bank deducts from its face in advance the interest until maturity.[1]

1. **Discount.**—A discount by a bank is a deduction or drawback on its loan upon an evidence of debt, not yet due, transferred to itself. National Bank *v.* Johnson, 104 U. S. 271, 26 L. Ed. 742.

"Nothing can be clearer than that, by the language of the commercial world and the settled practice of banks, a discount by a bank means, ex vi termini, a deduction or drawback made upon its advances or loans of money, upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank." Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631; National Bank *v.* Johnson, 104 U. S. 271, 26 L. Ed. 742.

When used in general sense.—The term "discount," when used in a general sense, is equally applicable to either business or accommodation paper, and is appropriately applied either to loans or sales by way of discount, when the sum is counted off, or taken from the face or amount of the paper, at the time the money is advanced upon it, whether that sum is taken for interest upon a loan or as the price agreed upon a sale. Niagara County Bank *v.* Baker, 15 O. St. 68.

Different between price and amount of debt.—"Discount * * * is the difference between the price and the amount of the debt, the evidence of which is transferred. That difference represents interest charged, being at some rate, according to which the price paid, if invested until the maturity of the debt, will just produce its amount. And the advance, therefore, upon every note discounted, without reference to its character as business or accommodation paper, is properly denominated a loan, for interest is predicable only of loans, being the price paid for the use of money." National Bank *v.* Johnson, 104 U. S. 271, 26 L. Ed. 742.

"Discount is the difference between the price and the amount of the debt, the evidence of which is transferred. That difference represents interests charged, being at some rate according to which the price paid, if invested until the maturity of the debt, will produce its amount; and the advance, therefore, upon every note discounted, without reference to its character as business or accommodation paper, is properly denominated a loan, for interest is predicable only of loans, being the price paid for the use of money." Anderson *v.* Cleburne Bldg., etc., Ass'n, 4 Tex. App. Civ. Cases, § 174, 16 S. W. 298.

In nature of cross action.—"Every discount is in the nature of a cross action, and if the discount filed in this case were thrown into the form of an action, it would be for money had and received to defendant's use." Fullerton *v.* Bank, 1 Pet. 604, 7 L. Ed. 280.

Purchase by way of discount.—Whether the discounting of a promissory note, according to the usage of banks, is a purchase is undecided; but if it is a purchase, it is a purchase by way of discount. Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631, cited in National Bank *v.* Johnson, 104 U. S. 271, 26 L. Ed. 742.

Of accommodation paper.—The term discount of notes originally meant the purchase of real transaction notes, as contradistinguished from mere accommodation notes, yet in practice the distinction has been too long disregarded, and too often ignored by the legislature to be the ground of judicial decision. Chafin *v.* Lincoln Sav. Bank, 54 Tenn. (7 Heisk.) 499. See Niagara County Bank *v.* Baker, 15 O. St. 68.

Mode of loaning money.—"To discount paper, as understood in the business of banking, is only a mode of loaning money with the right to take the interest allowed by law in advance." Anderson *v.* Cleburne Bldg., etc., Ass'n, 4 Tex. App. Civ. Cases, § 174, 16 S. W. 298.

Loaning money where the interest is taken at the termination instead of the commencement of the loan has been held within a prohibition against discounting notes. Anderson *v.* Cleburne Bldg., etc., Ass'n, 4 Tex. App. Civ. Cases, § 174, 16 S. W. 298.

In the business of banking the purchasing and discounting of paper is only a mode of lending money. Smith *v.* Exchange Bank, 26 O. St. 141; Niagara County Bank *v.* Baker, 15 O. St. 68. See, also, White's Bank *v.* Toledo Fire, etc., Ins. Co., 12 O. St. 601.

Embraces purchase.—The purchase

Rediscount.—A note sent by a bank to another bank for discount and

of a promissory note for a sum less than its face is a discount, within the provisions of Laws 1838, c. 260, § 18, authorizing the discount of notes, etc., by banking associations. Atlantic State Bank *v.* Savery, 82 N. Y. 291, affirming 18 Hun 36.

"The term 'discounting' includes purchase as well as loan." "To 'discount' signifies the act of buying a bill of exchange or promissory note for less than that which upon its face is payable." Anderson *v.* Cleburne Bldg., etc., Ass'n, 4 Tex. App. Civ. Cases, § 174, 16 S. W. 298.

Taking up note payable to debtor.—The charter of a bank provided that all notes, bills, and other evidences of debt, excepting bills of exchange discounted by it, should be made by their terms or by special indorsement payable solely to the company. Held, that where the bank took up a note payable to its debtor, which he had pledged as collateral to a third person by paying the debt for which it was pledged, it did not "discount" the note, within the meaning of its charter, and hence it acquired a valid title to the note, though it was not, in terms, indorsed to it; but, even if the note had been discounted, the charter provision being directory merely, a noncompliance therewith would not prevent a recovery on the note. City Bank *v.* Bruce, 17 N. Y. 507.

Under charter putting notes on footing of bills of exchange.—Under a bank charter providing that certain classes of promissory notes and bills of exchange shall, "when discounted" by the bank, be upon the footing of foreign bills of exchange, a note is "discounted" by the bank when it deducts from the face of the note in advance the interest until maturity, and places the balance to the credit of the makers. Eastin *v.* Third Nat. Bank, 102 Ky. 64, 19 Ky. L. Rep. 1043, 42 S. W. 1115.

The purchase of uncurrent bank bills, payable at a distant place, and not, therefore, immediately available, is analogous to a purchase of a note not due; and, if such a purchase is made at a legal rate of discount, the transaction is to be deemed "discounting," within the New York "act to authorize the business of banking." People *v.* Metropolitan Bank, 7 How. Prac. 144.

Purchase of state bonds.—A bank purchased bonds from a state giving its certificates of deposit therefor. Being unable to pay the certificates, it arranged to take other bonds, giving certificates therefor, and assigning to the state mortgages to secure the new certificates, which new bonds were left in the hands of the state's agent to be sold, and the proceeds used to pay the old certificates. Held, that the transaction was a purchase and not a discount of the bonds, or a taking of the bonds, as basis of an exchange account under the power to buy and sell bills of exchange. Mitchell *v.* Cook, 7 N. Y. 538, Seld. Notes 16.

A loan by a foreign corporation for the full value of the notes taken is not a discount of the notes, within the meaning of the statute (2 Rev. St. [4th Ed.], p. 118) prohibiting foreign corporations from discounting notes within the state. Noble *v.* Cornell (N. Y.), 1 Hilt. 98.

Note given for loan.—The Chenango Bank agreed with A. and his indorsers to let them have $5,000 in its bills, on their depositing $2,000. They were to pay no interest as long as the bills were kept out, and were not to suffer, at any time, a greater number of the bills to return than the amount of the deposit, and were to have the money as long as they kept the exchange good. Each party had liberty to end the contract by giving six months' notice; and, if the exchange were not kept good, the bank might demand immediate payment. A. gave the bank a note for $5,000, with two indorsers, payable in 90 days. Held, that the note was discounted by the bank, within the meaning of its act of incorporation. Bank *v.* Curtis (N. Y.), 19 Johns. 326.

Note taken in payment of debt.—A note taken by a bank in payment of a pre-existing debt is not discounted, within the meaning of the prohibition in Rev. St., c. 47, § 14, against discounting a note without two responsible names or collateral security. Lime Rock Bank *v.* Hewett, 52 Me. 531.

Notes taken to secure loan.—Where money is loaned by a bank at a usurious rate of interest, and notes taken for the amount of the principal and interest, payable at a future day, the transaction is not a discounting, within the meaning of Code, § 4140, prohibiting the discounting of any note at a greater rate of interest than

returns, in reply to a request for good paper indorsed by the bank, is rediscount paper.[2]

Loan.—A finding that a corporation did not borrow a certain sum from a bank on its note, in an action against the stockholders on the note, is not justified where the undisputed evidence is that the note was given to the bank in exchange for a partnership note held by the bank, which the corporation had assumed, since the transaction was, in substance, a loan, and a payment of the partnership note with its proceeds.[3]

8 per cent. Planters', etc., Bank *v.* Goetter, 108 Ala. 408, 19 So. 54.

Taking time draft.—Where the selling bank takes in payment a time draft made by the purchasing bank, this is not a discount or loan by the seller, in violation of Laws 1839, c. 355, § 3; and the issuing of such draft is a violation of Laws 1850, c. 251, only on the part of the purchaser. The seller may surrender the illegal draft, and recover, as upon an implied assumpsit, the value of the bills as measured by the discount agreed upon. Buffalo City Bank *v.* Codd, 25 N. Y. 163.

2. Rediscount.—Defendant bank, in reply to the request of plaintiff bank for good paper indorsed by defendant, sent it "for discount and returns" a 90-days note of ordinary discount paper form, indorsed by itself. The cashier testified on the first trial that the original note was rediscounted paper, and that this was the bank's usual method of having paper rediscounted. On the second trial he and one of the bookkeepers testified that the books of the bank do not show that defendant discounted it before transferring it to plaintiff. Defendant had the renewal notes executed every 90 days, and forwarded the discount to plaintiff. Held, that the note was rediscounted paper. First Nat. Bank *v.* Stone, 106 Mich. 367, 64 N. W. 487.

The cashier of St. Paul bank, who was the secretary of a land company, drew a check for $25,000, as such secretary, on his bank, to pay a note of the land company, and then accepted the check, as indorsed by the payee of the note, to be deposited in the bank to the credit of the payee. On the next day the amount of the check was credited to the payee on the books of the bank, and the land company was charged with the amount. At the same time, the cashier drew up a note from the land company to plaintiff bank in Chicago, credited it to the account of the land company in the books of his bank, and inclosed it to the cashier of the Chicago bank, with a letter, in his individual name, stating that he had been called on to take up $25,000 for a company in which he was interested, and did not want to borrow the money from his own bank, and asked if the Chicago bank would place the inclosed note to the account of the St. Paul bank, adding that the latter bank would not draw against it. The cashier of the Chicago bank replied that he had placed the proceeds of the land company note to the credit of the St. Paul bank, with the understanding that none of it was to be paid out, and that they reserved the privilege of charging the land company note to the St. Paul bank, at their option. The cashier replied, accepting the conditions. The Chicago bank then discounted the land company's note, and placed the proceeds to the credit of the St. Paul bank, which then paid the $25,000 to the land company. The St. Paul bank was not a party to the note of the land company, and had no interest in it. None of the officers of the St. Paul bank, except those who were stockholders in the land company, ever authorized, knew of, or ratified the agreement between their cashier and the Chicago bank, and they had no notice that the credit of $25,000 by the bank to the St. Paul bank was not an actual and unconditional credit for cash deposited. Held to warrant a finding that the St. Paul bank did not first discount the note, and then rediscount it. Ft. Dearborn Nat. Bank *v.* Seymour, 75 Minn. 100, 77 N. W. 543.

3. Loan.—Herman *v.* Hecht, 116 Cal. 553, 48 Pac. 611.

Distinguished from purchase of bill of exchange.—The plaintiffs, an incorporated bank in this state, advanced to an individual a sum of money in their bills, marked for identification, exceeding 10 per cent of their capital, and took from him bills of exchange for that amount, drawn by him on another person, payable at sight, with 5 per cent interest, with an agreement that the circulation of the money so advanced should be protected by the

Payment.—Where a person indebted to a bank gives in settlement of his indebtedness different evidences of debt from those given for the original, the transaction is a sale and not a renewal.[4]

Shaving.—Shaving, while not regarded as a technical term, is, however, a popular one. It is the business of purchasing evidences of debt in the market at less than the amount called for on their face.[5] The purchas-

person receiving it; and that from time to time, as the bank should redeem the bills, he should furnish them with exchange on New York for the amount of such redemptions, with 6 per cent interest on the same, and that the money so redeemed should be sent back to him on the receipt by the bank of the exchange therefor; and, further, that, if the agreement in regard to the circulation and redemption was carried out, payment of the drafts should not be required for one year. Held, that such transaction was a loan, and not a purchase of bills of exchange within the meaning of § 74, c. 84, p. 493, Comp. St. Farmers' Bank *v.* Burchard, 33 Vt. 346.

Distinguished from deposit.—A bank wrote to its correspondent that $30,000 worth of bonds had been allotted to it, and that it would have to take up and carry about $15,000 of old bonds, stating that it would have to finance the deal, and asked if the correspondent could help out on $10,000 for 30 or 40 days; that, if so, it would send up some paper maturing the next month; and that it did not object to any fair rate. Seven days later two certificates of $5,000 each bearing 7 per cent interest payable in 40 and 45 days were mailed to the correspondent. Credit for the full amount was given. Held, that the transaction was a loan, and not a deposit, and hence did create a preferential claim. Carroll *v.* Corning State Sav. Bank, 139 Iowa 338, 115 N. W. 937.

Payment of gold on contract of third persons.—Plaintiff agreed to sell gold coin for currency to a third person. The parties were members of the Gold Exchange of the city of New York, under whose rules the contracts for the sale of gold were to be settled by a bank. The bank, distrusting its ability to settle the transaction on the date of the sale, requested its customers to settle their sales between themselves. Plaintiff did not deliver any notice of the transaction to the bank. The third person delivered such notice to the bank, and it thereupon, without notice from plaintiff, paid the gold called for by the transaction to the third person. Held, that the advancement of gold by the bank was substantially a loan by it to plaintiff. Fowler *v.* New York Gold Exch. Bank, 6 Hun 186.

4. **Payment.**—Four persons being jointly indebted to one bank in two several sums, and to another bank in one sum, by mutual agreement between all parties, the notes which the banks respectively held for the debts were given up, and the debtors each executed his individual note and mortgage for such part of the aggregate sum as it was agreed among the debtors he should secure and pay; and in pursuance of said agreement the new notes and mortgages were drawn and made payable to a third person, and by him indorsed to one of the two banks. In an action against one of the debtors, upon his note and mortgage, by the bank to which it had been so assigned, it was held that the transaction was a payment, and not a mere renewal of the old notes; that there was a sufficient consideration to support the new notes and mortgages; and that the bank had authority, by the provision of the national currency act, to make the arrangement, and take the new notes and mortgages in that form and manner. Shinkle *v.* First Nat. Bank, 22 O. St. 516.

5. **Shaving.**—"The term 'shave' has not, perhaps, heretofore been regarded as a technical term; but in our local jurisprudence, at least, it can no longer be regarded as untechnical, inasmuch as its use is sanctioned by the authors of the 'Code of Tennessee.'" Wetmore *v.* Brien, 40 Tenn. (3 Head) 723.

"The business of purchasing notes, in the market, at less than the amount called for on their face, or par value, is common amongst individuals in the community; and by the act under consideration, the right to do so would seem to be impliedly conceded to corporations whose business it is to lend money, and exercise other functions of banking, under certain restrictions." Wetmore *v.* Brien, 40 Tenn. (3 Head) 723.

ing of notes at their actual commercial value is legal. But if the notes were made for the purpose of being sold to raise money or as an artifice to evade the usual orders, the purchase is illegal. It is in this latter sense that the term shaving is understood.[6]

§ 176. Power to Make Loans in General.[7]—Lending is a legitimate function of banking.[8]

Statutory Restrictions.—Statutory restrictions in regard to loans by banks should be so construed as to encourage sound banking and preserve a safe currency.[9]

To Whom Loan Made.—A provision in a bank charter authorizing the bank to advance or loan to any planter, farmer, miner, manufacturer or other person, does not include merchants; it being the evident intent of the legislature to benefit only the producing class.[10]

Loans to Officers and Agents.—Officers of a bank may, in the absence

6. The business of purchasing negotiable paper is, to a certain extent, sanctioned by law, although the purchaser may thereby get greatly more than legal interest for the use of his money. The distinction is between real transaction paper and paper made for the purpose of raising money by a sale in the market. May *v.* Campbell, 26 Tenn. (7 Humph.) 450; Ramsey *v.* Clark, 23 Tenn. (4 Humph.) 244, 40 Am. Dec. 645.

"If the note were made for the purpose of being sold, to raise money, or as an artifice to evade the usury laws, under the color of a sale and purchase of the paper, this will not avail, and the purchaser, under such circumstances, with knowledge of the facts, either actual, or inferable from the facts of the case, will be held guilty of usury, if the discount shall have been greater than the legal rate of interest. In this sense, the word 'shave' is to be understood in the act of 1855-56. And in this sense, and to this effect only, is the business of 'shaving' notes, or other negotiable paper, either by individuals or banking corporations, tolerated by law. 2 Pars. on Con. 421." Wetmore *v.* Brien, 40 Tenn. (3 Head) 723.

7. As to loans and discounts by national banks, see post, "Loans and Discounts," § 269. As to power of officer to represent bank, see ante, "Loans and Discounts," § 108.

8. **Power to make loans.**—Stark County Bank *v.* McGregor, 6 O. St. 45; Chafin *v.* Lincoln Sav. Bank, 54 Tenn. (7 Heisk) 499; Wetmore *v.* Brien, 40 Tenn. (3 Head) 723; Cameron & Co. *v.* First Nat. Bank, 4 Tex. Civ. App. 309, 23 S. W. 334, affirmed in 93 Tex. 656, no op.; Crump *v.* Nichols, 32 Va. (5 Leigh) 251.

"In all the American systems of banking, with which we have any acquaintance, the furnishing of loans, at fixed rates of interest, to facilitate the business and commerce of the country, has been made a cardinal feature in the institution of banks, and in giving them extensive corporate privileges." Niagara County Bank *v.* Baker, 15 O. St. 68.

Power necessary to effectuate object.—A bank is an instrument which is "necessary and proper" for carrying on the fiscal operations of government. This instrument can not, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter. Osborn *v.* Bank (U. S.), 9 Wheat. 738, 6 L. Ed. 204.

9. **Statutory restrictions.**—The restrictions contained in our banking laws for the purpose of securing the solvency and stability of the banks; and the statutes should be so construed and the law administered as to reasonably bring about that end. The wealth and prosperity of the people depend, to a large extent, upon the soundness of the banks and the safety of the currency. The purpose of the government is to foster and encourage sound banking and preserve a safe currency. Merchants' Nat. Bank *v.* Wehrmann, 69 O. St. 160, 68 N. E. 1004.

10. Bank *v.* Williams, etc., Co., 79 N. C. 129.

of statutory restriction, borrow money therefrom.[11] Under a statute providing that no officer or agent of any bank shall borrow from it without the approval of a majority of the directors, and that one violating such provision shall forfeit twice the amount to the state, when considered in connection with another statute absolutely prohibiting certain loans, a note executed by the teller of a bank for a loan made by it to him without the approval of the directors is not void.[12] Banks are by statute restricted to a certain amount in making loans to officers.[13] Such statutes do not render void a loan for a greater amount where the excess is loaned upon the faith of other names than that of the officer,[14] nor where the officer makes a conveyance of real estate to a trustee to secure the loan.[15]

To Make Loan for Another.—A bank has no power to make loans for other persons.[16]

Power of Foreign Banks.—A foreign bank may lend money and take security therefor.[17]

11. Loans to officers.—State *v.* Commercial Bank, 10 O. 535.

12. Laws 1892, p. 1857, c. 689, § 25, subd. 4, as amended by Laws 1895, p. 749, c. 929; Judgment, 113 App. Div. 375, 98 N. Y. S. 1045, affirmed. People's Trust Co. *v.* Pabst, 190 N. Y. 534, 83 N. E. 1130.

13. The "act to incorporate the state Bank of Ohio, and other banking companies" (43 O. L. 24), provided that neither the stockholders, collectively, nor the directors of any independent banking company organized thereunder, should become liable to their company, either as principal debtor or sureties, or both, to an amount greater than three-fifths of the amount of capital stock actually paid in, and remaining undiminished by losses or otherwise. State *v.* Seneca County Bank, 5 O. St. 171; Conant *v.* Reed, 1 O. St. 298.

14. Credit given to others.—Act May 13, 1876, providing that no director of a banking company shall receive as a loan more than 10 per cent of the stock paid in does not prevent the company from discounting or purchasing paper on which the name of a certain director shall appear to an amount greater than 10 per cent of the stock, provided such excess be taken on the credit of names other than that of such director. In re McKinley-Lanning, etc., Trust Co., 12 Pa. Co. Ct. Rep. 40.

15. Secured by real estate.—Section 13 of the act entitled "Banks" (1 Starr & C. Ann. St. [2d Ed.], p. 517), relating to the limitation of loans, does not apply to a case where a director makes a conveyance of his real estate to a trustee for the purpose of securing his indebtedness to the bank for advances on bills of lading and warehouse receipts. Nelson & Co. *v.* Leiter, 93 Ill. App. 176, judgment affirmed 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142.

16. To make loans for another.—It is no part of the business of a bank to loan money for the public or for individuals, and in the absence of proof that appellant was engaged in such business, it must be presumed that the teller in making the loan of appellee's money, was acting outside of the scope of his authority as agent of the bank, and no liability would attach to the bank for the acts of the teller, in making the loan. City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632.

17. Power of foreign banks.—It is not a violation of the statute of April, 1818, for an incorporated bank in another state to lend money, and take a mortgage for security in New York. Silver Lake Bank *v.* North (N. Y.), 4 Johns Ch. 370.

The cashier of a foreign banking corporation, making a loan on a borrower's check, in the city of New York, is not in violation of 1 Rev. St., p. 712, § 6, the corporation having no office for banking in that city. Suydam *v.* Morris, etc., Banking Co. (N. Y.), 5 Hill, 491.

A foreign corporation, not engaged in the business of banking, can make loans of money in this state, if such money is not prohibited from circulation by the laws of the state. Connecticut Mut. Life Ins. Co. *v.* Albert, 39 Mo. 181.

But a foreign bank can not make a

Power of Other Persons and Associations.—While lending money is a banking function, the authority to engage in such business is not confined to duly authorized banks. With the exception of so much of such business as is exercised by duly authorized banks, the entire business has been left to the enterprise of private individuals, coupled with their full responsibilities.[18]

primary contract in Virginia by discounting notes there. Bank *v.* Pindall, 23 Va. (2 Rand.) 465.

Compliance with statute.—Banks of other states are within the restraining statutes of New York providing that no person shall become a member of a banking association unless authorized by law, and declaring all notes, etc., given to such association, to be null and void; and therefore such bank can not recover on a check discounted by it in violation of those statutes. Pennington *v.* Townsend (N. Y.), 7 Wend. 276.

Under 1 Rev. St. (3d Ed. 1846), p. 894, §§ 6, 7, prohibiting any one, except a corporation expressly authorized by law, from keeping an office to discount bills, etc., and receive deposits, and making every person, corporation, or member of a corporation, who shall violate the provision, liable to a forfeiture, the president of a foreign corporation who comes into the state for the purposes specified is liable to the forfeiture. Taylor *v.* Bruen (N. Y.), 2 Barb. Ch. 301.

The president of a Covington, Ky., bank, was applied to in Cincinnati, Ohio, to have a note discounted at the bank in Covington. He agreed to get it discounted, took it to Covington, and induced the bank to discount it. The proceeds of the note were passed to the payee's credit, and the bank's bills were brought to the borrower, and paid to him in Cincinnati. Held, that the contract to loan was made in Kentucky, the contract being complete when the borrower was entitled to check on the bank; and hence the Ohio statutes to prevent unauthorized banking did not apply. Rezner *v.* Hatch, 2 Handy 42, 12 O. Dec. 320.

Agency in state.—If a bank of another state establishes an agency in this state, to discount bills with its own notes, it is in violation of the law of 28th March, 1808, and the bank acquires no title to the bills so discounted, and can maintain no action for their collection. Bowman *v.* Cecil Bank (Pa.), 3 Grant, Cas. 33.

The fact that two persons received money from a foreign bank, used it for discounting purposes, sent the paper thus obtained to the bank, regularly rendered accounts to it, and received from the bank a compensation for their services, was held sufficient evidence that they kept a banking house for said bank, within the statute prohibition. Bowman *v.* Cecil Bank (Pa.), 3 Grant, Cas. 33.

Necessity for authority from state.—A banking institution of Virginia authorized by its charter to buy, sell, and negotiate bills of exchange, etc., acting by its cashier in this state, loaned money on the discount of such bills, without authority from the state, and discounted a bill drawn upon a person in New York, which bill was assigned before maturity, to a third party, without notice of the manner in which the bill was acquired by the bank. After protest for nonpayment, the indorsee brought suit against the drawers. Held, that such indorsee's right to maintain an action upon the bill against the drawers was not affected by Act March 12, 1845, § 1 (1 Swan & C. St. 152), providing that no body politic or corporate shall establish a bank or engage in the business of banking, to receive on deposit, keep, and circulate the money or bank papers of others, without express authority of a law of this state. Pickaway County Bank *v.* Prather, 12 O. St. 497.

18. **Power of other persons and associations.**—Medill *v.* Collier, 16 O. St. 599; Corwin *v.* Urbana, etc., Mut. Ins. Co., 14 O. 6.

Under the act prohibiting unauthorized banking by corporations, passed March 12, 1845, a corporation, not having express power so to do, can not make loans and discounts where such operations are based upon deposits of money or bank paper of others. United Protestant, etc., Congregation *v.* Stenger, 21 O. St. 488; Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371; Pickaway County Bank *v.* Prather, 12 O. St. 497.

But this act did not prevent companies or associations from lending money. Associations that shall "lend

§ 177. Power to Discount.—Taking notes or other securities for discount is a part of the legitimate business of a banking corporation.[19] The power to discount notes belongs to a bank by necessary implication; and did belong to the Bank of the United States.[20]

money and shall, by their officers, issue bonds, notes and bills," to "pass or circulate by delivery," were the associations prohibited. "It has, by some, been contended that the word, 'and,' as here used, should, for the purpose of preventing the evil complained of, be held as having the same meaning as the word 'or;' but, at the time this act was passed, it was not supposed that any association would issue notes or bills, to pass and circulate as money, unless coupled with the design of loaning the same, and thus making a profit." Bonsal *v.* State, 11 O. 72.

In Forrest, etc., Bldg. Ass'n *v.* Gallagher, 25 O. St. 208, the question as to whether a general authority granted to a corporation to receive deposits and make loans came within the term "banking powers," as used in this section of the constitution, was queried. But it was held in this case that the power granted to building and loan associations by the Act of February 21, 1867, was not within this provision.

But a building and saving association, incorporated and organized under the act of May 5, 1868 (S. & S. 194), is not authorized to use its funds in making loans to members or depositors upon their promissory notes, at a rate greater than the legal rate of interest, in addition to the premium bid for the right of precedence, or in purchasing or discounting notes from such members or depositors at usurious rates of interest, or to use its funds in loaning the same to and in purchasing and discounting notes from persons other than its members or depositors upon any terms. State *v.* Greenville Bldg., etc., Ass'n, 29 O. St. 92.

Of insurance company.—Charter restrictions of an insurance company against exercising banking powers do not prohibit the lending of money. Corwin *v.* Urbana, etc., Mut. Ins. Co., 14 O. 6.

An insurance company which is authorized by its charter "to loan its funds and moneys" to individuals or public corporations, on real or personal security, but is prohibited from using the same "in the trade or business of exchange or money brokers," may lawfully purchase a bill of exchange, drawn on and accepted by third persons, if it be brought in good faith, either as an investment, or to collect a debt previously due to said company. White's Bank *v.* Toledo Fire, etc., Ins. Co., 12 O. St. 601.

19. Power to discount.—Fawcett *v.* Mitchell, etc., Co., 133 Ky. 361, 117 S. W. 956.

And authority therefor includes the taking of interest in advance. Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631.

Charter and statutory provisions.—"The specific power given to national banks (Rev. Stat., § 5136) is 'to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt.' So that the discount of negotiable paper is the form according to which they are authorized to make their loans, and the terms 'loans' and 'discounts' are synonyms." National Bank *v.* Johnson, 104 U. S. 271, 26 L. Ed. 742.

Where a statute authorizes a banking corporation to invest its capital in notes, and to purchase and hold securities in payment of the debts due it, the discounting of notes by it is not ultra vires. Bright *v.* Mountain City Banking Co. (Pa.), 3 Penny. 478.

The charter of the Mountain City Banking Company gives it discounting privileges. Appeal of Yungfleisch, 1 Walk. 125.

Where discounting privileges have been granted to a corporation, it will be presumed that the conditional requirements have been complied with. Appeal of Yungfleisch, 1 Walk. 125.

Where a bank discounts a note drawn in a form prohibited by its charter, the note is void. Vanatta *v.* State Bank, 9 O. St. 27.

20. Implied power of bank of United States.—"It is notorious, that banking operations are always carried on in our country by discounting notes. The late Bank of the United States conducted, and all the state banks now conduct, their business in this way. The principal profits of banks, and indeed, the only thing which makes them more valuable than private stock, arises from this source. The legislature can not be presumed ignorant of these facts; and it would be absurd to suppose, that it meant to create a bank, without any powers to carry on

Payable at Bank.—By statute in some states the power of a bank to discount notes is restricted to notes payable at such bank.[21]

Payable in Bank Notes.—The discounting of a note made payable in the office notes of the bank is not a violation of a statute which prohibits banks from dealing otherwise than upon legitimate subjects of banking.[22]

the usual business of a bank." Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631; Bank *v.* Waggener (U. S.), 9 Pet. 378, 9 L. Ed. 163.

The act of the 10th of April, 1816, c. 44, incorporating the Bank of the United States, does not, by the 9th rule of the fundamental articles, prohibit the bank from discounting promissory notes, or receiving a transfer of notes, in payment of a debt due the bank. Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631; Bank *v.* Waggener (U. S.), 9 Pet. 378, 9 L. Ed. 163.

Banks deal in bills of exchange, foreign or domestic. Nathan *v.* Louisiana (U. S.), 8 How. 73, 12 L. Ed. 992; Briscoe *v.* Bank (U. S.), 11 Pet. 257, 9 L. Ed. 709.

In the case of Bank *v.* Earle (U. S.), 13 Pet. 519, 10 L. Ed. 274, it was decided that the bank established in Georgia, having a right in its charter to deal in bills of exchange, through its agent and the comity of Alabama, buy and sell bills in that state. Nathan *v.* Louisiana (U. S.), 8 How. 73, 12 L. Ed. 922. See, also, Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 44 L. Ed. 657, 20 S. Ct. 518.

21. Payable at bank.—By St. Feb. 24, 1845, § 64, all notes discounted by banks organized under that act shall be made by the terms thereof or by special indorsement, payable solely to said bank, and shall only be indorsed over for collection, etc. These two provisions are distinct, and therefore the bank, or its assignee in insolvency, can maintain no action on a note discounted, made payable to the bank or order, because not by its terms payable solely to the bank, although it has never been indorsed over. Vanatta *v.* State Bank, 9 O. St. 27.

The Tombeckbee Bank is not authorized by its charter to discount a note, unless it be expressed on the face of the note that the same shall be negotiable at such bank. United States *v.* Fay (Ala.), 9 Port. 465.

Act 1819, authorizing a bank to discount notes made negotiable and payable at another bank, includes notes executed before the passage of the act. Taylor *v.* Farmers', etc., Bank (Ky.), 4 Litt. 341.

The charter of a bank provided that all notes, bills, and other evidence of debt excepting bills of exchange discounted by it should be made, by their terms or by special indorsement, payable solely to the company. Held, that where the bank took up a note payable to its debtor, which he had pledged as collateral to a third person by paying the debt for which it was pledged, it did not "discount" the note, within the meaning of its charter, and hence it acquired a valid title to the note, though it was not, in terms, indorsed to it. City Bank *v.* Bruce, 17 N. Y. 507.

When a branch bank assumed to discount a promissory note made payable, by its terms, to such bank, or order, no action could be maintained on such discounted note, either by such branch bank or, in case of its insolvency, by the State Bank of Ohio. Vanatta *v.* State Bank, 9 O. St. 27.

Action for money had and received.—But where a loan of money was effected by the supposed discounting of such paper, an action could be maintained to recover the money so loaned. The security, being in an unauthorized form, is simply void, and does not discharge the indebtedness arising from the loan which the bank had full power to make. Vanatta *v.* State Bank, 9 O. St. 27.

By a provision of its charter, the Bank of Nashville is not to trade in any sort of stock except bank bills, etc.; and, by another provision, bonds, notes, and bills shall not be received at the bank unless made payable there; which implies that bills made so payable may be received, discounted, and sued upon. Bell *v.* Bank, 7 Tenn. (1 Peck) 269.

Implied power to sue on.—Act 1807, c. 103, art. 14, provides that a bank shall not trade in any kind of stock except bank bills. Section 19 provides that bonds, notes, and bills shall not be received at the bank unless made payable there. Held, that the bank could discount and sue upon bills made payable at the bank, as such power was given to the bank by implication. Bell *v.* Bank, 7 Tenn. (1 Peck) 269.

22. Irvine *v.* Lumbermen's Bank (Pa.), 2 Watts & S. 190.

Unsecured Note.—A banking institution having power to lend deposits on the public stock of the state or the United States, on bond and mortgage, or upon any other securities which should be deemed by the board of directors ample, is not limited to the first-mentioned securities, but can discount commercial paper.[23]

Note to Mature within Year.—By statute in Tennessee a bank can not discount paper having more than twelve months to run unless to secure an existing indebtedness.[24]

To Rediscount Paper.—The power to dispose of discounted notes may be regarded as incident to the right to discount and hold them, in the absence of any limitation thereof.[25] And the president or cashier, or both, may be empowered by the directors to endorse and rediscount paper held by it.[26] It can not be held, as a matter of law, that borrowing by a bank

23. Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430.

24. **Note to mature within year.**—Where a statute authorized any bank to take and discount paper from any debtor having longer time than 12 months to run, when deemed advisable for the better security of the debt due to such bank, a bank previously chartered, and forbidden by its charter to discount paper which had more than twelve months to run, was held to be within the provision of the subsequent statute, and it was held that such paper, when discounted, would be presumed, prima facie, to be for an existing debt, and for the security of the bank. Dockery *v.* Miller, 28 Tenn. (9 Humph.) 731.

25. **Right to negotiate discounted paper.**—A power to dispose of its notes, as well as other property, may well be regarded as an incident to the business of a bank to discount notes, which are required to be in their terms assignable, as well as an incident to its right of holding them and other property, when no express limitation is imposed on the authority to transfer them. Not that a banking corporation has under its charter a constructive power to follow another independent branch of business, such as manufacturing or foreign trade, but merely the business of banking, and to do such acts as are necessary and proper or usual to carry that business into effect, and such as are in harmony with the letter and spirit of its charter. Planters' Bank *v.* Sharp (U. S.), 6 How. 301, 12 L. Ed. 447. See Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 40 L. Ed. 838, 16 S. Ct. 705.

Where a bank was chartered with power to "have, possess, receive, retain, and enjoy to themselves and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects of what kind soever, nature, and quality, and the same to grant, demise, alien, or dispose of for the good of the bank," and also "to receive money on deposit and pay away the same free of expense, discount bills of exchange and notes, and to make loans," etc., and, in the course of business under this charter, the bank discounted and held promissory notes, and then the legislature of the state passed a law declaring that "it shall not be lawful for any bank in the state to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant"—this statute conflicts with the constitution of the United States, and is void. Planters' Bank *v.* Sharp (U. S.), 6 How. 301, 12 L. Ed. 447.

It might indorse, waiving demand and notice, and be bound accordingly. People's Bank *v.* Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. Ed. 907.

So with a national bank. Auten *v.* United States' Nat. Bank, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628.

26. **Rediscount of discounted paper—Officers' authority.**—Auten *v.* United States Nat. Bank, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628.

A New York bank and an Arkansas bank were correspondents, the former discounting paper for the latter, until the latter failed, leaving a large amount of discounted paper in hands of former. The former sued the re-

from another bank, or the rediscounting of bills or notes with another bank, is beyond its powers, or so out of the usual course of business as to charge the lender with notice of want of authority in the officers of the borrowing bank in a particular instance.[27]

To Discount Deposits.—The privilege commonly given to banking corporations, in their charters, to discount upon the amount of moneys deposited for safekeeping, applies to general deposits only.[28]

Power of Foreign Banks.—A bank of another state can not enforce a primary contract made in Virginia, as by discounting notes or otherwise.[29]

By Other Persons or Associations.—By an old Virginia statute it was made unlawful for any unincorporated association or company to discount notes.[30] Where special authority is conferred upon a company not having a right by charter to discount notes, the company is restricted to such special grant.[31]

ceiver for the balance on account, and liability was denied. Held, that under § 5136, Rev. Stat., it was competent for the directors to empower the president or cashier, or both, to indorse the paper of the bank, and, under the circumstances, the New York Bank was justified in assuming that the dealings with it were authorized and executed as authorized. Auten *v.* United States Nat. Bank, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628; Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; People's Bank *v.* Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. Ed. 907.

In judging of the conduct and rights of the New York Bank the question is not what actual authority the president of the Arkansas bank had, but what appearance of authority he had, or, rather, what appearance of authority he was given or permitted by the directors. In the inquiry there is involved the two preceding propositions as questions of fact, or of mixed law and fact. The first—the power of a bank to rediscount its paper—as to what the course of dealing of the contending banks was; the second—the form of the notes and their order of indorsements as notice—whether relieved by the circumstances which attended them and the transactions which preceded them. Auten *v.* United States Nat. Bank, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628.

The order of indorsements did not necessarily import that the Little Rock Bank was an accommodation indorser. The order was a natural one if the notes had been discounted in the regular course of business. It is not contended that a want of power precluded the bank from discounting the notes of its officers. It had been done for one of the directors, and his note was rediscounted by the New York Bank. It had an example, therefore, in the dealings of the parties, and, besides, was neither wrong nor unnatural of itself. But it was further relieved from question, and any challenge in the indorsements was satisfied, by the circumstances. It is to be remembered that the discounting the notes in controversy was not the only transaction between the banks. It was one of many transactions of the same kind. They justified confidence, and it was confirmed by the manner in which the notes were presented. It is conceded that the cashier had the power to rediscount the bank's paper, and it was he who solicited the accommodation on account of which the notes were sent to the New York Bank. The notes themselves, it is true, were sent by the president, but expressly on the part of the bank, and subsequent correspondence, about them was conducted with the cashier. And there could have been no misunderstanding. Auten *v.* United States Nat. Bank, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628.

27. Auten *v.* United States Nat. Bank, 174 U. S. 125, 43 L. E. 920, 19 S. Ct. 628.

28. Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

29. **Power of foreign banks.**—Bank *v.* Pindall, 23 Va. (2 Rand.) 465. See ante, "Power to Discount," § 177.

30. **By other persons or associations.**—Commonwealth *v.* Horner, 37 Va. (10 Leigh) 700; Commonwealth *v.* Scott, 25 Va. (4 Rand.) 143.

31. **Where special authority is con-**

§ 178. Requisites and Validity of Loan or Discount—§ 178 (1) In General.—If the whole of the contract by the bank was to loan money, and on the part of the defendants that they would pay it back at a specified time, such contract is a legal one, founded on sufficient legal consideration, and its performance must be enforced.[32]

Mutuality of Contract.—A contract between a bank and a lumber manufacturer, whereby the bank agreed to advance to him a certain sum of money, but the manufacturer was not bound to take the whole or any part of said sum unless he found it necessary in conducting his business, was unilateral, in that there was no binding obligation on the part of the manufacturer to borrow any definite sum of money.[33]

Consideration for Loan.—A loan promised by a cashier, personally and as cashier, to enable one to go in search of the bank's president, who is sick in body and mind, and has disappeared, has sufficient consideration to hold the bank for the promise of its cashier, for which loan the latter issued a check, and, without cause shown, stopped payment without proof enough of any cause for stopping it, after the one who went in search had left, and was performing his part of the agreement.[34] Where there is a failure of consideration for a note discounted at a bank, because of the insolvency of the maker, the bank may close the account and return the note.[35]

Authority to Discount from Maker.—Where the evidence was conflicting as to the maker's authorization of the cashier of a bank to discount a note left with the latter, it was held sufficient to warrant a finding of want of such authorities.[36]

ferred upon a company to discount bills and notes, such company having no implied right, under its charter, to engage in such business, the company can not disregard the restrictions of the statute conferring such right, and the assumption to act in derogation of a prescribed mode of procedure would be equivalent, as a general rule, to the assumption of a franchise by individuals that could alone be imparted by the legislature. Lee & Co. *v.* Hartwell, 3 O. Dec. 225.

32. Puryear *v.* McGavock, 56 Tenn. (9 Heisk.) 461.

33. Swindell & Co. *v.* First Nat. Bank, 121 Ga. 714, 49 S. E. 673.

34. Valdetero *v.* Citizens' Bank, 51 La. Ann. 1651, 26 So. 425.

35. Dougherty *v.* Central Nat. Bank, 93 Pa. 227, 39 Am. Rep. 750.

36. Authority to discount from maker.—In an action by a bank against the surety on a note dated December 14, 1892, and payable in thirty days, plaintiff's president testified that when the note was first offered him by the maker he refused to discount it, because the maker had borrowed enough from the bank, and that subsequently, on January 9th, believing that the maker's indebtedness to the bank had been reduced, he discounted the note, and placed the proceeds to the maker's credit, and that the note was then brought to him for discount by the cashier of the bank, and that on that day the maker made no request of the witness to have it discounted. On the 8th of January the president and cashier learned that the maker had defrauded the bank to the extent of $24,000 After the refusal to discount the note, the maker had placed it in the custody of the cashier, from which it was not removed till the day it was discounted. The cashier testified that on the 8th the maker told him he might have the note discounted, if his line had been reduced enough to stand it, but there was evidence that on that day the maker told the cashier not to present it for discount. The proceeds of the note were offset against an overdraft of the maker. Held sufficient to warrant a finding that the

Insolvency of Maker.—Where a bank has discounted the note of a customer and placed the proceeds to his credit on account, if the customer becomes insolvent before maturity of the note, the bank may tender back the note and discount and will not be liable to the customer, although the latter had drawn checks which had not been presented.[37] Where the day after the maker had his note discounted at a bank, he made an assignment for the benefit of his creditors, there is a failure of consideration and the bank may close the account and return the note.[38]

Amount of Loan.—In the absence of statutory restriction, there is no limit upon the amount that may lawfully be loaned by a bank.[39]

Place Discount Made.—The charter of a bank provided that its operations of discount and deposit should not be carried on elsewhere than in the village of Ithaca, and the cashier discounted a note at the city of New York for the purpose of securing a demand due the bank. The note was valid. The restriction in the charter related only to the customary and permanent business operations of the bank.[40]

Rights of Parties under Invalid Loan.—Where a party makes an illegal loan from a bank, he can not, while retaining the money, restrain the bank from negotiating the securities received therefor; nor obtain an order directing their cancellation and return, although the loan was prohibited by law, and the securities were void in the hands of the bank.[41]

Conflict of Laws.—The fact that some bills are forwarded by a lending to a borrowing bank, the circulation of which is made illegal by a statute of the state in which the borrowing bank is located, will not affect the title of the lending bank to the securities transferred.[42]

cashier, on January 9th, had no authority from the maker to present the note for discount. St. Louis Nat. Bank *v.* Flanagan, 129 Mo. 178, 31 S. W. 773.

37. Insolvency of maker.—Where a bank has discounted a note for a customer, and placed the proceeds to the customer's credit on account, but before the note falls due the customer becomes insolvent, the bank may tender back the note and discount, and will not be liable to the customer for the amount, though the latter had already drawn checks on the account, which, however, had not yet been presented to the bank, and the bank having done nothing to give the customer an apparent right to draw so as to mislead the holders of the checks. Dougherty *v.* Central Nat. Bank, 93 Pa. 227, 39 Am. Rep. 750.

38. A. had his note discounted by a bank, and on the next day made an assignment for the benefit of his creditors. Upon learning of this the bank closed the account, and returned the note to the assignee. Suit being brought by the latter against the bank, held, that there was a failure of consideration as between the parties, and that the bank's defense was a good one. Lancaster County Nat. Bank *v.* Huver, 114 Pa. 216, 6 Atl. 141.

39. Amount of law.—State *v.* Commercial Bank, 10 O. 535. See post, "Where Statute Violated," § 178 (2).

40. Potter *v.* Bank (N. Y.), 5 Hill 490.

41. Elder *v.* Ottawa First Nat. Bank, 12 Kan. 238.

42. Conflict of laws.—City Bank *v.* Perkins, 17 N. Y. Super. Ct. 420, affirmed in 29 N. Y. 554, 86 Am. Dec. 332.

Under the statute it is a good defense to an action of debt on a note that the plaintiffs are an unchartered banking company, issuing and circulating their own paper notes as currency, and that they, as a banking company, discounted said note, contrary to law and public policy, and that the consideration for the note sued on was bank paper, so unlawfully issued; and a plea to this effect is good, notwithstanding the note was

Usage and Custom.—Contracts with banks are presumed to be made with reference to the usage of banking.[43]

§ 178 (2) Where Statute Violated.—A bank may recover for a loan made in violation of directory provisions of its charter or of a statute,[44] but not if made in violation of mandatory directions.[45] The viola-

made payable out of the state. Hamtramck *v.* Selden, etc., Co., 53 Va. (12 Gratt.) 28.

43. Usage and custom.—The Farmers' Bank is an incorporated bank chartered by the legislature mainly for the purpose of lending money; that is its trade, and all contracts with it, must be construed according to the usages of that trade, which all are presumed to know who deal with it. Their contracts are to be explained by the usages which make a part of them, unless such usages be contrary to law. Crump *v.* Nicholas, 32 Va. (5 Leigh) 251, per Brooke, J. See Bacon *v.* Bacon, 94 Va. 686, 27 S. E. 576.

In violation of law.—The fact that it was a general custom for individuals to violate the Act of 1805 in relation to the issue of circulating notes by unchartered banks, did not render such issue any less culpable or give a right of action upon notes so issued. Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491.

44. Where statute violated.—Bates *v.* Bank, 2 Ala. 451; McGehee *v.* Powell, 8 Ala. 827; Neillsville Bank *v.* Tuthill, 4 Dak. 295, 30 N. W. 154; Bond *v.* Central Bank, 2 Ga. 92; Nelson & Co. *v.* Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142; Smith *v.* Bank, 18 Ind. 327; Richmond Bank *v.* Robinson, 42 Me. 589; St. Joseph Fire, etc., Ins. Co. *v.* Hauck, 71 Mo. 465; Seneca County Bank *v.* Neass (N. Y.), 5 Denio 329; Noble *v.* Cornell (N. Y.), 1 Hilt. 98.

The regulations in §§ 11, 21, and the limitations as to amount in § 25 of the original charter of the Central Bank of Georgia, are directory merely, to the officers of the institution. And a debt may be collected, although contracted in disregard of any or all of these provisions: that is, being without security or indorser, having run more than twelve months, and exceeding the sum of $2,500. Bond *v.* Central Bank, 2 Ga. 92.

Statute of another state.—The mere fact that some bills are forwarded by a lending to a borrowing bank, under the contract to loan, the circulation of which as money is made illegal by a statute of the state in which the borrowing bank is located (but not by its charter), and of which statute the lending bank had no knowledge, will not affect the validity of the contract to loan. City Bank *v.* Perkins, 17 N. Y. Super. Ct. 420.

Ultra vires loan.—One who has given a note to a bank in consideration of a loan from it to him can not contend that the bank had no authority to take a note. Rome Sav. Bank *v.* Kramer (N. Y.), 32 Hun 270, affirmed in 102 N. Y. 331, 6 N. E. 682.

An action may be maintained by a bank on a note purchased by it, though the purchase is ultra vires under its charter, if the transaction appears to have been in fact a "discount," within the usual and legal acceptation of the term. Neillsville Bank *v.* Tuthill, 4 Dak. 295, 30 N. W. 154.

A mortgage given to a bank could not be attacked by a third person on the ground that it was ultra vires of the bank to take such security, or that the loan made by the bank, which the mortgage secured, was more than 10 per cent of the bank's capital. Smith *v.* First Nat. Bank, 45 Neb. 444, 63 N. W. 796.

The defendants, who procured a safe-deposit company to discount a note, can not, in an action by the assignee of the company to recover on the note, set up as a defense that the company was not authorized by its charter to discount the note. Pratt *v.* Short (N. Y.), 53 How. Prac. 506, affirmed in 79 N. Y. 437, 35 Am. Rep. 531.

Where a safe-deposit company exceeded its charter power in discounting a note, the defendants who obtained the money, and who seek to avoid the transaction on that ground, are still liable for the amount of the loan as money had and received by them on a voidable contract. Pratt *v.* Short (N. Y.), 53 How. Prac. 506, affirmed in 79 N. Y. 437, 35 Am. Rep. 531.

45. Mandatory statute.—Promissory notes made to a bank in payment of notes discounted by the bank for the maker, in violation of Rev. St., c. 36,

tion of a charter or statutory provision for which the bank is responsible to the state only can not be raised by its borrower.[46]

As to Amount of Loan.—A bank may recover for a loan of an amount more than that allowed by the provisions of its charter or a statute which are directory only.[47] That a bank loaned a larger sum to a debtor than its charter authorized it to loan to any one person did not prevent the bank from recovering the debt on the debtor's insolvency, as against the objection of the debtor's other creditors, since it was solely responsible to the state for violations of its charter.[48] The fact that a debtor owed a bank a sum amounting to more than one-tenth of the paid-in capital of the bank does not render such debt uncollectible and void, under a statute providing that the total liabilities of any person to any association shall at no time exceed one-tenth part of the amount of capital of such association actually paid in.[49] The bank may recover a loan to an officer in an amount in excess of a statutory limitation.[50]

§ 58, which declares that any such discount, not payable on demand, shall be so far void that the bank shall not be entitled to recover the amount thereon from the borrower, or from any other person, can not be enforced by the bank. Mills *v.* Rice (Mass.), 6 Gray 458; Western Bank *v.* Mills (Mass.), 7 Cush. 539.

46. Allen *v.* Freedman's Sav., etc., Co., 14 Fla. 418; Richmond Bank *v.* Robinson, 42 Me. 589; Ferguson *v.* Oxford Mercantile Co., 78 Miss. 65, 27 So. 877.

47. As to amount of loan.—Smith *v.* First Nat. Bank, 45 Neb. 444, 63 N. W. 796.

A defendant, sued by a national bank for moneys it loaned him, can not set up as a bar that they exceeded in amount one-tenth part of its capital stock actually paid in. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. Ed. 648.

The fact that a loan was for more than 10 per cent of the plaintiff bank's capital, and thus in violation of § 74, c. 84, p. 493, Comp. St., furnished no ground of defense either to the principal or surety upon the notes. Bank *v.* Bingham, 33 Vt. 621.

The fortieth section of the act of incorporation of the State Bank of Alabama, declaring it unlawful for the bank to discount or purchase a bill of exchange for a larger amount than $5,000, is directory merely; and, if they do discount a bill for a larger amount, the contract is not, therefore, void. Bates *v.* Bank, 2 Ala. 451.

A loan by a bank to an individual in excess of 25 per cent of its capital, while unlawful, under Rev. St. 1889, § 2758, is valid and enforceable, at least to the limit of 25 per cent of the capital. McClintock *v.* Central Bank, 120 Mo. 127, 24 S. W. 1052.

48. Ferguson *v.* Oxford Mercantile Co., 78 Miss. 65, 27 So. 877.

The fact that a debtor owed a bank a sum amounting to more than one-tenth of the paid-in capital of the bank does not render such debt uncollectible and void, under Starr & C. Ann. St. 1896, c. 16a, par. 13, providing that the total liabilities of any person to any association shall at no time exceed one-tenth part of the amount of capital of such association actually paid in. Judgment, 93 Ill. App. 176, affirmed. Nelson & Co. *v.* Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142.

49. "After stating the limitation upon the total liabilities to a bank by any one person, company or firm, at a sum not exceeding ten per cent of the bank's capital stock actually paid in, the statute proceeds to say: 'But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as borrowed money.' Starr & Curtis' Stat., Chap. 16a, entitled 'Banks,' § 13." Nelson & Co. *v.* Leiter, 93 Ill. App. 176.

50. Loan to officer.—Pemigewassett Bank *v.* Rogers, 18 N. H. 255; Fisher *v.* Murdock (N. Y.), 13 Hun 485.

Where a note was discounted by a bank, and indorsed by one of its di-

As to Security.—The fact that the taking of the security by which a loan of the bank is secured, is prohibited by law, will not invalidate either the loan or the security.[51] This is true where a national bank takes real

rectors, who was then liable to the bank to an amount exceeding that authorized by Act 1841, c. 77, § 19, it was held that this provision of the statute was not of that class of prohibitions which enter into the ordinary contracts of banks with their customers, and, when violated, render them illegal. Its violation might afford ground for an injunction, or a forfeiture of charter, but could not be availed of by a debtor of the bank in defense of a note. As to him, the violation was entirely collateral. It did not enter into or affect his contract. Richmond Bank *v.* Robinson, 42 Me. 589.

Under the act of amendment to Rev. St., c. 77, § 19, providing that the debts due a bank from a director as principal or indorser shall not exceed 8 per cent of the capital stock, where a bank discounted a note on the indorsement of a firm, who were payees, the maker can not defend an action by the bank thereon on the ground that one of the firm was a director of the bank, and indebted thereto in an amount exceeding the per cent above stated. Richmond Bank *v.* Robinson, 42 Me. 589.

Held bank could not recover.—The act to incorporate the State Bank of Ohio and other banking companies (§ 44) provides that the stockholders shall at no time be liable to such company to an amount greater than three-fifths of the stock actually paid in, "nor shall the directors be so liable, except to such amount * * * as shall be prescribed by the by-laws of such company, adopted by its stockholders." Held, that a bank can not recover of a director on a note made by him for money borrowed of the bank, where there was no by-law authorizing the loan. Arnold *v.* Reid, 1 O. Dec. 347.

A bank director, while indebted to the bank for an amount greater than 75 per cent of the stock held by him, obtained a loan for a further amount, giving his note, guarantied by A. The charter of the bank prohibited its lending to a director more than 75 per cent of the amount of his stock. Held, that the note was void, and could be enforced neither against the director nor against the guarantor. Workingmen's Banking Co. *v.* Rautenberg, 103 Ill. 460, 42 Am. Rep. 26.

By-law violated.—Where the charter of a bank provides that the directors of such bank shall not be liable to the bank except to such amount and in such manner as shall be prescribed by the by-laws of such bank, adopted by its stockholders to regulate its liabilities, a contract whereby the directors of the bank lend money to one of their associate directors, without the authority of a by-law, is void, and can not be enforced by the bank; the bank's remedy in the premises being by action for damages against the directors. Arnold *v.* Reid, 1 O. Dec. 347.

51. As to security.—Schuyler Nat. Bank *v.* Gadsden, 191 U. S. 451, 48 L. Ed. 258, 24 S. Ct. 129; Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 35 L. Ed. 107, 11 S. Ct. 496; Thompson *v.* St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66; Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. Ed. 188; National Bank *v.* Whitney, 103 U. S. 99, 26 L. Ed. 443; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. Ed. 648; First Nat. Bank *v.* Stewart, 107 U. S. 676, 27 L. Ed. 592, 2 S. Ct. 778.

One who has borrowed money from a trust and banking corporation upon securities on which it was prohibited from lending can not avail himself of the prohibition as a defense to the action for money lent. The breach of the law committed in making the loan may expose the corporation to penalty at the suit of the state, but is no answer to its claim to be repaid. Allen *v.* Freedman's Sav., etc., Co., 14 Fla. 418.

The charter of the Central Bank of Georgia limits loans to $2,500, requires two or more good securities or indorsers on notes and bills, and provides that all notes shall be renewed annually. Held, that these provisions were directory merely to the officers, and that a debt might be collected by the bank, although contracted in violation of all these rules. Bond *v.* Central Bank, 2 Ga. 92.

The mere fact that a statute under which a bank is organized prohibits it to take certain securities or to do certain acts, or makes it penal to do so, does not render such securities void.

estate security;[52] or a mortgage to secure a present loan,[53] or future ad-

because such prohibitions are made, and such penalties are imposed for the benefit of the government, which may or may not at its pleasure enforce the forfeiture; and certainly not for the benefit of the borrower or his securities. Wroten *v.* Armat, 72 Va. (31 Gratt.) 228, citing Banks *v.* Poitiaux, 24 Va. (3 Rand.) 136, 15 Am. Dec. 706; Rivanna Nav. Co. *v.* Dawsons, 44 Va. (3 Gratt.) 19, 46 Am. Dec. 18.

52. National bank taking real estate security.—"It is no longer open to controversy that the provisions of the statutes of the United States forbidding the taking of real estate security by a national bank for a debt coincidently contracted do not operate to make the security void, and thus enable the individual who has contracted with the bank to defeat recovery, but simply subject the bank to be called to account by the government for exceeding its powers." Schuyler Nat. Bank *v.* Gadsden, 191 U. S. 451, 48 L. Ed. 258, 24 S. Ct. 129. See, also, Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. Ed. 188; Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 35 L. Ed. 107, 11 S. Ct. 496; Zantzingers *v.* Gunton (U. S.), 19 Wall. 32, 22 L. Ed. 96; Scott *v.* Deweese, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585; Lantry *v.* Wallace, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878.

And so with the purchase by a national bank of a note secured by deed of trust upon real estate. The trust deed is enforcible. Swope *v.* Leffingwell, 105 U. S. 3, 26 L. Ed. 939; Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. Ed. 188.

"The statute forbids a national bank to lend money upon real estate as security. Rev. Stat., § 5137. Nevertheless, this court has frequently held that the borrower can not escape liability for the repayment of the money so borrowed, nor dispute the right of the bank to enforce the security taken in violation of the statute; that it was for the government and not for the borrower to complain of the bank's departure from the rule prescribed by statute. Scott *v.* Deweese, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585, and authorities there cited." Lantry *v.* Wallace, 172 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878.

Section 5136, Rev. Stat., 999; 13 Stat. 99, does not, in terms, prohibit a loan on real estate but the implication to that effect is clear. What is so implied is as effectual as if it were expressed. Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. Ed. 188.

Where it is not contended that under the law of a state an agent, acting in his own name, may not take security for the benefit of a principal, or that there is or could be any valid statute of the state discriminating against national banks, and depriving them of the benefit of transactions so consummated, this being true, it follows that the taking of real estate security by the president of the bank in his individual name, for the benefit of the bank, was in legal effect but the taking of security by the bank itself. Schuyler Nat. Bank *v.* Gadsden, 191 U. S. 451, 48 L. Ed. 258, 24 S. Ct. 129.

A. executed a promissory note to

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53. Illegal mortgage to secure existing debt.—"In Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 35 L. Ed. 107, 11 S. Ct. 496, decided in March, 1891, after the present case was decided by the court of appeals of New York, this court approved the decision in National Bank *v.* Whitney, 103 U. S. 99, 26 L. Ed. 443, and said that a disregard by a national bank of the provisions of the act of congress forbidding it to take a mortgage to secure an indebtedness then existing, as well as future advances, could not be taken advantage of by the debtor, but 'only laid the institution open to proceedings by the government for exercising powers not conferred by law.'" Thompson *v.* St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66.

Thus a mortgage to a national bank providing in terms for the payment of $5,000, one year from its date, with interest, but declaring that it was made as collateral security for the payment of all notes which the bank held at the time against him, and for his other indebtedness then due or thereafter to become due, is enforcible. National Bank *v.* Whitney, 103 U. S. 99, 26 L. Ed. 443.

And a loan of money made by a national bank on the security of a mortgage, may be enforced if objection thereto be not raised by the United States. Fortier *v.* New Orleans Nat. Bank, 112 U. S. 439, 451, 28 L. Ed. 764, 5 S. Ct. 234, following Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. Ed. 188, and National Bank *v.* Whitney, 103 U. S. 99, 26 L. Ed. 443.

vances;[54] makes a loan upon the security of shares of its own stock, certainly after the contract is executed;[55] or upon the security of shares of

B., and, to secure the payment thereof, a deed of trust of lands, which was in effect a mortgage with a power of sale thereto annexed. A national bank, on the security of the note and deed, loaned money to B., who thereupon assigned them to the bank. The note not having been paid at its maturity, the trustee was, pursuant to the power, proceeding to sell the lands, when A. filed his bill to enjoin the sale, upon the ground that, by §§ 5136, 5137, Rev. Stat., the deed did not inure as a security for a loan made by the bank at the time of the assignment of the note and deed. Held, that the bank is entitled to enforce the collection of the note by a sale of the lands. Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188, approved in National Bank v. Whitney, 103 U. S. 99, 26 L. Ed. 443; Fortier v. New Orleans Nat. Bank, 112 U. S. 439, 28 L. Ed. 764, 5 S. Ct. 234.

Object of restriction.—"The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter, of the statute constitutes the law." Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188.

"The statute did not declare such security void, but was silent on the subject; that had congress so intended it would have been easy to say so, and it can hardly be presumed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision." National Bank v. Whitney, 103 U. S. 99, 26 L. Ed. 443.

It was not meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was the check, and none other, contemplated by congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person can not, directly or indirectly, usurp this function of the government. Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188.

Title taken in name of third party.—Although a bank by statute, or the trustees, on the expiration of its charter, who liquidate its affairs, may be deprived of power to take or hold real estate, this does not prevent either's making an arrangement through the medium of a trustee, by which, without ever having a legal title, control, or ownership of such estate, they yet secure a debt for which they had a lien on such estate, and have the estate sold so as to pay the debt. Zantzinger v. Gunton (U. S.), 19 Wall. 32, 22 L. Ed. 96.

54. Future advances.—A mortgage to a national bank, so far as it applies to future advances, is not invalid, because a mortgage of that character is prohibited by the national banking law. National Bank v. Whitney, 103 U. S. 99, 26 L. Ed. 443; Fortier v. New Orleans Nat. Bank, 112 U. S. 439, 28 L. Ed. 764, 5 S. Ct. 234.

Whatever objection there may be to a mortgage executed to a bank (national) for future advances, as security for such advances, from the prohibitory provisions of statute, the objection can only be urged by the government. National Bank v. Whitney, 103 U. S. 99, 103, 26 L. Ed. 443, citing Fleckner v. Bank, 8 Wheat. 338, 355, 5 L. Ed. 631. See Fritts v. Palmer, 132 U. S. 282, 292, 33 L. Ed. 317, 10 S. Ct. 93; Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, 413, 28 L. Ed. 733, 5 S. Ct. 213.

55. National bank loan on security of its own stock.—"While § 5201 of the Revised Statutes in terms prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower, if a loan upon such security be made. If, therefore, the prohibition can be urged against the validity of the transaction by anyone except the government, it can only be done before the contract is executed, while the security is still subsisting in the hands of the bank. It can then, if at all, be invoked to restrain or defeat the enforcement of the security. When the contract has been executed, the security sold, and the proceeds applied to the payment of the debt, the courts will not inter-

stock in another national bank, even if it were prohibited, which it is not.[56]

As to Interest and Usury.—See elsewhere.[57]

Action for Money Received.—Where a bank loans money by the discounting of paper, prohibited by its act of incorporation, though no action will lie on the note, an action may be maintained to recover the money so loaned.[58]

§ 178 (3) Particular Loans or Discounts.—Loan in Bank Notes.—That a bill of exchange was discounted, by a branch of the Bank of the United States in Pennsylvania, in notes of the old Bank of the United States, was no defense to an action on the bill, as it did not appear that the former had obtained its bills of the latter after its charter had expired.[59] An incorporated banking company, to avoid a run, may make loans in its own bills on a contract that, if any of the bills shall be returned to the bank during the continuance of the loan, the borrower shall redeem them with specie, and that he shall also receive of the bank a certain amount of the bills of other banks, not current at par, for which he should pay specie.[60]

Loan to Officers.—A bank may lend money to its officers.[61] Its right to

fere with the matter. Both bank and borrower are in such case equally the subjects of legal censure, and they will be left by the courts where they have placed themselves. First Nat. Bank *v.* Stewart, 107 U. S. 676, 27 L. Ed. 592, 2 S. Ct. 778. See First Nat. Bank *v.* Lanier (U. S.), 11 Wall. 369, 20 L. Ed. 172.

Supposing that it was unlawful for the bank to take those shares as security for a loan, it was not unlawful to authorize the bank to sell them when the contingency occurred. The shares being sold pursuant to the authority, the proceeds would be in the bank as borrower's property. His administrators, indeed, affirm the validity of that sale by suing for the proceeds. As against the deceased, however, the money loaned was an offset to the proceeds. In either view the administrators can not recover. First Nat. Bank *v.* Stewart, 107 U. S. 676, 27 L. Ed. 592, 2 S. Ct. 778.

The provision found in the thirty-seventh section of the Act of 1863, prohibiting an association from making any loan or discount on the security of the shares of its own capital stock, was re-expressed in a substantially identical, though somewhat more amplified, form of statement in § 35 of the new act. The provisions of the Act of 1864, in the particulars in question, are now embodied in §§ 5139 and 5201 of the Revised Statutes. Third Nat. Bank *v.* Buffalo German Ins. Co., 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524.

56. On security of other national bank stock.—Germania Nat. Bank *v.* Case, 99 U. S. 628, 25 L. Ed. 448.

57. See post, "Interest or Rate of Discount, and Usury," § 181.

58. Action for money received.—Under Act Feb. 24, 1845, incorporat- the State Bank of Ohio and other banking companies, a restriction of the power to discount notes to those whose negotiability is restricted by special indorsement, where a branch discounts a note payable to such bank, or order, no action can be maintained thereon either by such branch bank, or, in case of its insolvency, by the State Bank of Ohio, but an action may be maintained for the money loaned. Vanatta *v.* State Bank, 9 O. St. 27.

59. Bank *v.* Davis (N. Y.), 2 Hill 451.

60. Northampton Bank *v.* Allen, 10 Mass. 284.

In denominations not allowed by statute.—Although the issuance of bills of a less denomination than three dollars was prohibited at the time when a contract for the loan of the bills of an unchartered association was made, yet the mere fact that bills for less than three dollars were received does not avoid the contract. McGehee *v.* Powell, 8 Ala. 827.

61. Loan to officers.—Money was loaned by a bank to its cashier with the consent of its stockholders and di-

do so is usually controlled by statutory or charter provisions.[62] A charter provision that no director or officer shall borrow any of the funds of the bank does not prevent the bank from recovering a loan made to a partnership because one of its members is an officer or stockholder in the bank.[63]

Loan Not Authorized by Directors.—A debtor can not avoid payment of his obligations to a bank on the ground that the discounts were not made by a quorum of directors, as required by the bank's charter. Such provisions are directory merely.[64]

rectors. There was no intent to defraud those subsequently dealing with the bank. Held, that such a transaction was not void as to subsequent creditors. Barth *v.* Koetting, 99 Wis. 242, 75 N. W. 395.

As to recovery by bank where statute violated, see ante, "Where Statute Violated," § 178 (2).

62. Under Act April 16, 1850, a banking corporation thereafter created by special act can loan to a director no more than 3 per cent of the capital stock paid in, unless the act of incorporation gave a special exemption from the provisions of such act. In re Iron, etc., Sav. Bank, 12 Pa. Co. Ct. Rep. 42.

Loan without consent of directors.—Under Acts 15th Gen. Assem., p. 52, c. 60, § 17, declaring that all loans by a bank to its officers shall be made only by action of the directors in the absence of the party applying therefor, practically re-enacted in Code, § 1869, a loan by a bank to an officer thereof without the authority of the directors for the particular loan is illegal; and a resolution adopted by the directors authorizing the managers of the bank to make loans to the members of the board on their indorsements, the same as to other persons, is insufficient to make the loan legal. German Sav. Bank *v.* Des Moines Nat. Bank, 122 Iowa 737, 98 N. W. 606.

Note given for existing indebtedness.—Act July 3, 1841, § 1, prohibits directors of banks from acting as such while they are debtors to the bank to an amount exceeding half their stock. Section 2 restrains directors from becoming indebted to their banks in sums exceeding half their stock, and imposes a penalty for a violation thereof. Section 3 makes void any promise or undertaking of such director to indemnify those who may assume to pay his debt to the bank. Held, that a note given for the accommodation of a director of a bank for money which he owed the bank, exceeding the amount of one-half his stock, is not prohibited, and is, therefore, valid, although the bank, when it received the note, had knowledge of all the facts. Pemigewassett Bank *v.* Rogers, 18 N. H. 255.

Where a bank had allowed the liabilities of its directors to amount to a sum beyond that allowed by law, and the cashier of the bank, in anticipation of a legal examination of its affairs, and to reduce the directors' liabilities, procured notes to be made and indorsed for his accommodation, and with them took up other notes of his held by the bank on which a director was an indorser, it was held that the transaction was not illegal, and that the parties to the substituted paper were liable thereon. Seneca County Bank *v.* Neass (N. Y.), 5 Denio 329.

Statute not retrospective.—Act May 13, 1876, prohibiting a banking company from loaning to a director more than 10 per cent of its capital stock, does not apply to a company incorporated prior thereto by special act, and having under its charter the right to loan to directors to a greater amount, though the charter of such company has been renewed since the passage of the Act of 1876. In re McKinley-Lanning, etc., Trust Co., 12 Pa. Co. Ct. Rep. 40.

Right of bank to security taken.—Where the charter of a bank prohibited the corporation from loaning any of its funds to any of the directors, and such a loan was made, and stock was transferred to it as collateral security for the loan, it was held that the bank acquired no title to nor interest in the stock transferred to it, and, if any injury accrued to a third party from its acts, it was responsible to such third party. Albert *v.* Baltimore, 2 Md. 159.

63. Fisher *v.* Murdock (N. Y.), 13 Hun 485.

64. Smith *v.* Bank, 18 Ind. 327.

Loan for Illegal Purpose.—The knowledge of the bank of the illegal use to which the money lent is intended to be applied by the borrower, or the purposes or motives of the lender, if neither enter into and forms part of the contract or consideration for the loan, can not impair its validity. The consideration is the cause of the contract, and is distinct from the motive to it.[65]

Where Proceeds Left on Deposit.—Under a Massachusetts statute it was held that the discount of a note is void if the proceeds are to be de-

65. **For illegal purpose.**—Seneca County Bank *v.* Neass (N. Y.), 5 Denio 329; Puryear *v.* McGavock, 56 Tenn. (9 Heisk.) 461.

Mere knowledge of the illegal purpose for which the money was borrowed will not defeat a recovery; nor will the private declarations of a minority of the directors, that it could have been obtained for no other purpose, bind the bank. Jones *v.* Planters' Bank, 56 Tenn. (9 Heisk.) 455.

To aid confederate states.—Mere knowledge on the part of bank officers that the money given on a note was to be used for an unlawful purpose, as in equipping a company to act against the United States, is not sufficient to invalidate the note, unless it be shown that in discounting the note it was the object and intent of the bank to aid in the unlawful purpose. Henderson *v.* Waggoner, 70 Tenn. (2 Lea) 133; Jones *v.* Planters' Bank, 56 Tenn. (9 Heisk.) 455.

To purchase futures.—A contract for the purchase and sale of "cotton futures" is a gaming contract, and therefore illegal and contrary to public policy. This being so, neither such a contract nor the loss or gain resulting therefrom can be invoked to measure the damages sustained by a party thereto in consequence of the failure or refusal of a bank to comply with its agreement to advance to him money which he intended to use as a "margin" in conducting a speculation in such "futures." In so far as the decision in Western Union Tel. Co. *v.* Blanchard, etc., Co., 68 Ga. 299, 45 Am. Rep. 480, conflicts with what is above laid down, it is, upon a formal review thereof, overruled. Moss *v.* Exchange Bank, 102 Ga. 808, 30 S. E. 267.

To purchase at foreclosure sale.—Defendant, holding a second lien on mortgaged premises, purchased the property at a sale under the decree of foreclosure, and paid the costs of the action, but failed to pay the purchase money. Afterwards he, with others, executed a note to a bank for the amount of the purchase money for the use of the sheriff, and delivered the same to one F., to be held until a motion to set aside the sale should be determined. The motion was overruled, and the sale confirmed, whereupon the sheriff took the note to the bank, and obtained the money thereon. The sale was afterwards set aside on a petition thereafter filed. The bank had no interest in the foreclosure proceedings, but simply loaned the money. Held, that it was entitled to recover. Simms *v.* Bank, 32 Neb. 607, 49 N. W. 332.

Application to use of corporation.—A bank which discounts notes of a corporation depositor, and places the proceeds to the credit of the corporation, upon whose checks they are drawn out in the regular course of business, can not be required to know that such proceeds are properly applied to the uses of the corporation; and the fact that a portion of such proceeds is not so applied will not invalidate the notes where the bank was not in collusion as to the diversion. First Nat. Bank *v.* G. V. B. Min. Co., 89 Fed. 439, modified G. V. B. Min. Co. *v.* First Nat. Bank, 36 C. C. A. 633, 95 Fed. 23.

Evidence to prove motive.—A circuit judge charged the jury that they might look to all the acts, declarations, objects and purposes of the individuals composing the board of directors, in connection with other evidence, to ascertain the motives of the bank in discounting such a note. The introduction of such testimony was not excepted to, nor were any additional instructions asked to that given in the charge. Held, no error in this. Henderson *v.* Waggoner, 70 Tenn. (2 Lea) 133.

"In the case of Jones *v.* Planters' Bank, 56 Tenn. (9 Heisk.) 455 (it was held), that the motives of the board in making the loan, could be proved only by the record of its official action. This holding must have been intended

posited not subject to demand by the borrower.[66]

§ 179. Collateral Security—§ 179 (1) Power of Bank.—Taking securities to secure a debt is a part of the legitimate business of a banking corporation.[67] It is one of the bank's implied powers in the absence of an express negation in the charter or general law.[68]

§ 179 (2) Conflict of Laws.—Where a Kentucky bank took a transfer in Ohio of notes to secure an Ohio debt, the transaction must be governed by the laws of Ohio.[69]

§ 179 (3) Persons Liable on Security.—A bank advanced money on a note secured by collaterals deposited by the indorser. The defendant appeared on the note as maker. The bank had a right to assume, in the absence of notice to the contrary, that the defendant was the principal debtor, and not surety for the indorser, and to deal with the indorser accordingly, with reference to the collaterals.[70]

Agreement between Maker and Indorser.—Where one who is in-

to apply to the particular case, as there was in evidence in that case an extract from the records of the bank, showing its actions and the motives for it. In many cases no such record of the motives or object of the bank would be made, and yet it would be competent otherwise to prove them. We do not think that the admission of the testimony as to the acts and declarations of members of the board, in this case, was error, especially as no objection was made thereto; nor that the court erred in stating to the jury that they might look to such evidence together with all the other proof in the cause." Henderson *v.* Waggoner, 70 Tenn. (2 Lea) 133.

66. **Proceeds left on deposit.**—A bank agreed with A. to discount his paper, indorsed by B., to a certain amount, and that A. should leave with them on deposit one-sixth of the several discounts, and A. agreed to give them the first offer of all his business; and it was also agreed that either party might terminate the arrangement by giving ninety days' notice to the other. After obtaining some discounts, A. informed the bank that he should extend his discount to the full amount, and gave them a check for a sixth part of said amount, and received of the bank a certificate of deposit thereof, payable after ninety days' notice of his desire to withdraw it. A. took the benefit of the insolvent law, and B. gave his notes to the bank in renewal of the notes of A. on which he was indorser, the bank agreeing to prove the notes of A. against his estate in insolvency, and to apply the proceeds towards the payment of B.'s notes. It was held that, the entire proceeds of the discount not being payable by the bank on demand, under Rev. St., c. 36, § 58, the discount was so far void that the bank could not prove the notes of A. against his estate. Western Bank *v.* Mills (Mass.), 7 Cush. 539.

67. **Collateral security.**—Fawcett *v.* Mitchell, etc., Co., 133 Ky. 361, 117 S. W. 956.

68. **Implied power.**—It is a power incident to every bank of discount that it should be permitted to secure its loans in any manner not prohibited by its charter or some public statute. Commercial Bank *v.* Nolan (Miss.), 7 How. 508.

A bank has the power to acquire a credit by bond, bill of exchange or other chose in action, and to obtain security for the payment of such credit by mortgage, deed of trust, or other security. That a bank, the main object of whose creation is to loan out money, may acquire such a credit and obtain such security, would be a plainly implied power in the absence of a plainly expressed negation of such a power on the face of the charter of the bank. And if the charter could be fairly construed so as to make it consistent with the existence of such a power, it would accordingly be so construed. Wroten *v.* Armat, 72 Va. (31 Gratt.) 228.

69. Fawcett *v.* Mitchell, etc., Co., 133 Ky. 361, 117 S. W. 956.

70. Irving Nat. Bank *v.* Duryea (N. Y.), 1 City Ct. R. 317.

debted to a bank, upon demand to furnish security, procures an accommodation note, and indorses it to the bank, an agreement between the maker and the indorser that the note is to secure only future discounts, and not past indebtedness, will not bind the bank, unless it has knowledge thereof.[71] If a bank which discounts indorsed paper would in any case be bound by an agreement, of which it has notice, between the maker and indorser, that certain collaterals held by the bank to protect previous loans to the maker should also cover the transaction in question, the evidence of notice should be very clear and distinct, when such defense is made upon scire facias to revive a judgment against the indorser, who had made no claim to the bank that he was entitled to the protection of the collateral, but, after paying part of claim, confessed judgment for the balance, and then made repeated payments on account of the judgment.[72]

§ 179 (4) Manner of Making and Validity of Pledge.—Where a debtor to a bank, besides a cash deposit, transferred to it certain shares of stock without condition, but with an understanding that they should be held as collateral security for the debt, and the surplus paid over to the debtor, the transfer was valid.[73] A regular customer of a bank in the state of Indiana having consigned goods by railway to a point in Georgia, and taken a bill of lading showing on its face that he was the consignor and another person the consignee, and having drawn a negotiable bill of exchange payable to the cashier of the bank of which he was a customer, the bill being drawn on the consignee of the goods for the purchase price thereof, and having deposited with the bank this bill with the bill of lading attached and procured the bank to enter the amount to his credit under circumstances which would entitle him to draw upon the bank at once for the proceeds; from these facts a jury would be legally authorized to infer that the intention was to make an equitable assignment from the consignor to the bank of the fund representing the price of the goods, and it was not error to refer to the jury the question as to whether such was the intention or not.[74]

Where Discount Refused.—If the bank refuses to discount paper it has no right to hold such paper as collateral.[75] Where notes were sent to

71. Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620.

72. First Nat. Bank v. Gorman (Pa.), 2 Atl. 51, 1 Sad. 30.

73. **Manner of making pledge.**—New England Marine Ins. Co. v. Chandler, 16 Mass. 275.

74. Haas v. Old Nat. Bank, 91 Ga. 307, 18 S. E. 188.

75. **Where discount refused.**—A letter to a banker inclosed a note, and asked the banker to discount it, and place the proceeds to the writer's credit, and, in that event, to charge a certain overdraft against the credit. Held, that the banker, having declined the discount, had no right to hold the note as collateral. Bank v. White, 154 U. S. 660, 26 L. Ed. 307, 14 S. Ct. 1191.

Notes sent by another bank.—The inaction of a bank upon receiving notification that certain notes sent by it to another bank for discount and credit would not be discounted, but would be held as collateral, and that credit should either be transferred from other banks or currency shipped, is not equivalent to a request on its part to pay overdrafts previously drawn when presented, and to hold as collateral the notes which had been sent for discount. Judgment 153 Fed. 1021, 82 C. C. A. 676, affirmed. Hanover Nat.

a bank for discount and to have the amount placed to the credit of its correspondent, but the bank refused to discount the notes but thereafter paid drafts drawn in the belief that the notes had been discounted, its correspondent becoming insolvent, the bank is liable for the money collected on the paper sent for discount and for the value of so much of it as remained unpaid, less the amount of the drafts drawn upon it by its correspondent after the notes were forwarded for discount.[76]

Misapplication of Loan.—Where a bank loans money to another bank, and the money so loaned and sent to the borrowing bank was used by the cashier of the latter for his individual purpose, and not in the business of the bank, it will not affect the title of the lending bank, to securities transferred to it.[77] If an executor borrows money from a bank, pledging property of the estate in his charge to secure it, and the money is placed to the credit of that estate, his drawing out the money by a check payable to his own order gives no notice to the bank of an intent to misapply the fund.[78]

Fraudulent Pledge of Security.—Where a person to whom a note had been left by the maker for sale pledged it as collateral for a call loan from a bank, the maker, after paying the amount of the note, can recover from the bank where a surplus was realized from other notes.[79]

Bank Not Guarantor of Genuineness.—A bank in discounting commercial paper does not guarantee the genuineness of collateral attached thereto, such as a bill of lading accompanying a draft.[80] And acceptors of

Bank *v.* Suddath, 215 U. S. 110, 54 L. Ed. 115, 30 S. Ct. 58.

Notes sent to a bank by its correspondent for discount and credit, which such bank refuses to rediscount, can not be held by it as collateral to the payment of a loan voluntarily made to cover an overdraft, by virtue of an agreement embodied in a printed form prepared by such bank, and in general use by it, which gives the said bank power to appropriate any securities "deposited with said bank, or which may hereafter be deposited with said bank, or which may be in any wise in said bank or under its control, as collateral security for loans or advances already made or hereafter to be made to or for account of" its said correspondent by said bank, "or otherwise." Hanover Nat. Bank *v.* Suddath, 215 U. S. 110, 54 L. Ed. 115, 30 S. Ct. 58.

A bank which refuses to discount notes sent to it by a correspondent bank for discount and credit has no right, by virtue of its general bankers' lien, to apply such notes as collateral to the payment of a loan voluntarily made to cover an overdraft of such correspondent bank. Hanover Nat. Bank *v.* Suddath, 215 U. S. 110, 54 L. Ed. 115, 30 S. Ct. 58.

76. Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

77. City Bank *v.* Perkins, 17 N. Y. Super. Ct. 420, affirmed in 29 N. Y. 554, 86 Am. Dec. 332.

78. Lyman *v.* National Bank, 181 Mass. 437, 63 N. E. 923.

79. **Fraudulent pledge.**—A., without authority, pledged a note made by B. and left with A. for sale. The note was pledged with other notes as collateral for A.'s call loan from a bank. B. notified the bank of his rights as soon as he learned of the pledge, and, when his note came due, paid the amount to the bank, and demanded that, if a surplus over the amount borrowed by A. should be realized from the collateral, the amount of his note should be repaid to him. A surplus was realized from the other notes as they fell due. Held, that B., could maintain an action against the bank to recover the amount paid by him. Farwell *v.* Importers', etc., Nat. Bank, 47 N. Y. Super. Ct. 409, affirmed in 90 N. Y. 483.

80. **Genuineness not guaranteed.**—"A bank in discounting commercial

bills of exchange upon the faith and security of bills of lading attached after discount by the bank forwarding same for collection, are liable to pay the same to the bank, and proof that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amount to the payees or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business.[81]

§ 179 (5) What May Be Taken as Collateral.—The collateral taken as security may consist of a bond,[82] merchandise,[83] promissory note,[84]

paper does not guarantee the genuineness of a document attached to it as collateral security. Bills of lading attached to drafts drawn, as in the present case, are merely security for the payment of the drafts. The indorsement by the bank on the invoices accompanying some of the bills, 'for collection,' created no responsibility on the part of the bank; it implied no guarantee that the bills of lading were genuine; it imported nothing more than that the goods, which the bills of lading stated had been shipped, were to be held for the payment of the drafts, if the drafts were not paid by the drawees, and that the bank transferred them only for that purpose. If the drafts should be paid, the drawees were to take the goods. To hold such indorsement to be a warranty would create great embarrassment in the use of bills of lading as collateral to commercial paper against which they are drawn." Goetz v. Bank, 119 U. S. 551, 30 L. Ed. 515, 7 S. Ct. 318.

81. **Liability of acceptors of draft on faith of attached bill of lading.**—Goetz v. Bank, 119 U. S. 551, 30 L. Ed. 515, 7 S. Ct. 318.

82. **Bond.**—The sixth section of the act incorporating the State Bank authorized it to deal in any collateral security that might appear expedient to the president and directors. Section 21 provided that, in case of money loaned on real-estate security, the borrower could, at the end of 12 months, renew the said bonds or notes. A subsequent act fixed the rates of interest chargeable on all bonds, notes, and bills payable four months after date or under, and on those payable more than four months after date. Held, that under the latter act, either as interpreting the former or as in itself so authorizing, the bank could loan money on a bond due six months after date without real-estate security. Reed v. Bank, 5 Ark. 193.

A bond taken by the bank of the state for a loan of money is not illegal and void because it is not secured by a mortgage. State Bank v. Hammond, 1 Rich. Law, 281.

Lost bonds.—Suit was brought to recover the value of certain bonds, which, it was claimed, had been left at the bank as collateral security for money which the bank might, from time to time, advance to plaintiff. Plaintiff testified that on July 1, 1868, he went to the bank to obtain a loan on this security; that the bonds could not be found, but that he received the money. Defendant asked the court to instruct the jury that, "if the bonds were not found by the bank when the note of July 1st was offered, and were not afterwards found, the jury could not find that they were taken and held as collateral security for the note of July 1st." Held, that this instruction was properly refused. Dearborn v. Union Nat. Bank, 61 Me. 369; In re Ashton's Appeal, 73 Pa. 153.

83. **Merchandise.**—A bank, duly incorporated, may lend money, and, as incident thereto, take as security a crop of cotton, and ship the same to a factor, to be sold to reimburse the loan. Deloach v. Jones, 18 La. 447.

84. A. subscribed for 50 shares in the Real-Estate Bank, and gave a bond and mortgage, but, not having a perfect title to his land, was allowed to borrow money on notes with personal security. Some time after, having acquired a perfect title, he gave his note for the amount, but did not take up his old notes. In a suit by the trustees of the bank to foreclose the mortgage, it was held that the bank had power to loan on personal security, as well as on mortgage, and that in this case the loan was made on both. Biscoe v. Tucker, 11 Ark. 145.

Usurious note.—Where two promissory notes, before due, were delivered to and accepted by an incorporated body invested with banking privileges, as collateral security for a loan of money made by said corporation to the payees of said notes, at a greater rate of

land certificate,[85] deed,[86] mortgage,[87] corporate stock of another corpo-

interest than seven per cent, the title to the same does not pass, and the maker thereof may plead in bar to a suit thereon in favor of said bank, payment made to the original payees without notice of said assignment. Caswell *v.* Central R., etc., Co., 50 Ga. 70.

Note indorsed to third person.—The payees of a note pledged it to a bank as collateral to a loan, which they afterwards paid, and received the note, and indorsed it to C., who loaned it to the payees to enable them to again obtain a loan for a certain amount, C. going with the payees to the bank, and requesting the loan. The payees became indebted to the bank for an additional sum, and agreed that the note might stand as collateral for the entire indebtedness. Held, that since C.'s request for the loan was not equivalent to notice of his ownership of the note, the bank could, as against C., hold the note as collateral for the entire debt of the payees. Voorhees *v.* Citizens' Nat. Bank, 15 Abb. Prac., N. S., 13.

Given for accommodation.—Where an accommodation note has been pledged and delivered to a bank to secure collaterally its advancements made in good faith, the bank can recover against the indorser what was bona fide advanced by the holder, but the indorsers' obligation is limited to this. Berkeley *v.* Tinsley, 88 Va. 1001, 14 S. E. 842.

85. Land certificate.—The receipt by a bank of transfers of land certificates was within the scope of the ordinary course of banking business, where they were transferable by indorsement, and showed by the indorsements thereon that the sender held them for collateral security, and were sent with instructions to deliver to a certain person upon receipt of a certain sum. First Nat. Bank *v.* First Nat. Bank, 116 Ala. 520, 22 So. 976.

86. Deed to real estate.—A bank organized under the state banking act has authority, under Rev. Codes 1899, § 3230, to receive deeds of realty as security for a past debt, as well as for contemplated advances. Merchants' State Bank *v.* Tufts, 14 N. Dak. 238, 103 N. W. 760, 116 Am. St. Rep. 682.

87. Mortgage.—Duhart *v.* Citizens' Bank, 5 La. Ann. 141.

W. and his wife were in possession of lands owned by her father at the time of the father's death. After the father's decease, the heirs at law of the decedent agreed to devise his lands among themselves, and for that purpose, in the year 1854, executed deeds of quitclaim to each other. Certain of the heirs, in their deeds to W.'s wife of their interest in the land of which she was in possession, inserted, without her knowledge or consent, the name of W. as a joint grantee with his wife, and vested in him the legal title to one undivided half of the granted premises, which deeds were duly recorded. W. had not until the year 1863, and his wife had not until the year 1883, any knowledge that his name was inserted in the deeds. In 1883, W. being indebted to a bank on notes past due, in consideration of an extension of time for the payment of his indebtedness, and of a reduction of the rate of interest, gave the bank new notes in place of the old ones surrendered and canceled, and, to secure the payment of the same, executed to the bank a mortgage on the lands conveyed to him and his wife jointly. The bank had no knowledge or notice of any claim or interest of the wife in the lands mortgaged, adverse to the title of W. as shown by the deeds to himself and wife; nor of any fraud or mistake in the insertion of his name in the deeds; nor of the manner of the acquisition of the lands by W. and his wife, other than was shown by the records of the deeds. It was held that the bank was entitled to be protected as a bona fide purchaser, for a valuable consideration, without notice, and acquired a lien upon the one undivided half part of the lands embraced in the mortgage. Farmers', etc., Nat. Bank *v.* Wallace, 45 O. St. 152, 12 N. E. 439.

To secure future loans.—A mortgage given to a bank to secure loans previously made is not void because it provides that the mortgage shall cover renewals of the debt secured, by reason of Laws 1892, c. 689, § 43, which provides that banks may take mortgages on real estate only to secure loans made by such corporations, and in satisfaction of debts contracted in the course of their dealings, since such renewals are not future loans, within the statute, which should be construed as an aid, not only to maintaining quick assets, but also to collecting past indebtedness. Dunn *v.* O'Connor, 25 App. Div. 73, 49 N. Y. S. 270.

A mortgage, given to a bank to secure a loan previously made, which provides that it shall also secure future loans, is not void under Laws 1892, c. 689, § 43, providing for the taking of mortgages by banks only in

ration,[88] bank's own corporate stock,[88a] warehouse receipt for merchan-

satisfaction of debts previously contracted, if no future loans were made. Dunn *v.* O'Connor, 25 App. Div. 73, 49 N. Y. S. 270.

Under Louisiana Code.—The proviso in St. March 27, 1843, amending Civ. Code 1838, art. 3333, which declares that that act shall not apply to certain mortgages in favor of the property banks, is not restricted to stock mortgages executed in favor of those banks, nor to those made directly to them, but extends to mortgages which have been acquired by subrogation; and where the subrogation was by authentic act, and recorded where similar contracts are required to be recorded, third persons will be affected by notice without any inscription in the books of the recorder of mortgages. [On this point, the court being equally divided, the judgment below was affirmed]. In re New Orleans, etc., Banking Co., 4 La. Ann. 471.

The statute of March 27, 1843, was intended to enlarge the effect of the statute of March 11, 1842, amending Civ. Code, art. 3333. It does not follow because these statutes are exceptional that they should be construed strictly. The construction should be such as will advance the object of the legislature. [On this point, the court being equally divided, the judgment below was affirmed.] In re New Orleans, etc., Banking Co., 4 La. Ann. 471.

In the absence of a prohibitory statute, a commercial bank may loan money on real-estate security. Bank *v.* Hemme, etc., Land Co., 105 Cal. 376, 38 Pac. 963.

88. Corporate stock.—A national bank may take corporate stock as collateral for a loan. Merchants' Nat. Bank *v.* Wehrmann, 69 O. St. 160, 68 N. E. 1004; Armstrong *v.* Herancourt Brewing Co., 11 O. Dec. 297, 26 Wkly. L. Bull. 39; Cleveland, etc., Co. *v.* Shoeman, 40 O. St. 176.

Nothing is better settled than that shares in the capital stock of a corporation are the subject of pledge. A national bank may hold such shares in the capital stock of another national bank, as collateral security for a loan or loans made or to be made. Dayton Nat. Bank *v.* Merchants' Nat. Bank, 37 O. St. 208.

Where certificates of stock in another corporation were issued to the intestate and by the latter pledged and indorsed in blank to a bank as collateral to secure the payment of money advanced by the bank to purchase the stock, and the debt was still unpaid, the lien of the bank had the character of a vendor's lien, and was superior to the claim for allowances of the widow and children of the intestate. Rev. Stat., art. 2053. Fulton *v.* National Bank, 26 Tex. Civ. App. 115, 62 S. W. 84, affirmed in 94 Tex. 704, no op.

In absence of express power.—"No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may, in the usual course of doing such business, accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders." Fulton *v.* National Bank, 26 Tex. Civ. App. 115, 62 S. W. 84, affirmed in 94 Tex. 704, no op.

Under statute forbidding bank to hold or purchase.—Under the Act of March 21, 1851, entitled "an act to authorize free banking," § 12 (2 Bates' Anno. Stat., §§ 3821-71), providing that no banking company organized thereunder shall hold or purchase any portion of the capital stock of any other incorporated company, where a company organized under such act makes a loan and takes as collateral security therefor the stock of another company organized under such act, the transaction is ultra vires, and the bank taking such security can not compel the company whose stock is so taken to transfer it to the bank so holding it, nor can the latter bank maintain an action for the refusal to make such transfer. Franklin Bank *v.* Commercial Bank, 36 O. St. 350, affirming 4 Am. L. Rec. 705, 5 O. Dec. 339.

88a. Bank's own stock.—Rev. St., tit. 3, § 226, declaring that "no bank shall make any loan or discount on pledge of its own stock," must be considered as intending a case where the stock is directly and specifically pledged as security for a particular debt, and not where the discount is made in favor of a third party, who has no interest in the stock, on the personal security of a stockholder who had previously pledged his stock generally for his future indebtedness to the bank. Vansands *v.* Middlesex County Bank, 26 Conn. 144.

Laws 1881, c. 77, § 3, makes it unlawful for any state banking associa-

dise,[89] bill of lading[90] or funds on deposit.[91]

tion to make any loan or discount on the security of the shares of its own stock, or to be the purchaser or holder of any of its shares of stock, unless such security on purchase shall be necessary to prevent loss on a debt previously contracted in good faith. Held, in an action on a note by an assignee of an insolvent bank, that a general demurrer to the answer was properly sustained, it appearing that the transaction between the bank and defendant, as set forth in the answer, was an attempt to evade the provisions of the section. St. Paul, etc., Trust Co. *v.* Jenks, 57 Minn, 248, 59 N. W. 299.

When worthless corporation stock is deposited with a bank as collateral security, the reason why such stock is worthless being that the steps necessary to validate its issue were not taken, the measure of damages in an action of deceit against the president of the corporation, who signed the certificates of stock, is the difference between the face value of the note and its actual value. Where, therefore, subsequent to the taking of such stock as collateral, both the borrower and the corporation failed, and the makers of the note were also insolvent, and the bank commenced an action of deceit against the corporation's president, which action was settled by the payment of a certain sum by the defendant to the bank, it was held that notwithstanding such payment the bank was entitled to prove its whole claim against the estate of the borrower. Lloyd *v.* Western Nat. Bank, 30 Wkly. L. Bull. 165, 11 O. Dec. 851, affirmed in 54 O. St. 681, 47 N. E. 1113.

89. A warehouse receipt for merchandise may be taken by a national bank as collateral security for a loan. Cleveland, etc., Co. *v.* Shoeman, 40 O. St. 176.

90. Bill of lading.—A bank has the power to hold a bill of lading for corn as collateral security for the payment of a check. Freeman *v.* Bank, 3 Tex. App. Civ. Cases, § 338.

Defendants contracted with plaintiff to accept and pay sight drafts drawn on them by a third person in payment of certain consignments of cattle, such draft to be accompanied with a bill of lading. Under this agreement, they received and held a consignment, but refused to honor the draft for it, which plaintiff had discounted. Held, that plaintiff had a special interest in the consigned property to the extent of the amount of the draft discounted by it. Commercial Bank *v.* Pfeiffer, 108 N. Y. 242, 15 N. E. 311.

A bank which discounted a draft to which was attached, deliverable to its order, a bill of lading of the goods against which the draft was drawn, was not required, on notice of non-acceptance of the draft, to charge the amount thereof against the drawer's account, which was insufficient to pay the draft, in order to enforce its lien on the property against an attaching creditor of the drawer. Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702.

One A. sold defendants a car load of corn, to be delivered at a certain place, and shipped the corn, taking therefor the railroad company's bill of lading, to his order. He indorsed said bill of lading to plaintiff bank, and drew a check on defendant for the agreed price of the corn, and plaintiff paid A. for said check its full face value, less exchange, and forwarded it for collection against defendant. Held, that plaintiff held the bill of lading of the corn as collateral security for the payment of the check which it had cashed, and that such transaction was a usual and legitimate one, in the conduct of a banking business. Freeman *v.* Bank, 3 Tex. App. Civ. Cases, § 338.

Not indorsed by consignee.—The fact that a bill of lading attached to a draft, discounted by a bank on the application of the consignor, is not indorsed by the consignee, does not impair the bank's lien upon the property represented by the bill for the amount advanced on its credit. Morse *v.* Chicago, etc., R. Co., 73 Iowa 226, 34 N. W. 825.

Bank has legal title.—Where a seller ships goods under a contract of sale, by the terms of which the title does not vest in the buyer until accepted by him, and takes a bill of lading for the goods so shipped, which he transfers to a bank to secure payment of draft for the price of the goods drawn on the consignee by the seller, and discounted for him by the bank, the bank acquires legal title to the goods, which it is entitled to hold until payment of its claim. In re Non-Magnetic Watch Co., 69 N. Y. St. Rep. 98, 89 Hun 196, 34 N. Y. S. 1017.

91. Funds on deposit.—A contract by which one bank pledges any of its property in the hands of another bank,

Statutory Provision.—The term "personal security," as used in the National Banking Act of June 3, 1864, authorizing national banks to lend money on "personal security," does not limit such banks, in taking security for discounts and loans, to the personal undertaking of the borrower, or to the security afforded by the names of indorsers or personal sureties, but allows the taking of such collateral as bonds, choses in action, corporate stock, bills of lading, and other personal chattels.[92] Under the Act of 1865, incorporating the Missouri Benevolent & Loan Association, it has authority to make loans on personal security without joining therewith the pledge of goods and chattels, though section 2 provides that books shall be kept, in which shall be entered a description of the property pledged.[93]

Trust Property.—If a promissory note to a bank is signed by the maker, as trustee, and a portion of the securities deposited as collateral therefor is clearly marked as trust property, it must be inferred that the other securities, consisting of bonds capable of manual delivery, are also trust property.[94]

To Secure Previous Loans.—The restrictions as to what securities may be taken by a bank upon making a loan are not generally applicable to the taking of securities on loans already made, the officers of a bank being authorized, in the latter case, to take such securities as they may deem best.[95]

§ 179 (6) Title, Lien and Priorities.—The title of the bank to the securities is that of pledgee.[96] The bank may under an agreement be the absolute owner.[97] Where a mortgage is made in the name of an inter-

as collateral to notes discounted for and guarantied by it, authorizes the discounting bank to hold a deposit balance, standing to the credit of the borrowing bank at the time of its insolvency, as collateral to any liability, then or at maturity of the discounted notes, until the amount of the lien has been ascertained. Fisher *v.* Continental Nat. Bank, 64 Fed. 707, 12 C. C. A. 411.

92. Cleveland, etc., Co. *v.* Shoeman, 40 O. St. 176.

93. Missouri Loan Bank *v.* How, 56 Mo. 53.

94. Loring *v.* Brodie, 134 Mass. 453.

95. Merchants' Nat. Bank *v.* Wehrmann, 69 O. St. 160, 68 N. E. 1004.

96. **Title pledgee.**—Where a note is indorsed and delivered to a bank as collateral security, the indorser and the bank are to be regarded as sustaining towards each other the relation of pledgor and pledgee. Bridge Co. *v.* Savings Bank, 46 O. St. 224, 20 N. E. 339.

97. **Absolute owner.**—A bank, to enable a customer to purchase goods in a foreign country, agreed to accept drafts drawn against the goods by the customer's agent. Funds were to be provided to meet such drafts at maturity, and the customer assigned and transferred to the bank the goods, for cost of which bills should be accepted, and the proceeds of the goods and policies of insurance thereon, together with the bills of lading, as security for the payment of the drafts or other sums that might at the time of the purchase, or any time before payment, be owing by the customer to the bank. When an order of the goods was ready for delivery, the consular invoice and bill of lading were made out in the name of and delivered to the bank, together with a draft for the value, specifying the particular letter of credit. On acceptance of the draft it was sold by the agent, and the proceeds paid to the seller. The goods were then delivered by the bank to the customer, the latter executing a receipt acknowledging that he held the goods in trust for and as agent of the bank, with power to sell, provided the proceeds were immediately turned over to the bank. Held, that under the

mediary, and the property covered by the mortgage is bought by the bank, taking title in the name of the intermediary, the mortgage is treated as an assignment to a trustee.[98] Where a bank takes, as security for a loan, the notes of the borrower payable to a third person and secured by a mortgage, the notes being indorsed by such third person, the bank, by becoming the owner of the notes, acquires the equity in the mortgage.[99] Where partnership shares are transferred as security the bank does not become a partner, but a part owner in severalty of the property of the partnership.[1] Where stock in a corporation is indorsed in blank with power of attorney to transfer on the books of the corporation, and delivered to a bank as collateral security for a note, the legal and equitable title to the same passes to the bank.[2]

Lien for General Balance.—A bank which has advanced money to a customer has a lien on all securities of the latter in its hands for the amount of the general balance,[3] unless such a lien is inconsistent with the actual or

agreements with the bank the latter became the absolute owner of the goods. Wheeler *v.* New Haven Wire Co. (Conn.), 16 Atl. 393.

98. Where loan secured through intermediary.—Although all the proceedings, in the matter of securing a loan from a bank through an intermediary, may have the appearance of a transaction by the intermediary on his own account, yet when subsequent acts discredit this theory, and at the last the bank buys in the property covered by the mortgage securing the loan, taking title in the name of the intermediary, the mortgage will be treated as an assignment to a trustee. Goodman *v.* Rawson, 25 O. C. C. 696.

99. Allen *v.* First Nat. Bank, 23 O. St. 97.

1. Where partnership shares are deposited as collateral.—A customer of a national bank being largely indebted to the bank, and being in failing circumstances, and being the owner of nine shares in a partnership consisting of forty shares, each evidenced by a certificate transferable on the books of the partnership, transferred his nine shares to the bank to secure payment of his indebtedness, the bank becoming the owner of such shares. It was held that such transfer did not, in legal effect, make said bank a partner, but a part owner in severalty of the property then owned by the partnership, and as such, liable for nine fortieth parts of the debts and expenses incurred in purchasing, holding, handling, managing, improving and disposing of, said property. Merchants' Nat. Bank *v.* Wehrmann, 69 O. St. 160, 68 N. E. 1004.

2. Union, etc., Bank *v.* Farrington, 81 Tenn. (13 Lea), 333.

3. Lien for general balance.—Baltimore, etc., R. Co. *v.* Wheeler, 18 Md. 372; Miller *v.* Farmers', etc., Bank, 30 Md. 392.

Substituted property.—Under Civ. Code, § 3054, providing that a banker shall have a general lien dependent upon possession on all property in his hands belonging to a customer for the balance due from such customer in the course of his business, a banker, in addition to rights granted by an assignment of a life policy by the insured and beneficiary, has a statutory lien for the insured's overdraft on a paid-up policy issued to the banker in lieu of the assigned policy. Du Brutz *v.* Bank, 4 Cal. App. 201, 87 Pac. 467, transfer of cause denied (Sup.), 87 Pac. 469.

A provision in a bank charter that "advancements may be made," etc., "taking liens," etc., contemplates that the two should be contemporaneous acts, and not that the bank, at any time after making an advancement, could take a lien on all future purchases of the mortgagor, for a general balance due on such advancements. Bank *v.* Williams, etc., Co., 79 N. C. 129.

But see Biebinger *v.* Continental Bank, 99 U. S. 143, 25 L. Ed. 271 in which the indebtedness of the customer to the bank had been paid and their dealings suspended.

Where indebtedness paid and dealings suspended.—A. deposited with a bank, of which he was a customer, as collateral security for his current indebtedness, the note of a third person,

presumed intention of the parties,[4] as where such securities are held under

secured by mortgage, and, after the note had matured, withdrew it and the mortgage for the purposes of foreclosure and collection, under an agreement to return the proceeds, or to replace the note by securities of equal value. At the foreclosure sale A. became the purchaser, and, at the request of the bank, deposited with it his deed of the property. He had then paid all his indebtedness to the bank, and his dealings with it were temporarily suspended. Having afterwards become indebted to the bank, he became bankrupt, and the bank brought a bill against his assignee, claiming an equitable lien on the property, but there was no allegation therein of money loaned or debt created on the faith of the deposit of the deed. Held, that the deposit created no equitable lien in favor of the bank. Biebinger *v.* Continental Bank, 99 U. S. 143, 25 L. Ed. 271.

Advances on estimated value of securities.—A banker, being instructed, used his customer's funds to pay off claims constituting a lien on state bonds owned by the latter, and then took possession thereof. Later the customer sent the banker railway stocks with no specific direction, and subsequently the customer, becoming embarrassed, estimated the value of the securities, and requested to be allowed to overdraw a certain amount. The banker also estimated the value of the securities and granted the request for a less sum. Subsequently the customer sent a deed of real estate, stating that such deed, with what the banker already had, would be sufficient to cover advances. Held, that the banker had a lien on the securities. Kelly *v.* Phelan, Fed. Cas. No. 7,673, 5 Dill. 228.

4. Where inconsistent with intent.—Kelly *v.* Phelan, Fed. Cas. No. 7,673, 5 Dill. 228.

Certain promissory notes secured by a mortgage of land, the property of R., the mortgagee, were deposited by him in a bank, of which he was a director, in a package with other securities, under an agreement that they were all to be held as collateral security for his liability to the bank. R. was accustomed to add securities to this package and to take securities away from it with the consent of the officers of the bank, and in January, 1876, he took away these notes, with the permission of the cashier, and assigned them and the mortgage to W. for their full value; but the assignment of the mortgage was not recorded until May, 1877. W. requested R. to take charge of the notes for him, and R. placed them in his package at the bank, and collected the interest as W.'s agent. The mortgage was never in the bank, and no inquiry was made there in relation to it until May, 1877, when the credit of R. had become bad. Neither the president nor any director, except R., knew that the notes had been taken from the bank, and no one connected with the bank knew that he had disposed of them until he was asked to assign to the bank the several mortgages held by it as collateral security. At the time the notes were first left at the bank, and up to the time of his failure, R.'s debt to the bank had been much greater than the amount of these notes, but much less than the value of all his securities left with the bank. The notes had been relied on as part of the collateral security in making loans to R., and prior to January, 1876, R. had spoken of them as valuable, but they were not alluded to between R. and the other directors after that time. In July, 1876, the bank lent R. a certain sum, relying upon his package of securities as collateral security. At that time the package contained W.'s notes and other securities, including some bonds, which were worth more than the amount of the loan. These bonds R. was allowed, after that time, to take away and dispose of for his own benefit. The directors and officers of the bank had no actual knowledge of the return of W.'s notes, and did not rely upon them as security for any loan afterwards made to R. R. acted in good faith in selling the notes and mortgage to W., believing his debt to the bank to be much less than the value of his other securities deposited there, and having forgotten that he had given the agreement as to collateral security. W. had no knowledge of this agreement. Held, that these facts warranted a finding that R. never intended that the notes, after they were again put in the bank, should form part of the collateral security, and that the bank did not hold them as such, nor rely upon them in making loans to R. Wyeth *v.* National Market Bank, 132 Mass. 597.

some special agreement,[5] or to secure a specific loan.[6] The securities must

5. Bank *v.* New England Bank (U. S.), 1 How. 234, 11 L. Ed. 115; Miller *v.* Farmers', etc., Bank, 30 Md. 392; Baltimore, etc., R. Co. *v.* Wheeler, 18 Md. 372; Wood *v.* Boylston Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366.

A bank has a general lien for a general balance on all securities coming into its hands. Neponset Bank *v.* Leland (Mass.), 5 Metc. 259.

A saving bank, has no lien upon the surplus proceeds of the sale of stock held as collateral for payment of a promissory note for the general balance due from the maker. Brown *v.* New Bedford Inst., 137 Mass. 262.

Restriction in instrument pledged.—Where a person borrowing money from a bank makes a note therefor, and by its terms pledges as collateral security for its payment a promissory note for a large sum, which is indorsed, and also delivered to the bank, and the instrument of pledge only gives the bank the right to hold it as collateral for the note made to it, the bank has not a banker's lien on the residue of it, and the right to appropriate it to the payment of another note, indorsed by the borrower to the bank before the pledge of the collateral, and which still remains unpaid, and on which the borrower is liable to the bank. Stowe *v.* First Nat. Bank, 1 O. C. D. 292, 1 O. C. C. 524.

Contract as to security for general balance.—Defendant bank prepared and took a contract, signed by a correspondent bank, by which the latter agreed that "all bills of exchange, notes, * * * money, and property of every kind owned by the undersigned, * * * deposited with the said bank or under its control, as collateral security for loans or advances already made or hereafter to be made, to or for account of the undersigned, by said bank or otherwise," might be held by it as security for any and all indebtedness of the correspondent. Held, that such contract applied only to security or property deposited with defendant as collateral security, the words "or otherwise" having reference to the nature of the liability for which the collateral should remain as security, and not to the manner in which it came into defendant's possession and that it did not give defendant a lien on notes sent it by the correspondent for discount and credit, but which it declined to discount, to secure an overdraft unintentionally made by the correspondent in the expectation that the notes would be discounted and the proceeds placed to its credit. Van Zandt *v.* Hanover Nat. Bank, 149 Fed. 127, 79 C. C. A. 23.

On refusal to discount security.—Where an insolvent bank forwarded notes to another bank for discount, and the latter refused to discount, but paid drafts issued by the insolvent bank on the credit of such notes before learning of the refusal, it has no lien on the notes for the general balance of its account, but only for the amount actually paid upon the drafts. Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

6. **Deposited to secure specific loan.**—Masonic Sav. Bank *v.* Bang, 84 Ky. 135, 8 Ky. L. Rep. 16, 4 Am. St. Rep. 197; Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227; Stowe *v.* First Nat. Bank, 1 O. C. D. 292, 1 O. C. C. 524; In re Assignment of Meyers, 7 N. P. 262, 10 O. Dec. 121; Bacon *v.* Bacon, 94 Va. 686, 27 S. E. 576; Loyd *v.* Lynchburg Nat. Bank, 86 Va. 690, 11 S. E. 104.

Where specific property is pledged to a banking firm to secure payment of a particular loan, the firm has no general banker's lien on such property for other loans or advances made. Duncan *v.* Brennan, 83 N. Y. 487.

Where an indorser on a note to a bank pledges, as collateral security therefor, other notes owned by him, the bank has no lien on the latter notes to secure other liabilities of the pledgor to it. Neponset Bank *v.* Leland, (Mass.), 5 Metc. 259.

A bank has no lien for any balance due on the general account of a customer upon securities which have been deposited with the bank by the customer for a special purpose, or for the payment of a particular loan. Armstrong *v.* Chemical Nat. Bank, 41 Fed. 234, 6 L. R. A. 226.

Where a customer deposited with his banker collaterals as security for a specific loan, and there was nothing said as to such collaterals being held to secure a general balance, and it was the practice between them that when a loan was paid the customer was to take up the collaterals before maturity, the banker can not claim a lien on the collaterals to secure a general balance. Grant *v.* Taylor, 35 N. Y. Super. Ct. 338.

Certain bills of exchange, without any consideration between the drawer and acceptor, were made to raise

have come into the hands of the bank in the usual course of banking business.[7] A general lien by a bank for a balance of an account is not favored

funds for a special purpose for the benefit of both drawer and acceptor. The drawer, instead of using the drafts for the proper purpose, pledged them with a broker or banker, and borrowed specific sums of money upon them. The broker claimed to hold the bills for a general balance due from the drawer, after payment of the specific advances. Held, that he was entitled to a lien only for the specific loans. Grant *v.* Taylor, 35 N. Y. Super. Ct. 338.

Where specific debt paid.—The rule that a banker has a general lien on all securities in his hands belonging to his debtor does not apply to a surplus arising from sale of collateral securities after the debt for which they were pledged has been paid; and on the death of the debtor such surplus becomes subject to distribution, under §§ 33, 34, art. 2, c. 39, Gen. St., which provide for its payment to other creditors, till they have received a sum equal, pro rata, with the lien creditor. Masonic Sav. Bank *v.* Bang, 84 Ky. 135, 8 Ky. L. Rep. 16, 4 Am. St. Rep. 197.

In absence of agreement.—Where an absolute deed is given to secure a loan from a bank, no subsequent indebtedness of the borrower to the bank is secured by the deed, unless there is a written agreement to such effect. Fleming *v.* Georgia R. Bank, 120 Ga. 1023, 48 S. E. 420.

To secure note of partnership.—Where a partnership borrows money from a bank, giving a note, and pledges as collateral another note of the partnership, and the instrument of pledge only gives to the bank the right to hold such note as collateral for the one so executed, the bank has not a banker's lien on the residue for the payment of another note indorsed by the partnership to it before the pledge of the collateral, and on which the firm is liable to the bank, since the bank is bound by its contract. Stowe *v.* First Nat. Bank, 1 O. C. D. 292, 1 O. C. C. 524.

Bank can not plead set-off.—Where collateral is left with a bank as security for payment of a note, the bank can not, upon renewing the note, credit the collateral against both the new note and other indebtedness of the maker to it, without the maker's knowledge or consent that the collateral is to be used as security for the other indebtedness; nor can the bank avail itself of the doctrine of set-off. In re Assignment of Meyers, 7 N. P. 262, 10 O. Dec. 121.

After the dissolution of and the appointment of a receiver for a partnership which had pledged a note to a bank as collateral security for a loan, an action was brought by the bank on the pledged note, and the receiver was made a party and set up his claim for a judgment against the makers of the note, for the amount that would be left after the satisfaction of the note for which it had been pledged, and to this extent denying the ownership of the bank to the note. The bank replied, setting up its banker's lien on such residue for the other note. By consent, the whole amount due on the collateral note was paid to the bank without prejudice to the rights of the receiver, and was more than sufficient to pay the note for which it had been pledged. The bank filed an amended reply alleging the receipt of the money by it, but setting up as against the receiver's right to it the other note by way of set-off. It was held that this could not be done, the claim the receiver was asserting being one against the makers of the collateral note, and when the bank received this it was money had and received to his use, and became a claim against the bank, and could not be offset by a claim against a dissolved partnership. Stowe *v.* First Nat. Bank, 1 O. C. D. 292, 1 O. C. C. 524.

Bank must surrender security upon payment of debt.—Where a promissory note belonging to a third person is deposited by a debt or to his creditor, a bank, to secure a particular debt, upon payment of that debt the bank is bound to surrender the collateral, and can not hold it on account of any other indebtedness due by the debtor. Teutonia Nat. Bank *v.* Loeb & Co., 27 La. Ann. 110.

7. The lien given to a banker by Rev. St. Idaho 1887, § 3448, declaring that a banker has a general lien dependent on possession on all property in his hands belonging to a customer for the balance due him from such customer in the ordinary course of business, is limited to property taken by a banker in the usual course of the banking business, such as banks are in

and a usage giving the bank such lien must be proved, as the lien will not be presumed to exist in the absence of such proof, or of an express agreement.[8] A lien for a general balance is not inconsistent with a lien by special contract.[9]

Priorities.—Where, pending proceedings for review of a judgment, which was afterwards affirmed, the debtor gave a mortgage which was afterwards transferred to a bank, in an action to settle priorities the bank's interest in the land mortgaged dates from the entry for record of the mortgage.[10] The lien of a judgment creditor against the debtor is superior to a banker's lien as to a collateral note pledged to secure another indebtedness.[11] Under an agreement whereby a customer was to buy goods and deliver the same to the bank as security for the purchase price, the customer bought goods which were delivered to him and paid for by the bank, the title passed to the customer and the goods became subject to a judgment against him as against a claim by the bank.[12]

the habit of dealing in, or in taking on deposit, or for collection, or otherwise, as notes, bonds, stocks, and other choses in action, and does not include stocks of merchandise, etc., which can not conveniently pass into the actual possession of the bank. In re Gesas, 77 C. C. A. 291, 146 Fed. 734.

8. Grant *v.* Taylor, 35 N. Y. Super. Ct. 338.

9. **General and special liens not inconsistent.**—In an action against a bank to recover notes which it claims to hold as security for the payment of a debt, defendant's assertion of a general lien is not inconsistent with its claim of a lien by special contract. Cockrill *v.* Joyce, 62 Ark. 216, 35 S. W. 221.

10. **Priorities.**—In May, 1875, C. recovered judgment against L., who then owned four parcels of land. Pending proceedings to reverse this judgment, L. mortgaged one parcel to P., and afterwards conveyed the other parcels to other grantees. A national bank became the owner of the mortgage note. The sum due on the note exceeded the value of the mortgaged premises, and L. being insolvent, the bank, to save expense of foreclosure, accepted a deed for the land in payment of the mortgage debt. C.'s judgment was affirmed, and an action to settle priorities was properly brought. It was held the bank's interest in the land was properly dated from the entry for record of the mortgage to P. Lamprect *v.* Kehrwicher, 40 O. St. 646.

11. After the dissolution of a partnership and the appointment of a receiver therefor, a bank brought an action on a note pledged by the firm as collateral. The receiver was made a party, and set up his claim for a judgment against the makers of the pledged note for the difference between its amount and the note for which it had been pledged, to this extent denying the ownership of the bank. Replying, the bank set up its banker's lien on such residue for another note on which the firm was liable to the bank. By consent, the whole amount due on the note in suit was paid to the bank without prejudice to the rights of the receiver. The bank filed an amended reply, alleging its receipt of the money, but setting up, as against the receiver's claim, the other note by way of set-off. Held, that when the bank received the residue, it was money had and received to the receiver's use, since his claim was one against the makers of the collateral note, and, having become a claim against the bank, could not be offset by a claim against the dissolved partnership. Stowe *v.* First Nat. Bank, 1 O. C. C. D. 292, 1 O. C. C. 524.

12. Although a person engaged in purchasing goods for the purpose of filling orders previously received by him from others, may have arranged generally with a bank to pay for all goods purchased by him in the course of such a business, upon an express agreement that upon so doing the bank was to have possession of and title to such goods until reimbursed for its advances by the payment of drafts drawn in its favor by the dealer upon his customers, the bank to honor his checks for the purchase money, charg-

§ 179 (7) Right to Take Several Securities.—A creditor may lawfully take and hold several securities for the same debt, and can not be compelled to yield up either, until the debt is paid; therefore, the bank has a right to take security from one of the parties to a bill or note discounted by it, and also to hold the shares of another party as security for the same.[13] An agreement by which the borrower is to give the bank future security is not invalid as a fraud upon other creditors of the borrower.[14]

§ 179 (8) Equities of Third Persons.—Where the bank takes a security for a pre-existing debt it takes subject to the equities of third persons,[15] but where the bank advances money upon faith of the collateral it

ing him therewith and crediting him with the proceeds of the drafts, yet where, in a particular instance, a purchase was made and the goods delivered to the dealer himself, the bank paying the price thereof upon his check without having obtained either actual or constructive possession of the goods or having had any dealings with the seller, the title passed to the dealer and the goods became subject to an existing judgment against him as against a claim by the bank. Central Georgia Land, etc., Co. *v.* Exchange Bank, 101 Ga. 345, 28 S. E. 863.

13. **Several securities.**—"There is no want of equity, in holding the shares of P., who is the immediate debtor to the bank, liable in the first instance, rather than resorting to the security of an indorser, who is only liable upon the default of the acceptor." Union Bank *v.* Laird (U. S.), 2 Wheat. 390, 4 L. Ed. 269.

14. **Agreement for future security.**—An agreement between a bank and a borrower whereby the bank advances money through the borrower with the understanding that the latter, at any time that the bank shall deem it necessary for its own protection, shall execute to it a mortgage upon the personal property for the purpose of securing the bank, is not invalid as being a fraud upon the rights of other creditors of the borrower, and will be upheld in equity. Campbell Printing Press, etc., Co. *v.* Bellman Bros. Co., 5 O. C. D. 389, 11 O. C. C. 360.

15. **Equities of third persons.**—Where stocks are assigned to a bank simply as collateral security for a pre-existing indebtedness of the bank, which did not contract in any way on the faith of such security, this assignment confers on the bank no better title than the assignee had. Cleveland *v.* State Bank, 16 O. St. 236, 88 Am. Dec. 445. See, also, Roxborough *v.* Messick, 6 O. St. 448, 67 Am. Dec. 346; First Nat. Bank *v.* Crawford, 2 Cin. R. 125, 13 O. Dec. 807.

If one of the officers of a body claiming to be a corporation loan money to it upon a promissory note purporting to be made by it, by its president, he will be estopped from denying its corporate existence, and can not recover upon the same against the stockholders personally; and if, to obtain a loan of money, he pledges such note as collateral security, his lendor knowing that the organization claims to be a corporation, and the individual stockholders were ignorant of such transactions, such last lender, or pledgee, stands in the shoes of his borrower, and can not recover against the stockholders personally, because his borrower could not, such paper not being the commercial paper of individuals taken in the usual course of business without notice of the rights of the stockholders against personal liability upon the same. Second Nat. Bank *v.* Lovell, 2 Cin. R. 397, 13 O. Dec. 972.

The Merchants' National Bank of Cincinnati, as the agent of the Quebec Bank of Toronto, held for collection a gold draft, of which, Geo. M. Bacon & Co., of Cincinnati, were the acceptors. This draft not being paid at maturity, Bacon & Co. gave their promissory note to the national bank as security for its payment. This note being about to fall due, Bacon & Co. obtained from Weyand & Jung their accommodation note for the express purpose of taking up the gold draft. The national bank refused to discount this accommodation note, or to apply it in payment of the draft, or to give further time for payment, but received it as collateral security only for the pre-existing debt. The Quebec Bank of Toronto brought suit against Weyand & Jung on the note at its maturity. Held, that, as the national bank, as the

occupies the position of a bona fide holder for value.[16] The bank may be held chargeable with notice of the equitable title of a third party where it appears on the face of the security.[17] The defendant acted for the bank in examining the title of land, and in executing a mortgage on the land made to secure a loan by the bank. The mortgage contained full covenants of warranty, and did not refer to a prior incumbrance held by the defendant. The bank had no knowledge of the defendant's incumbrance. The evidence justified a finding that the defendant gave a certificate of good title to the premises free of incumbrances to the bank, and that the bank made the loan relying on the certificate.[18]

§ 179 (9) Custody and Surrender of Security.—Conversion of Security.—The action of the bank in refusing to surrender collateral on payment of the debt secured and holding it for a debt for which it was not pledged amounts to a conversion,[19] but an attempt to obtain dividends on and to vote stock pledged is not where the debtor was given a proxy to vote the same.[20] An alleged misapplication of collaterals by the president of a

agent of the plaintiff, received the accommodation note without any consideration therefor, and as collateral security only for a pre-existing debt, it was received subject to any defense which Weyand & Jung might have to it against Bacon & Co.; and as Bacon & Co. gave Weyand & Jung no consideration for it, and as it was not used for the purpose for which it had been given to Bacon & Co., the plaintiff could not maintain its action on it against Weyand & Jung. Quebec Bank *v.* Weyand, 2 Cin. R. 538, 13 O. Dec. 1055.

16. Thus, where a factor holding a warehouse receipt for the delivery of merchandise consigned to him by the owner to sell on commission, in order to obtain a loan from a bank, gave to the bank his negotiable promissory note, and as collateral security therefor (and not to secure any antecedent debt or demand), duly transferred and delivered to the bank the warehouse receipt, and made an agreement with the bank for the disposition of the merchandise, it was held that under the Act of March 12, 1844 (1 S. & C. 420), if the bank in good faith loaned the money, and took the warehouse receipt, and made said agreement, upon the faith that the factor was the true owner of the merchandise, such transfer and agreement were valid, and the bank was entitled to hold the merchandise as security for the payment of the note. Cleveland, etc., Co. *v.* Shoeman, 40 O. St. 176.

17. Notice of equitable title.—"In the case of Duncan *v.* Jaudon, 15 Wall. 165, 21 L. Ed. 142, this court decided that a banker lending money to a person, for his private use, on the security of stocks, the certificates of which showed that he held them as trustee for another, was chargeable, as a party to the breach of trust, for the value of the trust property converted, and cited with approbation the similar decision in Shaw *v.* Spencer, 100 Mass. 382, where the certificates were in the name of 'A. B., trustee,' without naming a cestui que trust. In that case it was held that the pledge is, by the terms of the certificate, put on inquiry as to the character and limitations of the trust, and if he accepts the pledge without inquiry, does so at his peril." National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693.

18. Nickerson *v.* Massachusetts Title Ins. Co., 178 Mass. 308, 59 N. E. 814.

19. Conversion of security.—Where a bank asserted a right to hold property pledged to it as security for debts for which the property had not been pledged, and refusal to deliver the property except on payment of such debts in addition to those secured, such refusal constituted a conversion of the property. Memphis City Bank *v.* Smith, 110 Tenn. 337, 75 S. W. 1065.

20. Where F. & W. borrowed money of bank on a note giving stock in gas company as collateral security, which was endorsed in blank, with power of attorney to transfer on the books of the company, under an agreement in

bank is waived, as against the bank, by subsequently giving a new note for the whole original loan, without any abatement for the missing collaterals.[21] The bank may be said on principles of equity to have held the stock as trustee for the maker of the note, and therefore not liable for conversion of the securities until such time as it actually parted with them by sale, or gave notice to the maker that it claimed to hold the stock as its own and denied that he had any right to it in the absence of a contract with respect thereto.[22]

Loss of Security.—A bank which has in its possession collateral security for the payment of loans is called upon to take the same care that good business men or persons or corporations of their class ordinarily take of such bonds and is liable for their loss.[23] This is the common-law liability of a pledgee and is not increased by a receipt for the deposit of the security.[24] The fact that a watchman employed to guard a bank left at four o'clock in the morning, after which plaintiff's securities were taken from the bank by robbers, is such slight evidence of want of ordinary care that

the note that the bank might protect itself by the sale of the stock, and before note fell due, the bank had the stock transferred to it on the books of the gas company, but not intending thereby to prejudice the rights of F. & W., and afterwards the bank insisted on its rights to the dividend declared on the stock, and on the right to vote it, but tendered F. a proxy to vote same; held, these facts do not show a conversion of the stock by the bank. Union, etc., Bank *v.* Farrington, 81 Tenn. (13 Lea) 333.

21. Girard Bank *v.* Richards (Pa.), 4 Phila. 250.

22. Moore *v.* Central Nat. Bank, 12 O. C. C., N. S., 529, 21-31 O. C. D. 614.

23. Loss of security.—Fleming *v.* Northampton Nat. Bank, Fed. Cas. No. 4,862a, 62 How. Prac. 177.

Certain bonds were deposited with a bank as security for a loan. When the loan was paid, the bonds were not returned or offered to the owner, but a receipt was issued to him by the cashier, stating that the bonds were held by the bank for safe-keeping or for future security for any loan to the owner. Subsequently the bonds were demanded, but the bank could not produce them. In an action against the bank for the value thereof, defendant could not explain the loss. The cashier had proved to be a defaulter, but it was not shown that he had stolen them, or appropriated them to his own use. Held, that the bank was liable. Ouderkirk *v.* Central Nat. Bank, 52 Hun 1, 4 N. Y. S. 734, 22 N. Y. St. Rep. 127, affirmed in 119 N. Y. 263, 23 N. E. 875; Hollister *v.* Central Nat. Bank, 52 Hun 610, 4 N. Y. S. 737, 22 N. Y. St. Rep. 131, affirmed in 119 N. Y. 634, 23 N. E. 878.

Evidence of previous care for securities.—In an action against a banking firm for damages on account of negligence, by reason of which certain bonds deposited by plaintiff with defendants had become lost, evidence that the bonds had been pledged as collateral security for loans at various times before they were stolen is competent to show that the relation of the parties to each other and to the bonds, in order to determine what would constitute reasonable care, though, at the time of the theft, all such loans had been paid. Gray *v.* Merriam, 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. Rep. 172.

In a suit to recover the value of certain bonds left at defendant bank as collateral security for money which the bank might advance plaintiff, and which were lost afterwards, testimony of the assistant cashier of the bank as to other bonds having been lost or misplaced, and afterwards found, is admissible to show how the business of the bank was conducted, and as bearing on the question of care. Dearborn *v.* Union Nat. Bank, 61 Me. 369.

24. A receipt given for bonds deposited as security, to be returned on the payment of the debt, is not a contract increasing the common-law liability of the bank as pledgee; and therefore, where the bonds are lost without the fault of the bank, the receipt will not support an action to recover the value. Jenkins *v.* National Village Bank, 58 Me. 275.

a jury would not be justified in finding for the plaintiff upon that fact alone.[25] A bank is not liable to the owners of collateral held by it, which was sold at less than its value by order of the commander of the United States forces during the war between the states.[26]

Negotiation of Security.—A bank, having in its hands for safe-keeping and for no other purpose, negotiable securities of its customer, may negotiate them to a bona fide purchaser.[27] Where the cashier of a bank, being indebted thereto, pledged notes as collateral, and afterwards, being indebted to a director, pledged the same notes to him, without the knowledge or consent of the bank, such director can not be held to be an innocent pur-

25. Failure to keep watchman.—Fleming *v.* Northampton Nat. Bank, Fed. Cas. No. 4,862a, 62 How. Prac. 177.

The omission of a bank, from which securities deposited as collateral for a loan were stolen on Sunday, to have an inside watchman, was not negligence per se. Erie Bank *v.* Smith, etc., Co. (Pa.), 3 Brewst. 9.

26. Loss due to superior force.—Where, in time of war, a bank was, notwithstanding the protest of its officers, put in liquidation by order of the commanding general of the United States forces, and its effects transferred to commissioners appointed by him, who, during their administration, sold for less than their face value choses in action held by the bank as collateral security at the time of the transfer—held, that as the proceedings of the commanding general and the commissioners constituted "superior force," which no prudent administrator of the affairs of a corporation could resist, the bank was neither responsible for those proceedings, nor for a loss thereby occasioned. McLemore *v.* Louisiana State Bank, 91 U. S. 27, 23 L. Ed. 196.

27. Right to negotiate.—Bankers to whom bills are pledged for the loan of money may pledge them to a third person, if the person who takes them from the bank has no notice of the character in which they are held. Merchants', etc., Nat. Bank *v.* Ohio Valley Furniture Co., 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312.

"The case of Fisher *v.* Bradford (Me.), 7 Greenl. 28, in many of its features bears a strong resemblance to the case in hand. There the note had been pledged as collateral security to a bank, and it was insisted, whilst so held, it could not be negotiated to a third person, so as to give him a right of action in his own name. In answer to this objection, Weston, Judge, said: 'The bank had a special property, which, accompanied as it was by possession of the instrument, would have justified and enabled it to sue and recover thereon. But the general owner may sue, although liable to be defeated in his action if the bank, not being otherwise satisfied, thought proper to retain the note as to its own use. And so may any other person, authorized to sue by the general owner, be subject to the same contingency. The arrangements between the bank and the payee afford no defense to the maker. The pledge having been given up, it is as to him as if it had never existed. He is not liable to the bank; and when he has paid and satisfied the plaintiff, he is completely discharged from the note; and no one who is or ever was interested in it can have any cause of complaint.'" Howe, etc., Co. *v.* Ould, 69 Va. (28 Gratt.) 1.

After knowledge of insolvency of debtor.—The L. Bank borrowed of the C. Bank $5,000, giving its notes therefor, with $7,000 of its circulating bills as collateral security. It was agreed that the bills might be put into circulation after the maturity of the notes given by the L. Bank, if the notes were not paid when due; and, soon after, the L. Bank failed, and passed into the hands of receivers. Subsequently, the C. Bank, with full knowledge of the failure, and without notice to the officers or receivers of the L. Bank, sold the $7,000 worth of bills in the market, crediting the proceeds to the L. Bank, and presented to the receivers a claim for the balance of the loan and interest. Held that, the C. Bank having made itself liable for the amount of the dividend which the receivers would be obliged to pay to the holders of the bills, such amount, when paid, should be applied in reduction of the claim of the C. Bank upon the original loan. In re Litchfield Bank, 28 Conn. 575.

chaser of such collateral, without positive evidence that he did not know of the original pledge to the bank, and that he loaned his money to the cashier on the faith of the collateral.[28]

Recording Security.—It is the duty of a bank in Louisiana to record a mortgage held by it as security.[29]

Fraudulent Use of Security by Owner or Bank.—Where a bank held warehouse notes or receipts for cotton, on which it had advanced money, and intrusted the notes to the owner to enable him to ship the cotton and obtain a bill of lading therefor, as was customary and necessary, the bank was not liable for a fraud committed by the owner by means of a false bill of lading so obtained, to which it was no party or privy. The fact that it received in good faith the proceeds of the fraud to pay its debt, does not make it liable.[30] The cashier of a bank, being indebted thereto, pledged certain notes as collateral. Without the consent of the bank, he pledged the notes to secure a debt to another. After his death his widow paid the latter debt with her own funds, and received and claimed the collateral notes. The business was transacted by her agent, who was a director of the bank, and knew that the notes were previously pledged to the bank. The widow was bound with notice of the facts known to her agent, and hence could not hold the notes as against the bank's claim. The bank was not estopped; it paid her check to take up the notes.[31]

Protection by Court.—Under the charter of the Citizens' Bank of

28. Major *v.* Stone's River Nat. Bank (Tenn.), 64 S. W. 352.

29. Necessity of recording mortgage.—The State Bank lent to A., who was already indebted to a branch of that bank for the sum of $15,000, the sum of $30,000, and it appeared that a part of the last sum was to pay A.'s former indebtedness. Held, that the mortgages taken to secure the last loan were not included under the special clause of the charter, which made mortgages given to secure certain loans, recorded from their date, but that the loan was to be considered as made under the incidental powers of the bank; and that the bank was placed on the footing of other mortgagees, and was bound to use the same diligence with them in recording the mortgages. Ross *v.* State Bank, 3 Strob. Eq. 245.

Stock mortgages.—The rule requiring the reinscription of mortgages at the expiration of ten years does not apply to mortgages given by stockholders to the property banks to secure the amount of stock subscribed. Haynes *v.* Courtney, 15 La. Ann. 630.

Under the charter of the Citizens' Bank of Louisiana, a property bank, no reinscription is necessary of a mortgage given by a stockholder to secure the amount borrowed by him. Latiolais *v.* Citizens' Bank, 33 La. Ann. 1444.

30. Fraudulent use of security.—McLeod *v.* Fourth Nat. Bank, 122 U. S. 528, 30 L. Ed. 1237, 7 S. Ct. 1212.

31. The widow of a bank cashier took up a note which he owed, and received collaterals pledged to secure the note, which the cashier had first pledged to the bank to secure his debt thereto, and had removed without the knowledge of the bank. She took up the note with her check on her account in the bank as executrix of her husband's will, though the money deposited in that account was her private property. The officers of the bank then knew that the check was to pay such debt, and that the collaterals had been pledged therefor, but did not inform her of the bank's claim. Held, that the bank was not estopped from claiming the collaterals, since, the check being drawn as executrix, the officers had reason to suppose that she was paying her husband's debt with the funds of the estate. Major *v.* Stone's River Nat. Bank (Tenn.), 64 S. W. 352.

Louisiana, the court has no control over mortgages given to secure a loan, unless the debt has been paid.[32]

Surrender of Security.—It is the duty of the bank upon repayment of the loan to surrender the securities.[33]

Holding for Other Indebtedness.—Where collateral is deposited by a debtor to his creditor, a bank, to secure a particular debt, upon payment of that debt the bank is bound to surrender the collateral, and can not hold it on account of any other indebtedness due by the debtor.[34] The act of the bank in so holding the collateral amounts to a conversion.[35] Where the bank refuses to surrender the collateral except upon the payment of the other indebtedness a tender of the amount due on the second debt is not necessary.[36]

Agreement to Surrender.—Where a bank held property as security for a debt for which plaintiff was liable as security, and, before selling the same agreed to reconvey the property to plaintiff for the amount bid at the sale, which was much less than the value of the property, the bank was not justified in subsequently refusing to comply with the contract on the ground that the amount bid was insufficient to pay the debt for which the property was pledged, since the bank still retained a claim against plaintiff for such unpaid balance.[37]

32. **Protection of court.**—Duhart *v.* Citizens' Bank, 5 La. Ann. 141.

33. **Surrender of security.**—Where a bank was notified of a chattel mortgage on certain collaterals pledged to it for a loan, it was the bank's duty on payment of its debt to surrender the collaterals to the mortgagee and not to the owner. Bank *v.* Kirkman, 156 Mo. App. 309, 137 S. W. 38.

Where a bank was notified of a chattel mortgage of collaterals pledged to it, it was not necessary that the cashier should indorse on the back of the instrument a recognition of the mortgage lien and an agreement to deliver the property to the mortgagee on satisfaction of the bank's lien, in order to impose a duty on the bank to return the collaterals on payment of its debt to the mortgagee. Bank *v.* Kirkman, 156 Mo. App. 309, 137 S. W. 38.

Before payment.—Commission merchants, having received from correspondents in another state an order for goods, shipped the goods, taking for them bills of lading, by the terms of which the goods were deliverable at their destination to the shippers, or their order. The shippers then drew bills of exchange of the consignees for the price of the goods, payable to the order of the shippers thirty days after sight, which they indorsed in blank, and, attaching thereto the bills of lading, also indorsed in blank, procured them to be discounted by a bank. The bank agreed orally with the shippers that the bills of lading should not be delivered to the consignees until the draft should be paid. Held that, even independent of the parol agreement, the transaction did not import a sale of the goods upon credit, or determine that the consignees were entitled to the bills of lading upon acceptance of the drafts without payment. Security Bank *v.* Luttgen, 29 Minn. 363, 13 N. W. 151.

34. **Holding for other indebtedness.**—Teutonia Nat. Bank *v.* Loeb & Co., 27 La. Ann. 110.

35. Memphis City Bank *v.* Smith, 110 Tenn. 337, 75 S. W. 1065.

36. **Tender not necessary.**—Where a bank refused to deliver property pledged to it, except on payment by the pledgor and his surety of other debts for which the property had not been pledged, and the surety was ready, willing, and able to pay the bank's claim and the debts secured by the pledge, a tender of the amount due on the debts so secured is not necessary. Memphis City Bank *v.* Smith, 110 Tenn. 337, 75 S. W. 1065.

37. Memphis City Bank *v.* Smith, 110 Tenn. 337, 75 S. W. 1065.

§ 179 (10) Collections on Securities.—If the collateral paper mature before the principal debt, the duty and obligation of the bank in the collection thereof is performed by the exercise of reasonable and ordinary care and diligence.[38] A bank to which a partnership had assigned various choses in action as collateral security for an indebtedness due by the partnership to the bank, had the right to apply to the satisfaction of such indebtedness, until fully paid, all collections made upon these choses in action, but did not, in the absence of any contract so authorizing, have the right to apply additional collections upon the collaterals to the payment of other debts due to the bank by the members of the partnership as individuals.[39]

§ 179 (11) Sale of Security.—Necessity for Judgment.—A bank in possession of the property of its debtor, as his agent or trustee, or bailee, may not, without reducing his debt to judgment, and without the process or order of any court, and without the consent and against the will of the debtor, sell or otherwise dispose of the property and apply its proceeds to the payment of his debt.[40]

Where Property in Hands of Third Person.—Where executory process is obtained by the Citizens' Bank of Louisiana, it is not material to inquire how any part of the land mortgaged is possessed by the defendants, as its charter authorizes it to seize and sell in whosesoever hands it may be found.[41]

Sale under Deed of Trust.—Where a deed of trust is given to a bank to secure to the bank the payment of notes discounted by the bank, and in that deed it is expressly covenanted and agreed that upon default made in

38. **Collections on securities.**—Bridge Co. *v.* Savings Bank, 46 O. St. 224, 20 N. E. 339.

If a note be made payable at a designated bank for the convenience of the maker, with no objection by the payee to the place of payment, and is indorsed and delivered by the payee to another bank as collateral security for the payee's own note, and if the collateral paper falls due before the principal debt, it is the duty of the receiver of the collateral, in the absence of any sufficient reason to doubt the solvency of the designated bank, to lodge it with such bank for collection. Bridge Co. *v.* Savings Bank, 46 O. St. 224, 20 N. E. 339.

39. **Paper of partnership.**—Under such circumstances the bank's right to appropriate to its claims against the partners as individuals any surplus remaining after the settlement of the partnership debts depended upon an accounting and an adjudgment of the partnership affairs as between the partners themselves; for the bank could not in any event apply money belonging to one of them to the satisfaction of a debt by the other, without the consent of the former. Bank *v.* Cotter, 101 Ga. 134, 28 S. E. 644.

40. **Sale of security.**—First Nat. Bank *v.* Stewart, 114 U. S. 224, 29 L. Ed. 101, 5 S. Ct. 845.

41. **Property in hands of third person.**—Citizens' Bank *v.* Downs (La.), Man. Unrep. Cas. 247.

No sale, whether judicial, forced, or voluntary, of property mortgaged to the Citizens' Bank of Louisiana, can in any manner affect the rights secured to that institution by the twenty-fourth section of its charter, which declares that (Act April 1, 1883), "all property mortgaged to that corporation for any purpose may be seized and sold at any time, according to law, in whosesoever hands or possession the same may be found, notwithstanding any alienation thereof, or change of possession, by succession, or descent to heirs, or legatees, by last will and testament, or otherwise, in the same manner as if the same was in possession of the original mortgagor." Bertoli *v.* Citizens' Bank, 1 La. Ann. 119.

payment of the notes or any part thereof, the trustee, upon request to the proper officer of the bank, after thirty days' notice, should sell the estate therein conveyed for cash, it was held that the right of the bank to enforce the trust, upon the happening of the event mentioned, is complete so far as the property is concerned.[42]

Notice of Sale.—Where the president of a bank becomes a borrower from the bank, and pledges collateral security, it can not be inferred, merely from that relationship, that he gave the bank power to sell the pledge without notice.[43] The maker of a note, which was not paid at maturity, can not be held to have been given notice of the sale of the securities pledged for its payment by the mere return to him of the canceled note, where it appears that he had requested the bank to pay the note for him and return the securities for its own protection, notwithstanding the bank declined so to do at the time the request was made.[44]

Purchase by Bank.—Except where authority has been expressly conferred, a bank can not become the purchaser of a security pledged to it.[45]

§ 179 (12) Termination and Release.—The contract of the sureties

42. Cardwell *v.* Allan, 74 Va. (33 Gratt.) 160.

43. **Notice of sale.**—In re Conyngham's Appeal, 57 Pa. 474.

44. Moore *v.* Central Nat. Bank, 12 O. C. C., N. S., 529, 21-31 O. C. D. 614.

45. **Sale of collateral to itself by bank.**—The rule that a pledgee of securities can not become the purchaser thereof either at a public or private sale, except where authority so to do has been expressly conferred, is a bar to the purchase of such securities by a bank which received for collection the note to which the securities were attached, where the note authorizes the "holders" thereof in the event of default of payment at maturity to sell the securities in whole or in part with the right reserved to the holder to become the purchaser and absolute owner thereof, free of all trusts and claims. Moore *v.* Central Nat. Bank, 12 O. C. C., N. S., 529, 21-31 O. C. D. 614.

In such a case, failure of the maker to claim the stock, or to protest against its being held by the bank, did not amount to consent on his part to the purported sale, and the statute of limitations did not begin to run against him until he received notice from the bank of its claim of ownership under the purchase. Moore *v.* Central Nat. Bank, 12 O. C. C., N. S., 529, 21-31 O. C. D. 614.

Consent of owner.—In the absence of express agreement authorizing it, a bank to which property has been pledged can not become the purchaser of the pledged property at his own sale; and if the property be bid off by him the contract of pledge is not hereby terminated, nor the relations of the parties changed, unless the pledgor elects to treat the transaction as a valid sale, in which event the pledgee will be accountable for the net proceeds of the sale. Glidden *v.* Mechanics' Nat. Bank, 53 O. St. 588, 42 N. E. 995, 43 L. R. A. 737.

If the pledgor do not so elect, the pledgee, while he retains the possession and control of the property with the ability to perform his part of the contract by restoring the property to the pledgor, can not be held for its conversion, without demand for its return accompanied with an offer by the pledgor to perform his part of the agreement. Glidden *v.* Mechanics' Nat. Bank, 53 O. St. 588, 42 N. E. 995, 43 L. R. A. 737.

When, however, the bank puts it out of its power to perform his part of the agreement, by an unauthorized disposition of the property, it will be liable for its conversion without demand and offer of performance by the pledgor; and when the bank has so disposed of a part of the property, it may be held for the conversion of all of it, as of the time of such disposition. Glidden *v.* Mechanics' Nat. Bank, 53 O. St. 588, 42 N. E. 995, 43 L. R. A. 737.

is terminated by the repayment of the loans.[46] Where a bank discounts a demand note, and receives another negotiable instrument as collateral, the maker of the collateral note is not released from liability to the bank by a failure of the bank to attempt to collect the demand note when its maker has sufficient on deposit to meet it.[47]

§ 179 (13) Renewal of Security.—The renewal of a note given as collateral does not constitute a new loan.[48] A note having been transferred by the payees to a bank as collateral security for their indebtedness to it, the makers, on its maturity, executed a renewal note to the original payees, who sold it to another bank. The bank holding the first note was not deprived of its right to recover thereon by the fact that the payees of the second note deposited its proceeds with such bank holding the original, without informing them whence the money came.[49] The makers should be permitted to testify to the circumstances under which the renewal note was executed;[50] but the holders suing on the original note were entitled to an instruction limiting the effect of such evidence to showing that the holders of the renewal note and mortgage obtained it without notice of the outstanding original one.[51]

46. **Termination and release.**—A note for $4,000, payable on demand, made by two persons as principals, and three as sureties, was deposited with a bank as security for drafts to be drawn by the principals on their agents, and to be discounted by the bank, the fact that the three were sureties being known to the bank. After drafts to the amount of over $30,000 had been discounted and paid, drafts amounting to $2,000, payable on time, were drawn by the principals, discounted by the bank, and protested for nonpayment; and the bank brought suit on the $4,000 note against all the makers, on the alleged ground that they were liable for all the indebtedness of the principals not exceeding the amount of such note. Held, that the contract of the sureties was not a continuing guaranty, but became functus officio when loans to the amount of the note had been made and repaid. Agawam Bank *v.* Strever, 16 Barb. 82, affirmed in 18 N. Y. 502.

47. Third Nat. Bank *v.* Harrison, 10 Fed. 243, 3 McCrary 316.

48. **Renewal of security.**—A bank surrendered a note, taking therefor a new note, in which was included the amount of the original, and also an additional loan. Held that, as to the first, this transaction did not constitute a new loan, relieving the bank from the results of having negligently made the original loan on the faith of a forged collateral. Metropolitan Sav. Bank *v.* Baltimore, 63 Md. 6.

49. **Proceeds deposited with bank.**—Where a loan was deposited by the payees as collateral with a bank, the fact that such payees deposited the proceeds of a second note executed in renewal of the first in such bank, without notifying the bank whence such fund was derived, or that it was to be applied on the first note, was no defense to an action by the bank thereon. Judgment, 35 Tex. Civ. App. 434, 80 S. W. 555, reversed. National Bank *v.* Kenney, 98 Tex. 293, 83 S. W. 368.

50. **Evidence of circumstances of renewal.**—Where, in an action on a note deposited with plaintiff as collateral security for a loan to the payees, it appeared that a second note had been executed in renewal of the note sued on, it was not error to permit the makers of the second note to testify as to the circumstances which led them to execute the same. Judgment, 35 Tex. Civ. App. 434, 80 S. W. 555, reversed. National Bank *v.* Kenney, 98 Tex. 293, 83 S. W. 368.

51. Where, in an action on a note secured by a mortgage, it appeared that the payees had induced the makers to execute a renewal note, which they had procured to be discounted by defendant bank, the court should have charged at plaintiff's request that statements of the makers and others to defendant bank as to the condi-

§ 179 (14) Effect of Taking Improper Security.—The action of the officers of a bank in investing its funds in an illegal way, as upon mere personal notes, does not work a forfeiture of the money loaned, and the bank has a cause of action for the money loaned even if the notes were void.[52]

§ 180. Loans to Stockholders, and Stock as Security.—Statutory Provisions.—A statutory provision that no state bank shall make any loan on the security of shares of its own capital stock, unless such security shall be necessary to prevent loss upon the debt previously contracted, does not conflict with and render nugatory a provision that no transfer of the stock of a state bank shall be valid against the bank as long as the legitimate holder thereof shall be indebted to the bank.[53]

tions under which they executed such renewal note and mortgage, and as to the agreement and understanding between the makers and the payees of such note, were admissible only for the purpose of showing that defendant bank obtained its note and mortgage without notice of the original note held by plaintiff. Judgment, 35 Tex. Civ. App. 434, 80 S. W. 555, reversed. National Bank *v.* Kenney, 98 Tex. 293, 83 S. W. 368.

52. Effect of taking improper security.—A savings bank organized under Laws 1851, c. 324, loaned $3,000 on a note signed by twenty-one persons, and $2,000 on one signed by 13, the money being turned over to St. Joseph's Church. In payment for balance due on said notes it took the note in suit, signed by forty persons. The defense was interposed that the bank was unauthorized by statute to loan on such notes. Held, that the bank could recover as, even though the first notes were illegal, the note in suit was given in satisfaction of a cause of action for money loaned, and the bank surrendered the first notes which were the evidence of the loan, and the note was thus founded upon a good consideration. Rome Sav. Bank *v.* Krug, 102 N. Y. 331, 6 N. E. 682, affirming 32 Hun 270.

A grantee of property subject to a mortgage to a bank can not, against an order of seizure and sale, defend on the ground that the bank directors, authorized to loan on mortgage of lands only when cultivated, have exceeded their authority by loaning on unimproved property; the question is one which concerns the state and stockholders only. Barrow *v.* Bank, 2 La. Ann. 453.

Whether land certificates constituted that character of real estate security which banks are prohibited from taking can not be inquired into by an individual, since that matter is between the bank and the government. Stone *v.* Brown, 54 Tex. 330. See, ante, "Negligence of Collecting Bank in General," § 178 (2).

53. Loans to stockholders.—Gen. St. 1899, § 458, provides that no transfer of the stock of a state bank shall be valid against the bank as long as the registered holder thereof shall be indebted to the bank. Section 417 provides that no state bank shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stocks so purchased or acquired shall within six months from the time of its purchase be sold or disposed of at public or private sale, and after the expiration of six months any such stock shall not be considered as a part of the assets of the bank. Held, that § 417 does not impair the lien given by section 458, and, where a state bank had loaned a large amount of money to one of its stockholders on his personal note and without taking his stock as security, it had a lien on such stock for the amount thereof as against a trustee claiming the same under an assignment for the benefit of creditors. Battey *v.* Eureka Bank, 62 Kan. 384, 63 Pac. 437.

Such provision of § 417, that the stock of a bank purchased or taken by the bank as security shall not be considered as assets of the bank after a period of six months from the time the same is so taken, does not have

Necessity for Security.—Although the Real Estate Bank of Arkansas is bound by its charter to loan a stockholder a sum equal to one-half his interest in its capital, it is not bound to do so except upon good and sufficient security.[54]

Real Estate Mortgage.—Under the direct provisions of the statute of incorporating the Citizens' Bank of Louisiana, the bank was authorized to take real estate mortgages to secure its stock loans.[55]

Stock as Security.—It is no defense to an action on a note discounted by a bank, and for which they have taken shares of their own stock as security, that the directors have neither sold such stock nor charged the shares in reduction of the stock of the company at the amount actually paid thereon.[56] The charter of the Citizens' Bank of Louisiana provides that the stock mortgage required of all shareholders shall stand as full security for loans to stockholders.[57] Where a stockholder of a bank gave a mortgage on his property to secure the subscription of stock and to secure a stock loan made under the charter of the bank, which provided that each stockholder should be entitled to a loan of one-half of the amount of his stock, and the mortgage stipulated that the property mortgaged should stand hypothecated for any stock loan so made, such mortgage included in its securities such stock loan.[58]

Notes as Security.—The Real Estate Bank of Arkansas can maintain an action at law on the notes or obligations of a stockholder given on ac-

the effect of rendering the lien acquired by § 458 unenforceable after the expiration of six months, in the absence of an express declaration in the statute that a retention of such stock for that period of time shall impair the lien acquired or prevent its enforcement. Battey *v.* Eureka Bank, 62 Kan. 384, 63 Pac. 437.

Necessary to prevent loss on previous debt.—A violation of that part of § 417 providing that a bank shall not be purchaser or holder of its own capital stock, except so far as "shall be necessary to prevent loss on a debt previously contracted in good faith," will not be implied from the fact that the cashier of a bank with a capital stock of $50,000 loaned $29,000 to a stockholder on his personal note, where the latter owned stock in the bank to the amount of such loan and was regarded as a man of great wealth and abundantly solvent. Battey *v.* Eureka Bank, 62 Kan. 384, 63 Pac. 437.

54. Dawson *v.* Real Estate Bank, 5 Ark. 283.

55. Real estate mortgage.—Citizens' Bank *v.* Nicolas, 3 La. Ann. 112; Eyssallenne *v.* Citizens' Bank, 3 La. Ann. 663.

56. Butterworth *v.* Kennedy, 18 N. Y. Super. Ct. 143.

57. Stock mortgage.—The charter of the Citizens' Bank provides that the stock mortgage required of all shareholders shall stand as full security for the loans which stockholders may obtain from the institution. It also stipulates that stockholders shall be entitled to a credit equal to one-half the total amount of their stock. Held, that where notes are given to the bank for loans made subsequently to the date of the stock mortgage, such mortgage is security therefor, even as to third parties, without a new mortgage, or any record of the loan in the parish where the mortgaged property is situated. Mitchell *v.* Logan, 34 La. Ann. 998.

58. Nutt *v.* Citizens' Bank, 22 La. Ann. 346.

The fact that the transfer of bank stock was made subsequent to the transfer of real estate subject to a mortgage given to secure the payment of the stock to the bank did not affect the mortgage rights of the bank. Nutt *v.* Citizens' Bank, 22 La. Ann. 346.

count of money obtained by him from the bank.[59]

Priority of Securities.—A stock mortgage, given to secure the payment of stock to a property bank, is prior and superior to a loan mortgage, although given in the same act or hypothecary contract with the corporation.[60]

Sale of Security.—A stock mortgage given to secure a payment of stock to a property bank, being prior to a loan mortgage, although given in the same act or hypothecary contract with a corporation, a sale of the property mortgaged, under a decree to satisfy the amount of the land loan, will not extinguish the stock mortgage, unless the amount of the adjudication exceed the amount of the stock mortgage.[61] Where the owner of bank stock secured by mortgage, and pledged for loans upon it, obtains further loans from the bank by a mortgage of the property securing the stock, the bank, nothing in the law or its charter forbidding it, may sell the stock separately from the property.[62] A bank made a loan, and took a pledge of the borrower's shares in its stock as collateral security, with a power of sale if payment should not be made according to the terms of the loan. After the borrower's decease, the bank sold the shares by auction for nonpayment, became the purchaser, gave credit for the amount of the sale, and claimed the balance of the borrower's administrator, who refused to sanction the proceeding. Nothing passed to the bank by this form of sale, but it still held the shares under its original title, as collateral security.[63]

Estoppel to Claim Security.—Where there is a custom between brokers and bankers that, on application of a broker, a bank will certify as to whether it has any lien on certain of its stock by the holder thereof being indebted to it, a bank, by being asked by a broker to give such a certificate, is thereby put on inquiry, and charged with notice that a loan for a certain amount had been made to the holder of the stock.[64]

Maturity of Loan.—Under a charter provision that if a debtor under a stock loan shall fail to pay the proportion of the capital stock and interests as the same shall become due, the whole debt may be considered as due and payment demanded and enforced, the failure to pay an installment of interest, renders the whole amount due,[65] but the bank has a right to waive

59. Dawson *v.* Real Estate Bank, 5 Ark. 283.

60. Haynes *v.* Courtney, 15 La. Ann. 630.

61. Sale of security.—Haynes *v.* Courtney, 15 La. Ann. 630.

The property banks of Louisiana furnish an exception to the rule that the creditor who holds under two mortgages of unequal rank on the same property, and who has caused the property to be sold to satisfy his junior mortgage, can not be allowed to sell it a second time to satisfy his senior mortgage. The property mortgaged for the subscription to the stock of the bank is liable in the hands of a third possessor, although it has been previously sold at the instance of the bank, to enforce the payment of the stock loan secured by the same mortgage. Haynes *v.* Harbour, 14 La. Ann. 237.

62. Bermudez *v.* Union Bank, 11 La. Ann. 64.

63. Middlesex Bank *v.* Minot (Mass.), 4 Metc. 325.

64. Covington City Nat. Bank *v.* Commercial Bank, 65 Fed. 547.

65. Maturity of loan.—The charter of the Citizens' Bank of Louisiana, provides that if any debtor under a

the enforcement of this entire obligation of its defaulting debtor.[66]

Action for Breach of Contract to Loan.—Under a statutory provision that no bank is allowed to lend any one person more than ten per centum of its capital stock and surplus unless the loan is secured by good collateral, and to entitle one to recover for breach of contract to make a loan, it must be shown that the amount promised did not exceed ten per centum of the capital stock and surplus, or was to be amply secured by good collateral.[67]

§ 181. Interest or Rate of Discount, and Usury—§ 181 (1) In General.—Implied Right to Interest.—The right of a bank to interest on advances made is to be implied, unless the parties to the transaction have otherwise stipulated, or under the circumstances it would be inequitable to exact it, and such right is not lost merely by a failure or refusal to furnish statements of account to the debtor when requested.[68]

Before Maturity.—A person indebted to a bank on notes bearing in-

stock loan should fail to pay the proportion of the capital and interest as the same should become due, the whole debt may be considered as due, and payment thereof demanded and enforced. A failure to pay a stipulated installment of interest operates, of itself, as a forfeiture of the right to renew the loan. Mitchell *v.* Logan, 34 La. Ann. 998.

By its charter a bank was empowered to raise a capital of $3,000,000 by a loan on the faith of the territory, to be secured by mortgages on the property of the stockholders, which mortgages were to be transferred whenever there was a transfer of stock. The bank was empowered to loan to the stockholders two-thirds of the amount of their respective shares at a certain rate of interest. Held, that the object of the mortgages on the property of the stockholders was not only to secure the payment of the territorial bonds, but also to secure the payment of the notes and interest thereon, upon which two-thirds of their shares were loaned to such stockholders, and that, therefore, the right of action accrued to the bank to proceed against the mortgaged property whenever the stockholders failed to pay interest upon their notes and renew the same, and the bank was not obliged to wait until final settlement of its affairs with the state at the expiration of its charter. The stockholders were only entitled to delay on their notes by payment of interest and a renewal at the proper times. Union Bank *v.* Parkhill, 2 Fla. 660.

66. Where the default of a bank stockholder to pay one of the installments of the stock loan at maturity, rendering the whole amount of the loan immediately exigible, and depriving the stockholder of the delays to which he was originally entitled, was waived by the bank by its failure to treat the whole note as due, the clerk of the court can not, by his order of seizure and sale, give greater relief than has been sought in the petition. Ives *v.* Citizens' Bank, 15 La. Ann. 83.

By the charter of a bank the default of the stockholder to pay one of the installments of the stock loan at maturity rendered the whole amount of the loan immediately exigible, and deprived the stockholder of the delays to which he was originally entitled; but in an action to foreclose a mortgage given to secure the loan the bank did not elect to treat the whole amount due. Held, that upon such waiver of the default, where the clerk of court, by his order of seizure and sale, gave greater relief than was sought in the petition, if the plaintiff show injury to himself by the sale of property under such order, even a bona fide purchaser's title would not be valid. Ives *v.* Citizens' Bank, 15 La. Ann. 83.

67. Civ. Code 1895, § 1916; Swindle & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13.

68. **Interest and rate of discount.**—Clark *v.* Smallwood, 156 Fed. 409.

As to national banks, see post, "Interest or Rate of Discount, and Usury," § 270.

terest, gave the bank possession of personal property which it sold and took the notes of the purchaser at a less rate of interest than the note of the owner bore. After accounting for the interest on the notes of a third person, the bank is entitled to the interest on the original note of the debtor.[69]

After Maturity.—A note discounted by a bank bears interest after maturity.[70] A law prescribing the rates at which a bank may discount notes is only a rule of discount, and not of interest. After a discounted note becomes payable, if not paid, it will bear interest according to the general law of interest.[71] But it has been held that a note discounted by a bank for the maker, to whom the proceeds are paid, will, if unpaid at maturity, bear the same rate from that time till payment for which it was discounted.[72]

For Forbearance to Sue.—When the rate of interest on loans or discounts is limited by its charter, a bank can not stipulate for a higher rate in

69. **Before maturity.**—A. was indebted to the bank by notes bearing interest at the rate of 8 per cent. and secured by mortgage on real and personal property, with a power to sell. By a subsequent agreement the bank took possession of the personal property, and sold it pursuant to the agreement on a credit of twelve months, taking notes payable in twelve months, with interest after six months at the rate of 6 per cent. Held, that the bank, in settling with A., was entitled to interest on A.'s notes at the rate of 8 per cent per annum up to the maturity of the sales notes, the bank accounting for the sales notes with interest at the rate of 6 per cent per annum for the last six months. Bank *v.* Stickney (Ill.), 4 Scam. 4.

70. **After maturity.**—A note discounted by the bank carries interest at the rate of 8 per cent per annum after its maturity. Kitchen *v.* Branch Bank, 14 Ala. 233.

Under Act March 3, 1838, § 6, the Real Estate Bank is entitled to recover interest at the rate of 10 per cent per annum on all amounts due it after maturity. Beebe *v.* Real Estate Bank, 4 Ark. 124.

Protest not necessary.—When the maker of a note, executed to a bank for a loan on a pledge of stock becomes bankrupt, under the Act of 1841, interest will be due on the note from maturity, though not protested. Conrad *v.* City Bank, 7 La. Ann. 4.

Of installments.—Where a stockholder in the Union Bank of Louisiana, in addition to the usual amount loaned on stock, borrows 15 per cent on his stock, it will be regarded as a stock loan, within the charter provisions for an increased rate of interest in default of installment payments. Bermudez *v.* Union Bank, 7 La. Ann. 62.

Agreement as to payment.—An agreement entered into by the bank to receive payment by installments of 20 per cent annually, but without consideration, has no effect upon the rate of interest which by law the note bears after maturity. Kitchen *v.* Branch Bank, 14 Ala. 233.

71. **What law governs.**—Chambliss *v.* Robertson, 23 Miss. (1 Cushm.) 302.

A charter provision whereby a bank had authority "to make discounts at the following rates: on notes, bills, or bonds having less than twelve months to run, at the rate of seven per cent per annum," did not prevent the bank from receiving 8 per cent on a note after its maturity, as the provision was merely a restriction upon the rate to be charged for discounts. Chambliss *v.* Robertson, 23 Miss. (1 Cushm.) 302.

All debts due the bank after maturity carry interest at the rate of 8 per cent per annum. Branch Bank *v.* Strother, 15 Ala. 51.

Bank Charter Act 1832, p. 62, § 24, provides that mortgages for stocks and loans granted by virtue of this act shall bear 10 per cent interest per annum after maturity, if not punctually paid. Held, that under the act a bank could charge 10 per cent per annum, not only on its stock loans, but on ordinary mortgage loans, after maturity. Union Bank *v.* Wilson, 10 La. Ann. 601.

72. Bank *v.* Wilcox, 2 La. Ann. 344.

consideration of its forbearance to sue.[73]

Loan on Accommodation Paper.—A loan on accommodation paper and a discount on real paper stand on the same footing as to the right of a bank to deduct the interest in advance on the whole amount of the note without making the transaction usurious.[74]

Particular Banks.—The supreme court of the United States having decided that national banks are not subject to the state laws against usury, such laws are repealed as to state banks also by the general banking law.[75] Under the laws of New York of 1882, a firm engaged in banking, but not as individual bankers, as defined by the above statute, is exempt from the provisions of the usury statutes of New York, when making loans in the usual course of business.[76] The eight per centum interest rate prescribed by the act of Congress of 1901 is restricted to banks and trust companies organized under the laws of Arkansas or any other state and transacting business in Indian Territory as foreign corporations by virtue of that act, and does not apply to domestic corporations doing a banking business in Indian Territory under laws of Arkansas extended in force by virtue of the act.[77]

Conflict of Laws.—In some states it is held that a bank can not charge more than the legal rate of interest in the state where located, although the loan was made in a state where a higher rate of interest is illegal;[78]

73. Forbearance to sue.—Exchange, etc., Co. v. Boyce (La.), 3 Rob. 307.

74. Stribbling v. Bank, 26 Va. (5 Rand.) 132.

75. Particular banks.—Hintermister v. First Nat. Bank, 64 N. Y. 212, overruling Farmers' Bank v. Hale, 59 N. Y. 53.

The state banks of issue in Pennsylvania are not authorized to take more than 6 per cent interest, and national banks can not claim such privilege. First Nat. Bank v. Gruber, 91 Pa. 377.

76. It was so held under the Laws 1882, c. 409, § 68, providing that every banking association, and every private and individual banker, doing business in New York, may charge 6 per centum interest; but, if they knowingly charge a greater rate, they shall forfeit the entire interest, and, if it has been paid, double the amount may be recovered back "from the association or private or individual banker receiving the same," and § 69 declaring that the true intent of § 68 is to place and continue the private and individual bankers and associations on an equality with national banks in the particulars referred to. Perkins v. Smith, 116 N. Y. 441, 23 N. E. 21, affirming 41 Hun 47.

77. Act Cong. Feb. 18, 1901, c. 379, § 8, 31 Stat. 795; Sulphur Bank, etc., Co. v. Medlock, 25 Okl. 73, 105 Pac. 321.

78. Law of state where performed controls.—A note dated and signed by the makers in Tennessee, and payable in Chicago, Ill., and forwarded by them to the payees in Chicago, to be used by the latter in raising money wherewith to pay off a prior note made by the same parties, and actually used in Chicago for that purpose by discounting it at a bank there, must be held an Illinois contract, and governed by the laws of Illinois relating to usury. Buchanan v. Drovers' Nat. Bank, 5 C. C. A. 83, 55 Fed. 223.

A bank incorporated in this state can not recover more than 6 per cent interest for its loans, nor upon securities taken therefor, though the loans may be made and the securities executed in a state where a higher rate of interest is allowed by law. Farmers' Bank v. Burchard, 33 Vt. 346.

A corporation organized under the act of February 26, 1873, entitled "An act to incorporate savings and loan associations," as amended March 3, 1875, can not enforce, in Ohio, a usurious contract for the loan of money to the extent of the usury stipulated for therein, although the contract was made in another state, where the laws authorize contracts for interest at the rate stipulated for in the contract sued on. Ewing v. Toledo Sav. Bank, 43 O. St. 31, 1 N. E. 138.

but in other states it is held that the legality of the interest is to be determined by the laws of the state where made.[79]

§ 181 (2) Controlled by General Law or Charter.—The law of usury applies to banks,[80] subject to the modifications produced by their charters.[81] Banks can not take advantage of a statute in regard to interest

79. **Law of state where made controls.**—Act Pennsylvania Feb. 18, 1836, art. 6, chartering a bank, and fixing the rate of discount for its loans, does not apply to contracts made in sister states. The validity of such contracts must be tested by the laws of the place where made. Frazier *v.* Willcox (La.), 4 Rob. 517; Erwin *v.* Lowry (La.), 6 Rob. 28.

Notwithstanding the charter of the United States Bank of Pennsylvania prohibits it from taking more than at the rate of 6 per cent per annum interest on its loans, yet where it enters into a contract of loans in a state where laws allow a greater rate of interest, the contract will not be vitiated if the bank receives the rate of interest allowed by law in the state where the contract is made. Hitchcock *v.* United States Bank, 7 Ala. 386.

The Bank of the United States was prohibited, by its charter, from taking more than 6 per cent interest. Held, that this prohibition was confined to the state of Pennsylvania, and that in regard to contracts made in other states the laws there in force govern. Knox *v.* Bank, 26 Miss. 655.

80. **General law.**—Bank *v.* Mandeville, Fed. Cas. No. 850, 1 Cranch C. C. 552; Blackmore *v.* Branch, 4 Ark. 454; Candler *v.* Corra, 54 Ga. 190; Billingsley *v.* State Bank, 3 Ind. 375; Veazie Bank *v.* Paulk, 40 Me. 109; Lumberman's Bank *v.* Bearce, 41 Me. 505; Perkins *v.* Watson, 61 Tenn. (2 Baxt.) 173; Wetmore *v.* Brien, 40 Tenn. (3 Head) 723; Dockery *v.* Miller, 28 Tenn. (9 Humph.) 731; Rock River Bank *v.* Sherwood, 10 Wis. 230, 78 Am. Dec. 669; Brower *v.* Haight, 18 Wis. 102.

The rate of discount is controlled by the laws relating to interest on loans and discounts generally. Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631; Niagara County Bank *v.* Baker, 15 O. St. 68; Smith *v.* Exchange Bank, 26 O. St. 141.

Act March 10, 1851, defining the legal rate of interest, and prohibiting usury, applies to banks as well as to natural persons. Durkee *v.* City Bank, 13 Wis. 241.

Under Wag. St., p. 887, § 4, making words in the singular number and masculine gender include bodies corporate as well as individuals, usurious contracts made with banking corporations are governed by the general law relating to interest and usury, and suits upon them must be disposed of in like manner as in cases of such contracts between private persons. Ritenour *v.* Harrison, 57 Mo. 502.

Section 33 of the Act of 1829, prohibiting, under The Safety Fund Act, the receiving by banks of more than 6 per cent on discounting notes maturing in sixty-three days, is not applicable to institutions established under the general banking law of this state. International Bank *v.* Bradley, 19 N. Y. 245.

Statute applicable to private persons only.—Incorporated banks are not embraced by the provisions of the Act of 1859-60, ch. 129, entitled, "An act to encourage the use of private capital," and therefore are not liable for the penalty therein imposed for taking usury in violation of that statute. That act applies alone to "persons and partnerships, and associations of persons paying taxes for the use of money as money lenders." It does not include corporations. State *v.* Lookout Bank, 89 Tenn. 278, 14 S. W. 801.

Section 6, art. 11, of the constitution of 1734, provides that "the legislature shall fix the rate of interest and the rate so established shall be equal and uniform throughout the state." That the object of the provision was to inhibit the legislature from granting to banking corporations the privilege of taking a greater rate of interest than was allowed to individuals, is manifest from the journals of the convention. Perkins *v.* Watson, 61 Tenn. (2 Baxt.) 173.

81. **Special charter provisions.**—Tuffli *v.* Ohio Life Ins., etc., Co., 2 Disn. 121, 13 O. Dec. 75; Stribbling *v.* Bank, 26 Va. (5 Rand.) 132.

Legal interest on sums discounted by banks is that established by their charter. Civ. Code, art. 2895. Bank *v.*

from the operation of which they are expressly excepted.[82] Where the

Sterling, 2 La. 60; Clinton Co. *v.* Kernan (La.), 10 Rob. 174.

In a case where a bank takes a rate of interest on a note higher than that allowed by law, the general usury laws apply to the bank as well as to individuals, unless there be something in its charter expressly or impliedly exempting it from that law, as by providing penalties independent of that law. Rock River Bank *v.* Sherwood, 10 Wis. 230, 78 Am. Dec. 669.

Where a bank's charter authorizes it to receive or charge interest at a rate not exceeding 10 per cent, and it contracts for more, the usury laws apply only as to the penalties and remedies prescribed; the bank charter fixing the rate of interest, and not the general law, determines whether or not there has been usury. Rock River Bank *v.* Sherwood, 10 Wis. 230, 78 Am. Dec. 669.

In Stribbling *v.* Bank, 26 Va. (5 Rand.) 132, it was held that a bank was subject to the general law relating to usury except so far as such law was modified by the special provisions of the bank's charter, Judge Coalter dissenting on the ground that the usury laws did not apply to corporations, especially to banks. Bank *v.* Stribbling, 34 Va. (7 Leigh) 26, is sequel to Stribbling *v.* Bank, 26 Va. (5 Rand.) 132.

No provisions in charter.—Where the rate of interest or discount at which a bank is authorized to use its money is not specified, nor is there any penalty declared for taking more than legal interest, nor any special prohibition against such illegal use of its money, it stands upon the general law which prohibits all persons or corporations from taking more than six per cent for the use of the money. Prosecuting Attorney *v.* Commercial Bank, 10 O. 535; Creed *v.* Commercial Bank, 11 O. 489; Chafin *v.* Lincoln Sav. Bank, 54 Tenn. (7 Heisk.) 499.

Provision as to special contract.—The provision in a bank charter authorizing the bank "to pay and receive such rate of interest as may be mutually agreed upon" held not to authorize charging a rate unlawful for others to charge. Tishimingo Sav. Inst. *v.* Buchanan, 60 Miss. 496.

The provision in charter of the Bank of Statesville that the bank "may discount notes and other evidences of debt, and lend money upon such terms and rates of interest as may be agreed upon," does not authorize the bank to charge more than the legal rate, 8 per cent, for money loaned. Simonton *v.* Lanier, 71 N. C. 498.

Provision as to banking custom.—The charter of a bank in Ohio, which authorizes it to discount notes, etc., "on banking principles," does not thereby prohibit the reserving of more than 6 per cent interest. McLean *v.* Lafayette Bank, Fed. Cas. No. 8,888, 3 McLean 587.

A charter allowing a bank to discount bills of exchange "upon banking principles and usages," does not authorize such bank to take more than the established legal rate of interest, in advance, on its loans and discounts. Creed *v.* Commercial Bank, 11 O. 489.

Where a bank charter does not fix the rate expressly, but provides that the bank may make loans and discounts "upon banking principles and usages," it seems that the bank would be bound by the rate generally fixed upon loans by other banks. Creed *v.* Commercial Bank, 11 O. 489. See, also, Commercial Bank *v.* Reed, 11 O. 498; Lafayette Bank *v.* Findlay, 1 O. Dec. 49.

Evidence of a usage with other banks organized under the same law, to discount at more than the legal rate of interest, upon the acquisition of business paper, is not admissible. Niagara County Bank *v.* Baker, 15 O. St. 68.

As deemed expedient.—Where a corporation is, by its charter, authorized to lend money upon "such terms" as its directors may deem expedient, interest in excess of the general legal rate may be charged. Corwin *v.* Urbana, etc., Mut. Ins. Co., 14 O. 6.

82. Statute excepting banks.—The Ten Per Cent Interest Act of March, 1850 (Swan's Stat. 481) did not enlarge the powers of banking corporations. This act was as follows: "The parties to any bond, bill, promissory note, or other instrument of writing for the payment or forbearance of money, may stipulate therein for interest receivable upon the amount of such bond, bill, note or other instrument, at any rate not exceeding ten per centum yearly. Provided, however, that no incorporated banking institution of this state shall be entitled to receive more than the rate of interest specified in its charter; or, if no rate be specified, more than six per

charter of a bank fixes the rate of interest which such bank may charge upon its loans and discounts, the bank can not legally take interest in excess of such rate,[83] although not in excess of that allowed by general law.[84]

cent yearly upon any loan or discount whatsoever." Tuffli v. Ohio Life Ins., etc., Co., 2 Disn. 121, 13 O. Dec. 75.

The provisions of the act of the general assembly of this state, passed May 4, 1869 (68 O. L. 91), substantially the same as the Act of 1850 set out in the above case, were not intended to embrace banks of issue organized under state laws, whose powers in relation to taking and charging interest on loans and discounts were conferred and limited by prior and special enactments. Shunk v. First Nat. Bank, 22 O. St. 508, 10 Am. Rep. 762.

But the statutes fixing six per cent as the rate of interest chargeable by banks of issue were repealed by the Act of April 28, 1873 (70 O. L. 178); so that such banks could thereafter stipulate for interest at the same rate as natural persons. LaDow v. First Nat. Bank, 51 O. St. 234, 37 N. E. 11.

Rev. St. U. S., §§ 5197, 5198 [U. S. Comp. St. 1901, p. 3493], limit the interest which national banks may take, and provides that the charging of a greater rate of interest shall forfeit the entire interest, and Banking Law, Laws 1892, p. 1869, c. 689, § 55, places state banks and individual bankers upon a parity with national banks in this respect. Usury Law, 1 Rev. St. (1st Ed.), pp. 771, 772, pt. 2, c. 4, tit. 3, § 5, provides that the taking of usury shall result in the forfeiture of the entire debt. Held, that this provision of the usury law is, by the statutes first quoted, rendered inapplicable to banks, not only with respect to notes originally given to the bank, but with respect to usurious notes purchased by the bank in good faith. Schlesinger v. Kelly, 114 App. Div. 546, 99 N. Y. S. 1083.

83. Charter provisions.—Bank v. Owens (U. S.), 2 Pet. 527, 7 L. Ed. 508; Bank v. Stevens, 1 O. St. 233, 59 Am. Dec. 619; Preble County Branch v. Russell, 1 O. St. 313; Russell v. Failor, 1 O. St. 327, 59 Am. Dec. 631; Busby v. Finn, 1 O. St. 409; State v. Commercial Bank, 10 O. 535; Niagara County Bank v. Baker, 15 O. St. 68; Bank v. Jones, 16 O. St. 145; LaDow v. First Nat. Bank, 51 O. St. 234, 37 N. E. 11; Miami Exporting Co. v. Clark, 13 O. 1; Morris v. Way, 16 O. 469; Creed v. Commercial Bank, 11 O. 489; Kilbreth v. Bates, 38 O. St. 187; Bank v. Swayne, 8 O. 257, 32 Am. Dec. 707; Hazen v. Union Bank, 33 Tenn. (1 Sneed) 115.

Act 1834, § 8, amending the act incorporating the Clinton & Port Hudson Company, provides that they shall not receive more than 8 per cent per annum on any loan or discount. Section 17 provides that the mortgages for stock and loans granted by this act shall bear 10 per cent after maturity. Held, that the last section does not apply to loans on notes secured by pledge of stock. Clinton Co. v. Kernan (La.), 10 Rob. 174.

Banks can in no case take more interest than that fixed by their charters. Where the charter fixes the rate at 9 per cent, and 10 is taken, it will be reduced to the former. Bank v. Stansbury, 8 La. 257.

Constitutionality of charter.—A charter allowing a bank to demand more than the legal interest is not a partial law repugnant to the constitution, but the grant of a franchise, which may be granted as well as the franchise, also allowed only to a few, of carrying on the business of banking. Hazen v. Union Bank, 33 Tenn. (1 Sneed) 115.

Provision in act extending charter.—The charter of the Bank of Mobile was in force until 1859, and allowed 7 per cent discount. In 1852 the legislature passed an act to extend the privileges of the bank for twenty years beyond the expiration of its charter, with a proviso that it should not take more than 6 per cent. This proviso was held to apply only to the privileges granted by the extension, and not to affect loans made while the original charter was in force. Pearce v. Bank, 33 Ala. 693.

Provision referring to general law.—Under a bank charter authorizing the bank to loan money in accordance with the general interest law then in force, the bank can not, after the amendment of the general law so as to reduce the legal rate of interest, continue to charge the rate in force at the date of the charter. Bank v. Coke, 20 Ky. L. Rep. 291, 45 S. W. 867.

84. Not in excess of general law.—Where a bank takes more interest on

In Absence of Contract.—When the rate of interest is not specified in a note given to a bank, it will bear the rate of interest fixed in the charter.[85]

§ 181 (3) Manner of Calculating Interest.—The including the day of payment of the first note in the second, whereby the bank receives, under each note, interest for the same day, is not usury.[86] The fact that the bank in discounting calculates interest on the basis of three hundred and sixty instead of three hundred and sixty-five days constituting a year does not make such discount usurious.[87] A discount of a note, made by calculating the interest for one year, and multiplying this sum by the number

a loan than it is authorized to take by its charter, the interest is forfeited, whether the rate which the corporation is prohibited from exceeding be less than the interest allowed by the general statute or not. Grand Gulf Bank *v.* Archer (Miss.), 8 Smedes & M. 151.

A bank may take a mortgage for a debt due to it, with 7 per cent interest (that being the legal rate of interest), notwithstanding it is prohibited by its charter from taking "more than 6 per cent per annum, in advance, on its loans or discounts." Bailey *v.* Murphy (Mich.), Walk. Ch. 424.

85. Consolidated Ass'n *v.* Wilson, 10 La. Ann. 591.

86. Manner of calculating interest.—Stribbling *v.* Bank, 26 Va. (5 Rand.) 132; Crump *v.* Nicholas, 32 Va. (5 Leigh) 251; State Bank *v.* Cowan, 35 Va. (8 Leigh) 238; Parker *v.* Cousins, 43 Va. (2 Gratt.) 372, 44 Am. Dec. 388.

The Farmers' Bank of Va. discounted a note for $6,000 payable on its face sixty days after date, for accommodation of the maker; it was understood, that this accommodation would be continued, indefinitely, till it should suit the interest or convenience of the bank, or of the party, to discontinue it, the bank reserving a right to discontinue it at its own discretion or pleasure, and the party also having a right to discontinue it at pleasure, and that for the purpose of so continuing it, the note should be renewed from time to time; the accommodation was, in fact, continued upon such renewed notes, from April 21, 1825, to May 4, 1826; the bank, in discounting the first note, deducted and retained to itself, the interest for sixty-four days, i. e., for the time the note had to run including the days of grace, counting the interest from the day of the date to the last day of grace, both inclusive; and in discounting the second note made on the last day of grace of the first, deducted and retained to itself, the interest for sixty-four days, counting from the day of the date of second and last day of grace of the first, to the last day of grace of the second note, both inclusive; and so on, upon each renewed note, successively, to the end of the transaction; so that the bank, in fact, received double interest for every sixty-fourth day; and this was in conformity with the known usage of the Farmers' Bank, and of all the banks of Virginia. Held, the transaction is nowise usurious. Crump *v.* Nicholas, 32 Va. (5 Leigh) 251.

87. On basis of three hundred and sixty days to year.—The state bank of North Carolina discounted a note made by the defendants, in renewal of which other notes were afterwards from time to time made and discounted; and it was found by a special verdict, that the bank was in the habit of using, in its calculations of interest, Rowlett's tables of interest, which consider 360 days as a year, instead of 365, the effect of which is to make the interest for every fraction of a year somewhat more than at the rate of six per centum per annum; held, this mode of calculating interest does not make the transaction usurious. State Bank *v.* Cowan, 35 Va. (8 Leigh) 238.

A note to a bank is not void for usury by reason of their discounting it at the rate of three hundred and sixty days to the year, for sixty-four days, such being shown to have been a custom of banks; but the excess of interest is to be deducted, and the custom is erroneous. Bank *v.* Scott, 1 Vt. 426.

Calculation by Rowlett's tables.—The circulation of interest by Rowlett's tables on the discount of a note does not make the transaction usurious. Parker *v.* Cousins, 43 Va. (2 Gratt.) 372, 44 Am. Dec. 388; citing State Bank *v.* Cowan, 35 Va. (8 Leigh) 238.

of years the note has to run, and deducting the amount thus ascertained from the amount of the note, is illegal, whether made by a bank, or by an individual.[88]

Compound.—Under the statute providing for a greater rate of interest by a special contract than that stated in the general usury law, where the parties contract for a greater rate but fail to stipulate as to compound interest, discount for compound interest at the rate agreed upon is usurious.[89]

§ 181 (4) What Constitutes Usury.—Interest in Advance.—The taking of interest in advance at the legal rate, upon discounting a note at a bank, is not usurious.[90]

88. Branch Bank *v.* Strother, 15 Ala. 51.

89. Compound.—Under 18 St. at Large, p. 35, § 1, declaring that no greater rate of interest than 7 per cent per annum shall be taken, agreed on, or allowed on any contract for the loaning of money, except on written contracts wherein by express agreement interest not exceeding 10 per cent may be charged; and no person or corporation loaning money on a greater rate of interest shall be allowed to recover any portion of the interest so unlawfully charged; and the principal sum so loaned, without any interest or costs, shall be taken to be the true debt; and § 2, allowing as counterclaim double the amount of interest so unlawfully charged—where a note containing an express agreement that the interest shall run to the maturity of the note at 10 per cent, but without mention of interest on interest, is discounted by a bank at 10 per cent on the principal and interest to accrue, the charge of discount on the interest to the extent of 3 per cent, the excess over 7 per cent, the legal rate, is usurious, and recovery can be had only for the principal sum loaned, without interest or costs, after the allowance of all just credits and a counterclaim of double the amount of the usurious charge. Carolina Sav. Bank *v.* Parrott, 30 S. C. 61, 8 S. E. 199.

90. Interest in advance—Discount.—Newell *v.* National Bank (Ky.), 12 Bush 57; Stribbling *v.* Bank, 26 Va. (5 Rand.) 132; Grigsby *v.* Weaver, 32 Va. (5 Leigh) 197; Crump *v.* Nicholas, 32 Va. (5 Leigh) 251; State Bank *v.* Cowan, 35 Va. (8 Leigh) 238; Parker *v.* Cousins, 43 Va. (2 Gratt.) 372, 44 Am. Dec. 388.

Incorporated banks authorized to discount paper are authorized to take interest in advance, and may therefore discount paper at the same rate as is allowed for the reservation of interest, payable annually, by the statutes fixing the legal rate of interest. Insurance Co. *v.* Carpenter, 40 O. St. 260; Southern Bank *v.* Brashears, 1 Disn. 207, 12 O. Dec. 578; Lafayette Bank *v.* Findlay, 1 O. Dec. 49.

Right arises from necessity.—The regular business of discounting notes by deducting from their face the interest for the entire time they have run, though in itself usurious—as the borrower pays interest on the amount thus deducted—has been long sanctioned by the courts, rather from necessity than upon principle. Wetmore *v.* Brien, 40 Tenn. (3 Head) 723.

Although in excess of legal interest.—Banks may deduct the legal interest at the commencement of loans, or make loans upon discounts, although they thereby receive a rate of interest which may be estimated at a small extent beyond the legal interest. Maine Bank *v.* Butts, 9 Mass. 49.

Authorized by charter.—Where a bank charter, in enumerating the benefits to be derived, included the rendering easy and expeditious by discount the anticipation of funds, and authorized the bank to receive 6 per cent for discounts made at the bank, the latter may reserve 6 per cent of the face amount of an indorsed note, paying the balance to the indorser; and such transaction will not be usurious. Bank *v.* Mandeville, Fed. Cas. No. 850, 1 Cranch, C. C. 552.

May deduct interest for whole term.—It is not a usurious transaction for a bank, upon discounting notes, to deduct the whole interest for the whole term they have to run, as such transaction is an anticipation of funds, and not a loan of money. Bank *v.* Mande-

Interest on Overdraft.—The charging of a depositor by a bank, by agreement, at the end of each month, with interest at the full legal rate on his overdraft, and adding such charge to the overdraft, does not constitute usury.[91]

Deposit of Proceeds.—Payment of the unlawful rate of interest need not be made in money, to constitute usury, and where a note has been discounted by a bank for a customer, and the proceeds credited in his account, this is sufficient payment.[92] A bank discounted for a borrower, at the legal rate of interest, a note to meet at maturity a note previously discounted, which was not yet due. The proceeds of the second discount did not pass into the hands of the borrower. The transaction was not within the statute.[93]

Purchase and Sale of Paper.—Laws establishing the legal rate of interest are confined to loans of money, and do not apply to the purchase and sale by a bank of promissory notes, bills of exchange, negotiable instruments, or credits.[94] But a bank under its charter, having the power to

ville, Fed. Cas. No. 850, 1 Cranch, C. C. 552.

But a banking partnership does not come within the reasons of the rule allowing incorporated banks, which are authorized to discount paper, to reserve the full legal rate in advance; and where a loan is made by such a partnership, and interest is reserved at the rate of eight per cent per annum; and from time to time renewal notes are given for the amount remaining unpaid, and interest thereon is paid in advance at the same rate, the original transaction and the subsequent renewals are usurious in character, and in an action founded on the last one of such renewal notes the lender can only recover the amount originally advanced, with interest thereon at the rate of six per cent per annum, after crediting all payments made thereon by the borrower, as of the date at which they were made. Coppock *v.* Kuhn & Sons, 3 O. C. C. 599, 2 O. C. D. 347.

For statutory length of time.—Where a bank was authorized by charter to take 7 per cent interest on notes payable within four months, and 8 per cent on those for longer time, it was held that a note payable four months after date (with grace) was entitled to but 7 per cent interest. Forniquet *v.* West Feliciana R. Co. (Miss.), 6 How. 116.

Banks can not discount notes or bills at the rate of 8 per cent per annum, having a longer period to run than twelve months; nor can they extend a debt due them, and charge interest, by way of annual discount, in advance. They may discount a bill or note having more than twelve months to run by ascertaining the present worth of the note or bill at 8 per cent for the time it has to run. Branch Bank *v.* Strother, 15 Ala. 51.

91. Interest on overdraft.—Where drafts are from time to time deposited in a bank, some of them being payable on demand and some on time, an agreement between the bank and the depositor that credit shall be given for such drafts on the day after their deposit, the depositor being charged the full legal rate for any overdraft, does not constitute usury when such agreement is made in good faith in order to save involved calculations. Timberlake *v.* First Nat. Bank, 43 Fed. 231.

92. Deposit of proceeds.—Nash *v.* White's Bank, 68 N. Y. 396, reversing 5 Hun 568.

93. Maine Bank *v.* Butts, 9 Mass. 49.

94. Sale of note.—Bank *v.* Briscoe, 3 La. Ann. 157.

Where the firm of S. & F. opened an account with a banking firm, and made an agreement whereby the latter should discount their "shingle paper" at 1¼ per cent per month, and subsequently gave a note for a supposed balance of the bank account, with the understanding that any error in said account was open to correction, held, in an action on said note, that, if the transaction was a sale of paper, a discount of 15 per cent was allowable, but not if it was a deposit of paper on account upon which interest was to be exacted when drafts

buy outright certain notes, has no right to purchase them at a greater rate of discount than the rate of interest it might lawfully charge for the loan of the money, or, if it had discounted the notes, instead of buying them, the amount of discount in excess of the lawful rate of interest was usurious.[95]

Exchange in Addition to Interest.—A bank, in discounting drafts at the higher rate of interest allowed by law, may also charge, in addition thereto, the current rate of exchange as compensation for collecting the draft, provided such charge is not resorted to as a device to evade the statute against usury.[96] The reason being that the exchange is regarded as a

were made upon it. Smith v. Hart, 39 Mich. 515.

A bank authorized to discount, on banking principles and usages, promissory notes and other negotiable paper, but forbidden to take more than 6 per cent per annum, in advance, on its discounts, may take from its debtor, in payment of a pre-existent debt, at a rate of discount greater than 6 per cent per annum, the note of a third person, where such note is bona fide business paper. Dunkle v. Renick, 6 O. St. 527.

A note made in the course of a real business transaction, for which the original party has been given a valuable consideration, is regarded as property; and, like other property, the owner may sell it for the most he can get, and whatever profits the purchaser may make on his purchase, there is nothing usurious in it. Wetmore v. Brien, 40 Tenn. (3 Head) 723.

Rev. St. (1st Ed.), pt. 2, p. 772, c. 4, §§ 2, 5 (Laws 1837, p. 486, c. 430, § 1), makes void all usurious notes, etc. Rev. St. U. S., §§ 5197, 5198 [U. S. Comp. St. 1901, p. 3493], limits the rate of interest national banks may charge, and provides that the knowingly charging of a greater rate shall forfeit all interest. Banking Law, Laws 1870, p. 437, c. 163; Laws 1892, p. 1869, c. 689, § 55, as amended by Laws 1900, p. 668, c. 310, § 1—make similar provision as to state banks, etc., declaring an intent to place them on a party with national banks as to usury. Held, that as no penalty is imposed for the bona fide purchase by a bank of a note void for usury as between the original parties, and the only penalty is when the bank acts knowingly, usury was not available as a defense in an action by a state bank's receiver on a note discounted by it before maturity in due course and for value. Judgment, 101 N. Y. S. 1143, affirmed. Schlesinger v. Gilhooly, 189 N. Y. 1, 81 N. E. 619.

Evasion of usury laws.—But if the note were made for the purpose of being sold to raise money; or as an artifice to evade the usury laws, under the color of a sale and purchase of the paper, this will not avail, and the purchaser, under such circumstances, with knowledge of the facts, either actual or interable from the facts of the case, will be held guilty of usury, if the discount shall have been greater than the legal rate of interest. Wetmore v. Brien, 40 Tenn. (3 Head) 723.

"The fact that the note in question was made to be sold for the purpose of raising money, and that this fact was known to the bank, made the transaction illegal and usurious, inasmuch as the bank took at a discount of fifteen per cent." Chafin v. Lincoln Sav. Bank, 54 Tenn. (7 Heisk.) 499.

Sale of corporation bonds.—Where a banking and trust company is authorized to invest the moneys received by it in trust, in "such real and personal securities" as may be deemed proper by the trustees, a bona fide purchase by the company of bonds is not subject to the law relating to usurious discounts. Bank v. Jones, 16 O. St. 145; Kilbreth v. Bates, 38 O. St. 187.

Where a corporation is authorized to sell its own bonds, a sale by it of such bonds to a bank duly authorized to purchase them is not necessarily a loan and subject to the usury laws; and the fact that the payment of such bonds is guaranteed by the directors of the corporation in their individual capacities does not necessarily make the transaction a loan; but the giving of the guaranty is to be looked to in determining whether the real transaction is a bona fide sale or a disguised loan. Bank v. Jones, 16 O. St. 145.

95. Salmon Fall Bank v. Leyser, 116 Mo. 51, 22 S. W. 504.

96. Exchange in addition to interest.—Marvine v. Hymers, 12 N. Y. 223; Farmers' Bank v. Williams, 4 O. Dec.

just and lawful compensation for receiving payment at a place where the money is expected to be of less value than at the place where the discount

69; Central Bank *v.* St. John, 17 Wis. 157.

A bank may charge a reasonable premium for exchange, without rendering itself liable for usurious interest. Farmers' Bank *v.* Garten, 34 Mo. 119.

It is not usury, where a bank discounts a note for the owner, charging the full legal rate therefor, and then sells him a draft for the proceeds, less the exchange. International Bank *v.* Bradley, 19 N. Y. 245.

It is not usurious for a banking company to take notes payable in Boston money, and, upon renewal of such notes, to take a premium equal to the difference between that and other money. Portland Bank *v.* Storer, 7 Mass. 433.

Where a bank, in discounting several notes, retained under the name of exchange a certain sum over and above legal interest, it constituted usury. State Bank *v.* Ensminger (Ind.), 7 Blackf. 105.

Restrained by charter.—A bank's charter provided that it could not charge or receive more than 7 per cent interest on loans and discounts. Held that, where a note was made in Cincinnati payable in New York, the bank in discounting the note could not charge exchange in addition to 7 per cent interest. Lee & Co. *v.* Hartwell, 3 O. Dec. 225.

Shift to obtain usury.—Where a bank charges exchange as a shift or device to obtain a greater rate of interest on a discount than is allowed by law, the transaction is usurious. Miami Exporting Co. *v.* Clark, 13 O. 1; Farmers' Bank *v.* Williams, 4 O. Dec. 69.

Under the Act of March 19, 1850 (S. & C. 150), § 5, no officer of a bank was permitted to discount or purchase a note or bill at the increased allowance of exchange if he knew or had reason to believe that the parties to such paper would not be prepared or did not intend to pay the same at the place of payment, or when any device was resorted to in order to secure to said bank a greater profit than it could realize from the discount or purchase of such paper if made at its own counter. Lee & Co. *v.* Hartwell, 3 O. Dec. 225.

A bill of exchange was sold to the State Bank at her branch at L., the plaintiff, by two of the parties, who were partners for their own benefit; the plaintiff knowing the bill to be an accommodation bill. The bill was paid by the sale of another and application of payment on the first. The process of paying each preceding bill by another of like amount continued through a series of bills up to the nonpayment of the one sued on. Each was made payable in four months from the time of the sale thereof to the plaintiff at Cincinnati, but the parties were all residents of this state. The plaintiff, when the bills were purchased, charged and received interest at 6 per cent and three-fourths of 1 per cent exchange. The cost of transporting specie between L., where the bills were purchased, and Cincinnati, did not exceed $2 on the 1000. At the time the bills were sold to plaintiff there was a standing rule of the branch bank at L. that no note should be discounted having more than ninety days to run. Held, that the transaction did not show a device of the plaintiff to exact usury. State Bank *v.* Rodgers, 3 Ind. 53.

Payable out of county.—The state banks may charge, in addition to the interest mentioned, a reasonable premium on exchange, when the note or obligation is payable out of the county in which it is discounted. Acts 1857, p. 22, § 38. Merchants' Bank *v.* Sassee, 33 Mo. 350.

Where a country bank discounted a note payable in New York City, receiving legal interest on the amount, and, at the request of the customer, paid him the proceeds in New York sight drafts, charging him one-half of 1 per cent therefor, which was the current rate of exchange, the transaction is not thereby rendered usurious. Marvine *v.* Hymers, 12 N. Y. 223.

Payable out of state.—Where the charter of a bank provides that its business shall be "to lend money, discount promissory notes and bills, and deal in exchange," and prohibits it from receiving interest at a greater rate than 6 per cent per annum for the loan or forbearance of money, it is not usury for the bank to receive a bill of exchange from the drawer, payable to another place, and to deduct therefrom interest at the legal rate, together with the usual and customary deduction of exchange between those

is made.[97] But where the money, when paid by the acceptor of a bill, is more valuable at the place of payment than it is in the place where the discount is made, the reason for allowing exchange to be deducted in addition to interest does not exist.[98] The rule is the same where the bank discounts the drawer's bill as where it buys a bill, in the market, from the payee.[99]

Commission in Addition to Interest.—Where the bank charged a commission for effecting a loan in addition to interest the transaction is usurious.[1]

Attorney's Fees in Addition to Interest.—An agreement to pay attorney's fees, in addition to the rate of interest which the bank is authorized to charge, renders the loan usurious.[2]

Charge of Protest in Addition to Interest.—Where six per centum damages on a protested bill of exchange addressed to the drawee in Ohio instead of Philadelphia, where the bill was payable, is voluntarily paid with full knowledge of facts, the reservation of such damages out of a second bill of exchange discounted to pay the first is not a reservation of more than six per cent. interest.[3]

points—the transaction is not a loan, but a dealing in exchange, within the charter provision. Southern Bank *v.* Brashears, 1 Disn. 207, 12 O. Dec. 578.

The discount by a state bank of a bill of exchange payable without the state of Ohio, with knowledge that the parties thereto do not expect to pay the same at the place of payment named, but with the bona fide expectation that a third person, for whose accommodation it was drawn, will thus pay it for the drawer, is not usurious within the meaning of the fifth section of the Act of March 19, 1850 (S. & C. 150). Bank *v.* Haynes, 23 O. St. 637.

The Planters' Bank of Fairfield has authority to discount bills of exchange between this and the other states, and such contracts at the usual rate of exchange are not usurious. Planters' Bank *v.* Bivingsville Cotton Mfg. Co. (S. C.), 11 Rich. L. 677.

Where a bank in Ohio, by submitting to a rediscount at the rate of 7 per cent, could supply itself with current funds in New York at an expense equivalent to the mere cost of collecting the draft which it had discounted at maturity, such rediscount secured a legitimate benefit to the lender without loss to the borrower, and where the original discount was at a lawful rate it was not rendered usurious by such subsequent rediscount. Farmers', etc., Bank *v.* Parker, 37 N. Y. 148.

97. Southern Bank *v.* Brashears, 1 Disn. 207, 12 O. Dec. 578; Lee & Co. *v.* Hartwell, 3 O. Dec. 225.

98. Lee & Co. *v.* Hartwell, 3 O. Dec. 225.

Allowance must be made for the premium on the bill at the place of discount; that is, the premium must be deducted from the rate of discount. Farmers' Bank *v.* Williams, 4 O. Dec. 69.

99. Southern Bank *v.* Brashears, 1 Disn. 207, 12 O. Dec. 578; Lee & Co. *v.* Hartwell, 3 O. Dec. 225.

1. Commission in addition to interest.—A banking company effected a loan of $350 and $100 retained as commissions under contracts with the borrower, which stated that the company acted as agent for the borrower. Interest and principal were both made payable at the banking company's office, which attended to the collections. Held, that the loan was infected with usury. Olmstead *v.* New England Mortg., etc., Co., 11 Neb. 487, 9 N. W. 650.

An agreement, between a bank and contractors on the public works, for the bank to make a loan to the state, to be applied to the public improvements on which they were engaged, and charge the contractors five per cent commission, is an illegal shift and device by the bank to obtain more than the legal rate of interest upon its loans. Spalding *v.* Bank, 12 O. 544.

2. Attorney's fees in addition to interest.—Busby *v.* Finn, 1 O. St. 409; Martin *v.* Belmont Bank, 13 O. 250.

3. Commercial Bank *v.* Reed, 11 O. 498.

Payment of Debt in Addition to Interest.—A loan at the legal rate is not rendered usurious by the presence of an agreement by the borrower to pay another indebtedness.[4]

Loan of Depreciated Notes.—A loan of depreciated currency to be repaid in sound funds for their face value is usurious,[5] but not where to be

4. **Payment of debt in addition to interest.**—Where an officer of a bank entered into a contract with a merchant by which the latter was to purchase a stock of goods against which the bank and the merchant both had claims which they desired to secure, and providing that the officer should secure a loan from his bank for the merchant, in consideration of stipulated interest and payment of the bank's claim against the goods, the contract should be treated as an independent agreement to pay the bank's claim, and not as one usurious by reason thereof. Boyer *v.* Kintz, 22 O. C. C. 655, 12 O. C. D. 588.

The fact that upon a loan of money by a bank it exacts as a condition to make the loan at the legal rate of interest that the borrower shall secure to it the payment of another genuine and subsisting debt to it for which the borrower is liable, does not render the loan usurious; nor is the case altered by the fact that the other debt is of such nature that the borrower, upon paying it, can not have contribution from the other parties jointly liable with him therefor. Southern Trading Co. *v.* State Nat. Bank, 35 Tex. Civ. App. 5, 79 S. W. 644, affirmed in 98 Tex. 632, no op.

5. **Loan of depreciated notes.**—Nashville Bank *v.* Hays, 9 Tenn. (1 Yerg.) 243; Lawrence *v.* Morrison, 9 Tenn. (1 Yerg.) 444; Burton *v.* School Com'rs, 19 Tenn. (1 Meigs) 585.

Discounting a note at a bank, and, in lieu of money, receiving the post notes of the bank, payable at a future day, without interest, said notes being at a discount in the market at the time, is usurious. Gaither *v.* Farmers', etc., Bank (U. S.), 1 Pet. 37, 7 L. Ed. 43.

The Act of 1826, ch. 53, making it the duty of the Bank of Tennessee to loan the depreciated notes of the Nashville Bank, to be repaid in par funds, is constitutional; and an action upon a security executed for notes so loaned can not be resisted by the plea of usury. Burto *v.* School Com'rs, 19 Tenn. (1 Meigs) 585.

Bank's own notes.—A note given to a bank for money loaned is not usurious upon the ground that the bills of the bank, which were received by the defendant as money, were at a discount, by reason that the bank had suspended specie payments. Otherwise, if it lend the depreciated bills of another bank. Maury *v.* Ingraham, 28 Miss. 171.

A banking company lent a sum of money in their own bills, deducting 6 per cent interest at the time, upon a contract that, if any of the bills loaned should be returned to the bank during the continuance of the loan, the borrower should redeem them with specie; and that he should also receive of the company a certain amount of the bills of other banks, which were then passing at a small discount when exchanged for specie, for which he should pay specie. It was held that such contract was not usurious. Northamption Bank *v.* Allen, 10 Mass. 284.

At a time when the state bank of North Carolina had suspended specie payments, the defendant offered to the bank a note for discount, accompanied by an offer, in case his note should be discounted, to exchange an equal amount of northern funds for North Carolina bank notes. A bill was accordingly drawn upon a firm in Virginia, at ninety days and the same being accepted, the bill and note were both discounted, with a farther condition annexed to the note, that it should be paid in Virginia or other northern bank notes. The bank paid for the bill and note, in its own notes in part, and in part in the notes of other banks in North Carolina, all of which were at that time under par in Raleigh, at from 3½ to 4½ per cent. At the time of the discount, suits were depending against the bank upon its notes, to coerce payment of them. The notes received by the defendant were, in the presence of the president and cashier of the bank, in their banking house, handed over to the acceptor, to meet his acceptance with them, and then pay the balance to the defendant; the president and cashier knowing the loss to which the defendant would be subjected. The notes were sold in Virginia at a loss of from 2½ to 3½ per cent and the bill paid at maturity

repaid in like currency.[6] Where a bank, in good faith, and with no intention to evade the provision of its charter limiting the rate of interest it could take on loans or discounts, gave the notes of another bank in exchange for the note of the borrower, and for the latter's accommodation, such transaction is not usurious, though the bank notes so exchanged then circulated greatly below par.[7]

Actual Payment.—The mere discharge by a party of the note executed by himself and another, by giving his own note in renewal thereof, will not uphold a recovery from the bank on account of usurious interest in the former note. The payment contemplated by the statute is an actual payment, and not a further promise to pay.[8]

Subsequent Receipt of Usury.—The subsequent receipt of interest by a bank in excess of the rate fixed by its charter will not invalidate an original loan upon interest at the authorized rate.[9]

Small Excess of Legal Rate.—A discount is not usurious because of a small excess of the legal rate of interest.[10]

Intent.—To constitute the taking by a bank of a greater rate of interest

in Virginia or United States bank notes. These notes were at par at the time of the discount, and the president and directors to the North Carolina bank knew at that time that their notes were not of equal value. Held, notwithstanding, the transaction is not usurious. State Bank *v.* Cowan, 35 Va. (8 Leigh) 238.

Notes of another bank.—Every attempt by a bank to put upon a borrower bank bills not its own, and below par at the time and place, is usurious, unless the bank, by its contract of loan, engage to make the notes good as cash. State Bank *v.* Ford, 27 N. C. 692.

The taking by the Bank of the United States of a note payable in coin for the face amount of state bank notes loaned to the maker, which notes were greatly depreciated, whereby the bank obtained a greater profit than the 6 per cent allowed by its charter, is usurious and void. Bank *v.* Owens (U. S.), 2 Pet. 527, 7 L. Ed. 508.

As Act 1826, c. 33, makes it the duty of the Bank of Tennessee to loan the depreciated notes of the Nashville Bank, an action upon a security executed for notes so loaned can not be resisted by the plea of usury. Burton *v.* School Com'rs, 19 Tenn. (1 Meigs) 585.

Bank notes passed at par.—A bank at Albion, in the state of New York, discounted a bill of exchange, deducting a little less than legal interest for the time it had to run, and gave the holder, at his request, and for his accommodation, a draft, payable in its own bills, on a bank at Albany, where by law it was required to redeem them, at a discount not exceeding one-half of 1 per cent and the holder received those bills at par. The bank at Albany was the agent of the bank at Albion for the redemption of its bills, and paid the holder of the discounted bill in the bills of the bank at Albion, which then passed current at par; and that bank paid to the bank at Albany the amount of said draft in full. Held, that these facts did not prove that the bill was discounted on a usurious consideration or agreement. Bank *v.* Curtis (Mass.), 11 Metc. 359.

6. **Repayable in like currency.**—A loan made bona fide by a foreign bank on suspended bank notes, returnable by tacit understanding in the like currency, although the borrower immediately sold the notes for specie at a discount, is not usurious, and the lender has a valid claim for repayment in similar notes, or their equivalent in specie. Curtis *v.* Leavitt (N. Y.), 17 Barb. 309.

7. Bank *v.* Waggener (U. S.), 9 Pet. 378, 9 L. Ed. 163.

8. Lasater *v.* First Nat. Bank, 40 Tex. Civ. App. 237, 88 S. W. 429.

9. Busby *v.* Finn, 1 O. St. 409.

10. **Small excess of legal rate.**—Where, on the issue whether plaintiff was guilty of reserving interest in excess of the 8 per cent allowed by Code 1886, § 4140, to bankers for dis-

than that allowed by its charter usury, there must have been the intention on the part of the bank to violate its charter.[11]

§ 181 (5) Defenses to Usurious Contract and Recovery of Interest Paid.—Who May Raise Objection.—Where the holder of a bill sells the same to a bank, which discounts it at a greater rate than is legal, such illegal act is not available as a defense in an action by the bank against the drawer.[12] One who has not promised or paid usury to a bank on a loan made by it, but has merely agreed to indemnify the bank against a judgment collaterally connected with the loan as to which usury is claimed, has no right to recover a penalty for usury which he can assign to another.[13] An assignee of a claim for a penalty for taking usurious interest may maintain an action thereon.[14]

Against Bank Taking for Value.—While under the negotiable instruments law construed in an action with the banking laws of New York, where a state bank has in good faith discounted negotiable paper for value before maturity without notice that it was void for usury, the defense of usury is not available, such defense is available in an action by a state bank's receiver for notes purchased by it from the holder with knowledge that the notes were void as between the original parties because usurious interest was included therein.[15]

counting commercial paper, the evidence shows an excess of five cents only, the maxim, "De minimis non curat lex," obtains, and the issue need not be submitted. Slaughter *v.* First Nat. Bank, 109 Ala. 157, 19 So. 430.

11. Bank *v.* Waggener (U. S.), 9 Pet. 378, 9 L. Ed. 163.

12. Oneida Bank *v.* Ontario Bank, 21 N. Y. 490.

13. Southern Trading Co. *v.* State Nat. Bank, 35 Tex. Civ. App. 5, 79 S. W. 644, affirmed in 98 Tex. 632, no op.

14. Assignee.—One who has a right of action for double the amount of usurious interest paid by him under art. 3106, Rev. Stat. Tex., can assign the same, so as to give the assignee the right to maintain an action thereon. Lasater *v.* First Nat. Bank (Tex. Civ. App.), 72 S. W. 1054, affirmed in 97 Tex. 638, no op., citing Taylor *v.* Sturgis, 29 Tex. Civ. App. 270, 68 S. W. 538.

15. Against bank taking for value.—Banking Law, Laws 1870, p. 437, c. 163, and Laws 1892, p. 1869, c. 689, § 55, as amended by Laws 1900, p. 668, c. 310, § 1, declaring an intent to put state banks, etc., on an equality with national banks in the particulars therein referred to, prescribes the rate of interest the former shall charge, and provides that knowingly charging a greater rate shall forfeit all interest. The general provisions of Rev. St. (1st Ed.), p. 772, pt. 2, c. 4, tit. 3, §§ 2, 5 (Laws 1837, p. 486, c. 430, § 1), forbid the taking of interest upon loans in excess of the rate prescribed by law, and render void notes, etc., given to secure a loan made in violation thereof. Held, that in view of the provisions of the Negotiable Instruments Law, Laws 1897, p. 732, c. 612, § 96, protecting purchasers of commercial paper in good faith, before maturity, for value, and without notice of infirmity, although where a state bank has in good faith discounted negotiable paper for value before maturity without notice that it was already void for usury, the defense of usury is not available, such defense is available in an action by a state bank's receiver on notes purchased by it from the holder with knowledge that the notes were void as between the original parties because usurious interest was included therein. Order 117 App. Div. 428, 102 N. Y. S. 630, reversed, which reversed 99 N. Y. S. 389, 50 Misc. Rep. 610, which reversed 99 N. Y. S. 819, 49 Misc. Rep. 419. Schlesinger *v.* Lehmaier, 191 N. Y. 69, 83 N. E. 657.

Where the charter of a bank gives it power to loan money, buy, sell and negotiate promissory notes and to dis-

Defense to Action.—Usury may be set up as a defense to an action to enforce the usurious contract.[16]

Counterclaim.—The rule established by the federal laws, that the penalty imposed upon national banks for taking usury can not, in an action by the bank on the indebtedness, be set up as a counterclaim, is by the New York banking law rendered applicable in actions by state banks and individual bankers.[17]

Relief in Equity.—The defense of usury may be made to a suit brought to enforce the usurious contract in equity as well as at law.[18] Under the doctrine that he who asks equity must do equity, the plaintiff in a suit to cancel a mortgage as a cloud on title, alleging a usurious consideration, must tender the amount actually borrowed with lawful interest.[19]

count, upon banking principles and usages, promissory notes and other negotiable paper, with a proviso that said bank shall not take more than six per cent per annum in advance, upon its loans and discounts; and such bank receives from its debtor, in good faith, and in payment of a pre-existing debt, but at a rate of discount greater than 6 per cent per annum, the negotiable promissory note of a third party, the same being bona fide business paper, such transaction is not usurious, nor beyond the corporate capacity of the bank. Dunkle *v.* Renick, 6 O. St. 527.

16. **Defense to action.**—Metropolitan Trust Co. *v.* Truax, 67 Misc. Rep. 588, 122 N. Y. S. 739.

Sufficiency of answer.—In an action by the receiver of a banking corporation against the indorser of a note, an answer alleging that the bank, of which plaintiff is receiver, discounted the note on which he sues, upon a corrupt agreement against the form of the statutes that the defendant should receive $300 (the amount of the note being $500, and it being payable three months from its date), and leave the remaining $200 in the bank until the note became due, then to be applied towards its payment, sufficiently states the defense of usury. Butterworth *v.* Pecare, 21 N. Y. Super. Ct. 671.

17. **Counterclaim.**—Under the general banking law of 1892 (Laws 1892, c. 689, § 55), permitting one paying usury to an individual banker to recover twice the interest so paid, and stating the true intent to be to place banks and individual bankers on an equality, in such matters, with national banks, such recovery can not be had by way of counterclaim against an action for the debt, but must be enforced by penal suit in the same manner as is provided by act of congress in the case of national banks. Judgment and order, 29 App. Div. 304, 51 N. Y. S. 418, affirmed. Caponigri *v.* Altieri, 165 N. Y. 255, 59 N. E. 87.

Though a state bank purchased notes with knowledge that usurious interest had been paid, the maker could not plead usury as a defense to a suit brought upon them by the bank's receiver, since under the National Banking Act (Act June 3, 1864, c. 106, 13 U. S. Stats. pp. 99-103, § 30) a penalty for taking usury by national banks can only be recovered in an action of debt, and not as a counterclaim or set-off to the original obligation, and the banking law (N. Y. Laws 1892, p. 1869, c. 689, § 55) places state banks on an equality with national banks. Judgment 99 N. Y. S. 389, reversed. Schlesinger *v.* Lehmaier, 117 App. Div. 428, 102 N. Y. S. 630, reversed on another point in 191 N. Y. 69, 83 N. E. 657.

Under Banking Law (Consol. Laws, c. 2), § 74, providing that a bank receiving usurious interest shall forfeit the entire interest, and the person paying the same may recover twice the amount of interest paid, the remedy where a bank exacts usurious interest is by a separate action, and not by setting up the matter as a defense or counterclaim in an action on the debt. Terminal Bank *v.* Dubroff, 66 Misc. Rep. 100, 120 N. Y. S. 609.

18. **Relief in equity.**—The defense of usury, in that an incorporated bank has reserved interest at a rate greater than that allowed by its charter, may be made to a suit brought to enforce such contract in equity, as well as at law. Bank *v.* Stevens, 1 O. St. 233, 59 Am. Dec. 619.

19. **Tender of amount due.**—Code 1886, § 4140, made it a misdemeanor for any banker to discount any note at a higher rate than 8 per cent. Plain-

After Judgment.—When the contract has been merged in a judgment, and a creditor's bill brought to obtain satisfaction, the parties to it are estopped, while it remains in force, from averring or proving such illegality to have existed in the obligation upon which it was founded, for the purpose of impeaching the judgment. The remedy in such case can be had in a direct proceeding brought to set aside or impeach the judgment by motion in the same court to set it aside and let the party in to defend; or, under the circumstances of this case, by original or cross bill in chancery, filed for that purpose.[20]

Evidence.—An affidavit stating that the lender of money was a private banker before the loan, and president of a national bank, is per se insufficient to show that the lender was a private banker, exempted by Laws of 1882, from the effect of the general usury law.[21]

Recovery of Interest Paid.—It is held in some states that interest paid on a usurious contract may be recovered,[22] while in others that it may not.[23]

After Repeal of Statute.—The repeal of a usury law pending an action for a penalty thereunder abates the action.[24]

tiff sued to have a mortgage made to defendant canceled as a cloud on her title, alleging a usurious consideration. Held, that she was not entitled to relief without tendering the amount actually borrowed, with lawful interest, since the loan, though prohibited by the act, was not in itself wrong, and he who asks equity must do equity. Turner *v.* Merchants' Bank, 126 Ala. 397, 28 So. 469. See Bank *v.* Stevens, 6 O. St. 262.

20. After judgment.—Bank *v.* Stevens, 1 O. St. 233, 59 Am. Dec. 619.

Where a bank takes a bond which is void for usury, with a warrant of attorney to confess judgment annexed, from S., as principal, and C. and A., as sureties, and judgment is taken against all without process or notice, and the bank afterwards files a bill in chancery to subject equities of the sureties to the payment of the judgment, the sureties, though ignorant of the usury until after the rendition of the judgment, can not, by cross bill, allege the usury, and have relief against it, without a tender of the amount due in equity. Bank *v.* Stevens, 6 O. St. 262.

21. New York Laws 1882, c. 409, § 68; Sexton *v.* Home Fire Ins. Co., 35 App. Div. 170, 54 N. Y. S. 862.

22. Recovery of interest paid.—One who, by transfer of property to a surety on his note, procures its payment, with usurious interest, by such surety, can recover back such interest and penalty therefor as on a payment made by himself. Lasater *v.* First Nat. Bank, 96 Tex. 345, 72 S. W. 1057. See, also, Lasater *v.* First Nat. Bank (Tex. Civ. App.), 72 S. W. 1054, affirmed in 97 Tex. 638, no op., citing Taylor *v.* Sturgis, 29 Tex. Civ. App. 270, 68 S. W. 538.

23. Where interest in excess of the amount which a bank is authorized to charge is voluntarily paid, it can not be recovered back. Busby *v.* Finn, 1 O. St. 409; Hade *v.* McVay, etc., Co., 31 O. St. 231; Spalding *v.* Bank, 12 O. 544; Commercial Bank *v.* Reed, 11 O. 498.

24. After repeal of statute.—Laws N. Y. 1870, c. 163, which authorized banking associations to charge on loans and discounts interest at the rate of 7 per cent per annum, and conferred the right to recover double the amount of interest paid at any greater rate, is repealed by Laws N. Y. 1880, c. 567, which enacted that Laws 1870, c. 163, § 1, "is hereby amended so as to read as follows," and then set out the provisions of the Act of 1870, except that "six per centum" was inserted in place of "seven per centum;" and, there being no clause in the Act of 1880 saving actions pending, an action brought for penalties under the Act of 1870, which was pending when the Act of 1880 came into effect, will abate. Nash *v.* White's Bank, 105 N. Y. 640, 11 N. E. 946.

§ 181 (6) Effect of Usury.—Banks are subject to the same penalties for taking usurious interest as individuals are.[25] Some decisions hold that where the bank takes usurious interest it forfeits the principal loaned as well as the legal and excessive interest,[26] others hold it forfeits the legal

25. Effect of usury.—Lumberman's Bank *v.* Bearce, 41 Me. 505; Perkins *v.* Watson, 61 Tenn. (2 Baxt.) 173.

Where a bank discounts a note at a usurious rate, it stands upon the same footing as an individual unless its charter or some statute provides differently. Chafin *v.* Lincoln Sav. Bank, 54 Tenn. (7 Heisk.) 499.

Under Banking Law, § 74, which provides that twice the amount of excess interest charged a borrower may be recovered, cumulative penalties may be recovered. Mackey *v.* Royal Bank, 78 Misc. Rep. 145, 137 N. Y. S. 929.

26. Void as to principal.—Orr *v.* Lacey (Mich.), 2 Doug. 230; Commercial Bank *v.* Reed, 11 O. 498; Lafayette Bank *v.* Findlay, 1 O. Dec. 49; Larwell *v.* Hanover Sav. Fund Soc., 40 O. St. 274; National Bank *v.* Insurance Co., 41 O. St. 1; Russell *v.* Failor, 1 O. St. 327, 59 Am. Dec. 631; Kilbreth *v.* Bates, 38 O. St. 187; Laskey *v.* Board of Education, 35 O. St. 519; First Nat. Bank *v.* Garlinghouse, 22 O. St. 492, 10 Am. Rep. 751; Bank *v.* Jones, 16 O. St. 145; Union Bank *v.* Bell, 14 O. St. 209; Preble County Branch *v.* Russell, 1 O. St. 313; Bank *v.* Stevens, 1 O. St. 233, 59 Am. Dec. 619; Busby *v.* Finn, 1 O. St. 409; Morris *v.* Way, 16 O. 469; Miami Exporting Co. *v.* Clark, 13 O. 1; Spalding *v.* Bank, 12 O. 544; Creed *v.* Commercial Bank, 11 O. St. 489; State *v.* Commercial Bank, 10 O. 535; Bank *v.* Swayne, 8 O. 257, 32 Am. Dec. 707; Farmers' Bank *v.* Williams, 4 O. Dec. 69; Lee & Co. *v.* Hartwell, 3 O. Dec. 225; Brower *v.* Haight, 18 Wis. 102.

A loan by a bank is rendered void by the reservation of a rate of interest therefor prohibited by its charter. Bank *v.* Owens (U. S.), 2 Pet. 527, 7 L. Ed. 508.

Under Act April 2, 1829, § 33, prohibiting banks subject thereto from taking more than 6 per cent per annum in advance as interest on paper discounted by it maturing in sixty-three days, paper discounted in violation of such provision is void in the hands of the bank, and no recovery can be had thereon; and, since the contract sought to be enforced arises from a violation of the law, the courts will refuse aid to either in enforcing it. Seneca County Bank *v.* Lamb (N. Y.), 26 Barb. 595.

Where a bank, prohibited by statute from charging interest on loans in excess of 7 per cent, discounts a bill of exchange as a mere devise to obtain a greater rate of interest, the contract is void, and the bank can neither recover the amount loaned in an action on a bill nor in assumpsit for money loaned. Miami Exporting Co. *v.* Clark, 13 O. 1.

Where a bank is limited by its charter to 6 per cent interest, if it reserves or takes more, the note or obligation on which it is reserved or taken is void, not only for the want of corporate power to enter into such a contract, but by the express provisions of the sixty-first section of the act of Ohio to incorporate the state bank. Preble County Branch *v.* Russell, 1 O. St. 313.

Draft held absolutely void.—Since Code 1886, § 4140, provides that any banker who discounts any note or draft at a higher rate of interest than 8 per cent per annum is guilty of a misdemeanor, cashing a thirty-days draft at a discount of 1 per cent of its face renders the draft absolutely void, and defeats an action thereon against the acceptor. Youngblood *v.* Birmingham, etc., Sav. Co., 95 Ala. 521, 12 So. 579, 20 L. R. A. 58, 36 Am. St. Rep. 245.

Renewed paper void.—If a bank, on discounting a bill of exchange, corruptly reserves greater interest than it is authorized by its charter to receive, the bill will be void; and so, also, will be a new bill given in renewal of the balance due on such previous illegal one. Orr *v.* Lacey (Mich.), 2 Doug. 230.

Void as between parties.—The usury statute of Ohio is applicable only to banking corporations, and merely declares a forfeiture of the debt as between the borrower and lender, without annulling the contract. Farmers', etc., Bank *v.* Parker, 37 N. Y. 148.

Where its charter provides that a bank "shall not take more than at the rate of six per cent per annum on its loans or discounts," a contract for a loan made by the bank for a greater rate of interest is void, and is not

merely void as to the excess of interest, as would be the case under the general law of Ohio. Bank *v.* Swayne, 8 O. 257, 32 Am. Dec. 707.

A banking partnership does not come within the rule which renders a usurious loan by a banking corporation void. Coppock *v.* Kuhn & Sons, 3 O. C. C. 599, 2 O. C. D. 347.

A mistake of law whereby a bank, limited by its charter to a certain rate of interest on its loans and discounts, reserves more than the rate so limited, will not relieve the bank from the consequences of such violation of its charter. Busby *v.* Finn, 1 O. St. 409.

But it would seem that a mistake of fact in the computation of interest, whereby interest is reserved in excess of the charter rate, will not render the loan void. Lafayette Bank *v.* Findlay, 1 O. Dec. 49.

Not void as to principal.—McLean *v.* Lafayette Bank, Fed. Cas. No. 8,888, 3 McLean 587; Planters Bank *v.* Sharp (Miss.), 4 Smedes & M. 75, 43 Am. Dec. 470; Grand Gulf Bank *v.* Archer (Miss.), 8 Smedes & M. 151; Bank *v.* Finlay (N. Y.), 6 Hun 584; Chafin *v.* Lincoln Sav. Bank, 54 Tenn. (7 Heisk.) 499.

A note discounted by a bank at a higher rate of interest than is allowed by Rev. St., c. 36, §§ 59, 60, is not thereby rendered void. Quinsigamond Bank *v.* Hobbs (Mass.), 11 Gray 250.

Not void for want of authority.—Where a bank takes a greater rate of interest on a discount than that allowed by its charter, the contract is not void for want of authority, inasmuch as a discount or a loan is an act within the scope of the powers of a bank. It would be otherwise in the case of a contract foreign to the objects and powers of the corporation. Commercial Bank *v.* Nolan (Miss.), 7 How. 508.

Principal valid by statute.—The statute of 1843, which declares usurious contracts valid as to the principal debt, applies as well to loans made by the State Bank as to those made by individuals. Billingsley *v.* State Bank, 3 Ind. 375.

Under a bank's charter forbidding usurious profits, the fact that the bank discounts a draft at a usurious interest does not prevent the bank's recovering the amount of the draft, less the usurious excess. Gibbs *v.* Union Banking Co. (Pa.), 2 Wkly. Notes Cas. 472.

Though a bank be specially restricted by its charter from taking more than a certain interest, a note securing higher interest is not void, as being a contract which the bank is not authorized to make. Rock River Bank *v.* Sherwood, 10 Wis. 230, 78 Am. Dec. 669.

Under Missouri statute.—Wag. St., p. 329, c. 37, authorizing the formation of banking corporations with power to loan money "at a rate of interest not to exceed 10 per cent per annum," does not render void a note taken for a loan at a greater rate of interest. Ritenour *v.* Harrison, 57 Mo. 502.

Under New York statute.—Not void under Rev. Banking Laws of New York of 1892 repealing Bank Act of 1882. Hawley *v.* Kountze, 16 Misc. Rep. 249, 38 N. Y. S. 327, 73 N. Y. St. Rep. 788.

Where note brokers adopted as a branch of their business the making of loans to their customers on security of the notes held for sale, they thereby became engaged in the banking business, within Laws N. Y. 1870, p. 437, c. 163, as amended by Laws 1880, p. 823, c. 567, under which bankers are exempt from liability for forfeiture of the principal of usurious loans. In re Samuel Wilde's Sons, 133 Fed. 562, affirmed 144 Fed. 972, 75 C. C. A. 601.

The National Bank Act [3 U. S. Comp. St. 1901, pp. 3454-3493] provides that usurious interest can not be collected, but does not impose a forfeiture of the principal as a penalty for usury. Laws N. Y. 1870, p. 437, c. 163, subjected state bank associations to the same liability in respect to usury as national banks, and Laws 1880, p. 823, c. 567, declares that the former acts should apply to private or individual bankers. Held, that the effect of such legislation was to abolish the statutory forfeiture of the principal of usurious loans made by all persons engaged in the business of banking in New York. In re Samuel Wilde's Sons, 133 Fed. 562, affirmed 144 Fed. 972, 75 C. C. A. 601.

Where other penalties provided.—A provision in a bank charter providing for a forfeiture of such charter as a penalty for the taking of interest at a greater rate than that fixed by the charter, will not prevent the operation of the rule that loans by an incorporated bank upon interest in excess of that allowed by its charter are void. Kilbreth *v.* Bates, 38 O. St. 187.

The National Bank Act (3 U. S. Comp. St. 1901, pp. 3454-3493) provides that usurious interest can not be collected, but does not impose a for-

and excessive interest,[27] while still others hold that excessive interest only is forfeited.[28]

feiture of the principal as a penalty for usury. In re Samuel Wilde's Sons, 133 Fed. 562, affirmed 75 C. C. A. 601, 144 Fed. 972.

Tennessee statute.—"Ever since the Act of 1819, the statutory law has been that when money is loaned at more than 6 per cent, the party could recover the principal and simple interest, and the excess over 6 per cent alone was usury." Perkins *v.* Watson, 61 Tenn. (2 Baxt.) 173.

When a note is discounted at a greater rate of discount than is allowed by law, the taint of illegality affects the whole and every part of the transaction; not merely the contract for the excessive rate of discount, but the note itself, illegally discounted, although the note, taken by itself, may have been an independent contract, and free from any objection. Wetmore *v.* Brien, 40 Tenn. (3 Head) 723, citing Perkins *v.* Watson, 61 Tenn. (2 Baxt.) 173.

27. Void as to interest.—Where a bank, in its discounts, reserves a greater interest than is allowed by its charter, the contract, in Mississippi, falls within the general law of usury; but it is not void, and the bank may recover the principal sum lent, though without any interest. Planters' Bank *v.* Sharp (Miss.), 4 Smedes & M. 75, 43 Am. Dec. 470.

The charter of the Grand Gulf Bank prohibited it from taking more than 7 per cent on a certain class of loans. The general law of the state prohibited the taking of more than 8 per cent, except on bona fide contracts for the loan of money, where 10 per cent might be taken, if it was expressed in writing. In either case the penalty of exceeding the rate was a forfeiture of the entire interest. The bank took more than 7 per cent usuriously. Held, that she only forfeited the interest, and could recover the principal. Grand Gulf Bank *v.* Archer (Miss.), 8 Smedes & M. 151.

New York Act of 1892.—Banking Act 1882 (Laws 1882, c. 409) applied to "banking associations" and "individual bankers" who were allowed to do business under the same, subject to state supervision. Sections 68, 69, relieved them and "private bankers" from forfeiture of the principal for usury, under the general usury laws, and subjected them to the forfeiture of interest only. Revised Banking Laws 1892 (Laws 1892, c. 689) dropped the designation of private bankers in the rendering of §§ 68, 69, of the previous act; and in the schedule of repealed acts at the end, which included Laws 1882, c. 409, such sections (§§ 68, 69) were expressly exempted from repeal. Held, that private bankers by usury forfeit the interest only. Hawley *v.* Kountze, 16 Misc. Rep. 249, 38 N. Y. S. 327, 73 N. Y. St. Rep. 788.

Under Laws 1870, c. 163, a state bank forfeits only the interest where a note has been discounted by it at a usurious rate of interest. Bank *v.* Finlay (N. Y.), 6 Hun, 584.

Interest not paid.—Under Banking Law (Consol. Laws, c. 2), § 74, providing that knowingly reserving an illegal rate of interest shall work a forfeiture of the interest, the reservation of an illegal rate of interest prevents a recovery of any interest not already paid, and the fact of the reservation of illegal interest not paid may be set up in an action on the loan. Metropolitan Trust Co. *v.* Truax, 67 Misc. Rep. 588, 122 N. Y. S. 739.

28. Void as to excessive interest.—Gibbs *v.* Union Banking Co. (Pa.), 2 Wkly. Notes Cas. 472; Perkins *v.* Watson, 61 Tenn. (2 Baxt.) 173; Chafin *v.* Lincoln Sav. Bank, 54 Tenn. (7 Heisk.) 499.

In an action by a bank on a note the fact of usury will only avoid the excess of interest taken over the legal rate. Lumberman's Bank *v.* Bearce, 41 Me. 505.

A charter of a bank, silent as to the effect or penalty if more than the charter rate of interest be taken, renders a contract void only as to the excess of interest stipulated. Darby *v.* Boatman's Sav. Inst., Fed. Cas. No. 3,571, 1 Dill. 141.

Rev. St., c. 69, provides that, any person taking or reserving for loans of money a rate of interest over 6 per cent, the debtor may avoid such excess. By the Bank Act of 1841, § 49, no bank is allowed to take a greater rate of interest than 6 per cent. Held, that banking corporations are subject to the general law as modified in the act relating to banks, and, when a greater rate than legal interest is taken or reserved, such excess only can be avoided in an action brought by them upon the paper. Veazie Bank *v.* Paulk, 40 Me. 109.

§ 182. Application of Proceeds.—The presentation of a note to a bank for discount is an offer to sell it to the bank for its face value, less the legal discount; and when accepted or discounted the bank agrees to pay such sum to the person presenting it, and, until such payment is made, the bank has no title, but holds it merely as a bailment; and an application of the proceeds to the extinguishment of liability on other notes held by the bank of the person presenting it, without his consent, is not such legal payment as gives the bank title to the note.[29] A contract between two banks that the proceeds of paper, discounted by one for the other, should not be drawn on in advance of the maturity of such paper, is not affected by the subsequent fraud of the bank obtaining the discount, in reporting such proceeds to the comptroller of the currency as part of its cash reserve.[30]

§ 183. Rights and Liabilities as to Paper Discounted—§ 183 (1) Of Bank.—The bank is entitled to retain the discounted security in its own hands, or make any lawful disposition of it tending to its own advantage.[31] A note discounted by a bank, with its funds made payable to another, is the property of the bank, upon which it can, without the payee's indorsement, maintain suit in its own name with the same advantage as if the note had been made payable to the bank.[32] A bank, after the discount of paper, standing the position of an original lender, and is unaffected by want or failure of consideration.[33] Where a draft is discounted by a bank

29. The presentation of a note to a bank for discount is an offer to sell it to the bank for its face value, less the legal discount; and when accepted or discounted the bank agrees to pay such sum to the person presenting it, and, until such payment is made, the bank has no title, but holds it merely as a bailment; and an application of the proceeds to the extinguishment of liability on other notes held by the bank of the person presenting it, without his consent, is not such legal payment as gives the bank title to the note. Parry *v.* Highley, 8 Pa. Co. Ct. Rep. 584.

Where a loan was negotiated through a banker, who received the money and failed before paying it over to the borrower, it was held, as being purely a question of fact, on the testimony, that the money was held by the bankers as a deposit to the credit of the borrower, and that he knew and so understood it before their failure. Merriam *v.* Haas, 154 U. S. 542, 18 L. Ed. 29, 14 S. Ct. 1159.

30. Fisher *v.* Tradesmen's Nat. Bank, 64 Fed. 706, 12 C. C. A. 409.

31. **Rights and liabilities as to discounted paper.**—Farmers', etc., Bank *v.* Parker, 37 N. Y. 148.

32. **Paper is property.**—"There are old cases holding, in such a case, the bank could not sue in its own name on such a note without an indorsement of it by the payee. Bank *v.* Lyman, 20 Vt. 666; Horah *v.* Long, 4 Dev. & B. 274. But the authority of these cases has been overthrown and the consensus of judicial opinion now is that such a note, executed under the conditions just stated, is, upon delivery, ipso facto the property of the bank, and can be sued upon without indorsement. 1 Randolph on Commercial Paper, § 133, 157; 2 Daniel on Notes and Bills, § 1189." Lookout Bank *v.* Aull, 93 Tenn. 645, 27 S. W. 1014, 42 Am. St. Rep. 934.

33. **Holder for value.**—"The bank after discounting the drafts, stood towards the acceptors in the position of an original lender, and could not be affected in its claim by the want of a consideration from the drawer for the acceptance, or by the failure of such consideration. This has been held in numerous cases, and was directly adjudged by this court in Hoffman *v.* National City Bank (U. S.), 12 Wall. 181, 20 L. Ed. 366, which in essential particulars is similar to the one at bar." Goetz *v.* Bank, 119 U. S. 551, 30 L. Ed. 515, 7 S. Ct. 318.

and passed to the credit of the drawer, and he is allowed to check against it, and does so, the bank is a holder for a valuable consideration.[34]

Against Maker.—Where a draft was drawn in favor of a bank, and while the draft was in transit for acceptance, the drawee without knowledge of the existence of the draft remitted the amount due, and the drawer converted the amount remitted to his own use by a deposit to his credit with his bank, the drawee bank has the right to have the proceeds of the draft applied to its payment, no intervening rights of others having attached.[35] An accommodation drawer of a bill of exchange made payable to a particular bank, for the purpose of being discounted by the bank named, can not be held liable on the bill to a third person, who, after discount by the bank had been refused, took the bill from the principal for value; nor can he be held liable to the bank, where it subsequently discounts the bill for such third person, with notice of the suretyship of the drawer.[36] As between a bank, discounting a draft and the drawer, the proceeds of the draft when collected belong to the bank.[37]

34. In such a case, though the drawer's account is overdrawn, at the time of the discount and at the time of the maturity of the draft, the court will not inquire into the amount checked out, but the consideration once existing will be held good as to the whole note. First Nat. Bank *v.* Crawford, 2 Cin. R. 125, 13 O. Dec. 807.

Purchaser for value.—A bank that discounts a note in good faith, before its maturity, without notice of any defense against it, paying value therefor, by the surrender of secured notes and claims on third persons and the payment of a small balance in cash, is such purchaser for value as is protected against the defense of failure of consideration and fraud in procurement of note. Bank *v.* Looney, 99 Tenn. 278, 42 S. W. 149, 38 L. R. A. 837, 63 Am. St. Rep. 830, citing Nichol, etc., Co. *v.* Bate, 18 Tenn. (10 Yerg.) 429; Cherry *v.* Frost, 75 Tenn. (7 Lea) 1; Jordan *v.* Maney, 78 Tenn. (10 Lea) 135; Lookout Bank *v.* Aull, 93 Tenn. 645, 27 S. W. 1014, 42 Am. St. Rep. 934.

35. Against drawer.—A drew his negotiable draft in favor of C, a banker, on B, for the exact amount due him, for the purpose of having C discount the same, which he did, in the usual course of business, and paid to A the proceeds. While the draft was in transit to B for acceptance and payment, he, without any knowledge of its existence, remitted the amount due, by certified check on his banker, to A, who received and converted it to his own use, by depositing it to his credit with his banker, as cash, together with his other deposits, subject to his checks. On presentation of the draft, B refused to accept or pay, and it was returned to C. A then made a general assignment, having a bank balance to his credit greater than the amount of his draft. This check was forwarded by his banker for payment, and two days after the assignment was paid by the bank certifying the same. It was held that as between A and C, and under these circumstances, C acquired, by equitable assignment, the right to the amount then in B's hands; that B, having remitted to A the amount, by check, before notice of the draft, which was afterwards paid, was released from the obligation to accept or pay, but the check in the hands of A, or his banker, or its proceeds when collected, belonged in equity to C in the absence of any intervening right, and he may, in an action for equitable relief against the parties, have the same applied to the payment of his draft; and that the conversion by A of this check, by obtaining a credit therefor on his account in bank, did not defeat this right to the proceeds of the check when collected, there being sufficient balance out of which to pay the same, and no intervening right of the bank or others having attached. Gardner *v.* National City Bank, 39 O. St. 600, affirming 4 O. Dec. 229.

36. Knox County Bank *v.* Lloyd, 18 O. St. 353.

37. Krafft *v.* Citizens' Bank, 139 App. Div. 610, 124 N. Y. S. 214.

Against Indorser.—A bank has a right to recover from a person discounting paper on a guarantee that the paper is good and collectible.[38] A bank which has discounted an order of a township board of education issued without authority has no recourse against the drawee in the absence of evidence of fraud.[39] If one intrusts his name in blank to another to procure a discount, he is liable to the full extent to which such other may see fit to bind him, when the paper is taken in good faith without notice that the authority given has been exceeded.[40] A bank may be estopped to claim ownership of paper by holding an employee personally liable for not demanding payment and giving notice of dishonor.[41] A bank having discounted a note for a dealer is not liable for failing to charge a prior indorser, on the dishonor of the note, and such failure will not prevent a recovery by the bank against the dealer as indorser.[42] Where a note is made payable to a bank, and signed by a surety, presented to the bank for discount and refused, and afterwards discounted by a third person, without the knowledge of the surety, an action will not lie, at the suit of the bank, for the use of the person discounting the note, against the surety.[43] Upon a letter from persons in New Orleans, addressed to one in Cincinnati, stating that bills of a certain amount would be duly honored by them up to a certain date,

38. **Guarantee of indorser.**—Held, that the statement on which the note with the others was sold, "we know them to be good," constituted a guaranty that the note sued on was good and collectible at maturity; and the plaintiff having, without avail, used due diligence to collect the note, had a right to recover of the defendant, upon such guaranty, the amount of the note so purchased. Union Nat. Bank *v.* First Nat. Bank, 45 O. St. 236, 13 N. E. 884, affirming 13 Am. L. Rec. 748, 6 O. Dec. 1229. See, also, Sturges & Co. *v.* Bank, 11 O. St. 153.

39. **On order of board of education.**—Where a board of education purchased books of S. and issued to him its order on the treasurer of the township, payable at a future time, and S. sold the order to a bank before maturity, and the bank was unable to collect the order because the board of education had no legal authority to make the purchase, the bank has no recourse on S. without allegation and proof of fraud on the part of S. in the sale of the order to the bank. Farmers' Nat. Bank *v.* Squire, 18 O. C. C. 697, 6 O. C. D. 697.

40. **Indorsed in blank.**—"The authority conferred by such blank signatures is said to be that of a general letter of credit. It is no defense against a bona fide holder to prove that the person to whom the paper was intrusted was only authorized to use it for a particular purpose, and had fraudulently converted it to a different purpose; or that he was only authorized to fill the blank upon a certain condition which had not happened. 1 Parsons on Notes and Bills 110; Fullerton *v.* Sturges, 4 O. St. 529; Putnam *v.* Sullivan, 4 Mass. 45, 3 Am. Dec. 206; Selser *v.* Brock, 3 O. St. 302." Weirick *v.* Mahoning County Bank, 16 O. St. 296.

41. **Bank estopped.**—If an employee of a banker, in the absence of the latter, violates the rules of the bank, by not demanding payment of the maker of a promissory note falling due and giving notice of dishonor to the indorser, so as prima facie to charge him, and such banker insists upon holding the employee responsible for the amount of such note, and the latter acquiesces, takes possession of the paper with the banker's consent, sues the indorser upon it in his own name, and the banker appears as a witness at the trial, and states such facts and makes no claim to the note, he will be estopped from claiming against the indorser that he is the owner of such note, and the employee may recover upon it as the owner and holder. Heman *v.* French, 2 Cin. R. 561, 13 O. Dec. 1069.

42. Lake *v.* Artisans' Bank (N. Y.), 17 Abb. Prac. 232.

43. Clinton Bank *v.* Ayres, 16 O. 282.

the same being accompanied by a bill of lading of shipments to their address, by steamboats, an action may be maintained for a breach of promise to accept in his own name, by a bank, which, upon the faith of such letter, has taken bills drawn according to its provisions.[44]

Against Creditors of Maker.—A bank receiving a bill of lading from its customer, and discounting a draft drawn by him on the consignee, may enforce its claim against the goods, as against an attaching creditor of the customer, where the consignee refused to honor the draft or receive the goods, though it customarily charged the amount of unpaid drafts back to its customers.[45] A bank receiving a bill of lading from its customer, and discounting a draft drawn by him on the consignee, may enforce its claim against the goods, as against an attaching creditor of the customer, where the consignee refused to honor the draft or receive the goods, though it customarily charged the amount of unpaid drafts back to its customers.[46]

To Rescind Discount.—Where the holder of a note, knowing that the maker is insolvent, procures the note to be discounted by a bank by false representations, upon which the bank relies, the bank, upon discovering the insolvency of the maker, may rescind the discount, and charge back to the holder the amount of the note with which he has been credited in his deposit account.[47]

Of Branch Bank.—A branch bank is the owner of paper discounted by it, and, as such, when notified by the parent bank of the dishonor of a bill

44. Lonsdale *v.* Lafayette Bank, 18 O. 126.

45. Against creditors of maker.—Judgment 25 Misc. Rep. 454, 55 N. Y. S. 561, affirmed. American, etc., Sav. Bank *v.* Austin, 47 App. Div. 635, 62 N. Y. S. 1131.

B. & C., being insolvent, made an assignment for the benefit of their creditors. Prior to such assignment, B. & C. had entered into an agreement with the F. Co. and certain banks, whereby said banks were to discount acceptances on drafts drawn against certain goods made by the F. Co. for B. & C., and to be delivered to them, and the proceeds arising from the sale of such goods were to be applied to the extinguishment of the debt represented by such acceptances, and whereby all acceptances were to be predicated upon actual sales or consignments of such goods to B. & C. by the F. Co. Just prior to said assignment, the A. S. & I. Co. delivered to B. & C. goods, under a bill of sale executed by the F. Co. to B. & C., and the assignee of B. & C. took possession of said goods. On a hearing before the probate court to determine how the proceeds of the sale of said goods should be distributed, it was held, that the banks, by reason of the foregoing facts, were entitled to the proceeds of the sale, under an equitable lien superior to that of any other creditors. Appalachian Bank *v.* Gatch, 7 N. P. 307, 2 O. Dec. 366.

46. American, etc., Sav. Bank *v.* Austin, 25 Misc. Rep. 454, 55 N. Y. S. 561, affirmed 47 App. Div. 635, 62 N. Y. S. 1131.

47. To rescind discount.—Bank *v.* Union Trust Co., 50 Ill. App. 434.

A bank, under the justifiable belief that it was dealing with an incorporated bank instead of with the owner of a private bank, gave the latter credit under his bank name for a draft drawn by himself on his own bank. When he drew it, he was hopelessly insolvent, and, before the credit expired, he made an assignment for his creditors. Held, that the bank was entitled to rescind the credit upon learning these facts, though they were not learned until after the assignment. Kling *v.* Irving Nat. Bank, 21 App. Div. 373, 47 N. Y. S. 528, order affirmed 55 N. E. 1096, 160 N. Y. 698.

transmitted through it for collection, is entitled to a day to give notice to the endorsers.[48]

§ 183 (2) Of Maker.—A bank discounted certain notes for defendant, and the notes were subsequently protested for nonpayment. Defendant sent the bank other notes to discount, the proceeds of which were to be used in taking up the protested notes. The bank was under no obligation to inform defendant that it refused to discount the second lot of notes.[49]

§ 183 (3) Of Indorsers.—Where a bank holding funds of the payee discounted a draft before maturity, and, on its being protested for nonpayment, was requested by the payee to bring suit thereon against the acceptors, the payee promising to hold the bank harmless as to additional expenses, the bank, having made the proper entries, the acceptors were entitled to inquire into the consideration between the payee and themselves.[50] Where a principal discounts a bill at a greater rate of discount than six per centum, this will not be such a fraud upon an accommodation indorser as to discharge him from all liability upon the bill.[51] By statute in Ohio a surety in fact and as such known to the bank but falsely stated to be a principal may show such fact.[52] But although it may be beyond the scope of a partnership business to execute notes as surety, yet the mere fact that a partner signed the firm name to a note under his own name was not sufficient to charge a bank discounting the note with notice of the fact that the firm was surety merely, and, in the absence of any other evidence that the bank had notice of that fact, a peremptory instruction to find against the firm should have been given.[53]

§ 183 (4) Of Third Persons.—A bank entitled to discount a negotiable note so that it may be placed upon the footing of a foreign bill of exchange is not required to exercise care to learn whether there are equities or defenses thereto.[54]

48. McNeil *v.* Wyatt, 22 Tenn. (3 Humph.) 125.

49. Bank *v.* Cake (Pa.), 33 Leg. Int. 4.

50. Rights of indorsers.—Union Bank *v.* Tutt, 5 Mo. App. 342.

As to right of indorser to proceeds of paper charged to his account and afterwards collected by bank, see ante, "Right of Indorser or Surety on Note," § 135 (4).

51. Perkins *v.* Watson, 61 Tenn. (2 Baxt.) 173.

52. To show he is not principal.—Section 5832, Rev. Stat., was intended to permit sureties, who were such in fact, and known to the banker to be such at the time, but who were falsely stated in the note to be principals, to show the truth, and then have all the rights of sureties. McDowell *v.* Reese, 20 Wkly. L. Bull. 102, 10 O. Dec. 303.

53. Warren Deposit Bank *v.* Younglove, 112 Ky. 767, 23 Ky. L. Rep. 1969, 66 S. W. 749.

54. Equities of third persons.—Warren Deposit Bank *v.* Younglove, 112 Ky. 767, 23 Ky. L. Rep. 1969, 66 S. W. 749.

By making a note negotiable in a bank, the maker authorizes the bank to advance on his credit, to the owner of the note, the sum expressed on its face; and it would be a fraud upon the bank, to set up offsets against this note, in consequence of any transactions between the parties. Mandeville *v.* Union Bank, 9 Cranch 9, 3 L. Ed. 639.

Where a bank, in West Virginia, is secured by a trust deed for all indebtedness, and the drawer is a bank-

§ 184. Renewal of Loan or of Paper Discounted.—Upon a renewal and rediscount, the lending is qualified and not absolute, but for the purpose of being specifically applied to the credit of the last indorser, and should not be otherwise applied, except with his assent.[55]

Consideration for Renewal.—The subsequent procurement of the original bill by the bank from an assignee and its return to the maker is a sufficient consideration for a renewal bill.[56]

Necessity for Payment of Interest.—A party, to entitle himself to a renewal of his note in the Bank of the State, must tender the interest on the sum to be renewed in advance.[57]

Necessity for Journal Entries.—It is not essential to the right of a bank to recover upon notes accepted by it as a renewal of notes held by it that its journal and discount book should show entries of the discount of the renewal notes.[58]

Presumption of Acceptance by Bank.—Where there was an agreement between the agent of the bank and the maker of a note for its re-

rupt, and the trust property has been sold, under the order of the United States court in West Virginia, in bankruptcy, the acceptor is not entitled to a stay of execution upon the judgment and an order to the bank here to account to him for the proceeds, on account of equities existing between him and the drawer, of which the bank had no notice at the time of the discount. First Nat. Bank *v.* Crawford, 2 Cin. R. 125, 13 O. Dec. 807.

Paper made payable to director.—Where the payee of a note happens to be a director of the bank that discounts the same for his benefit, without notice of the maker's claim for recoupment, the bank can recover as an innocent bona fide holder without notice. Loomis, etc., Co. *v.* Eagle Bank, 1 Disn. 285, 12 O. Dec. 625.

55. Renewal, and application of proceeds.—On the discount and renewal of a business note, the proceeds should be passed to the credit of the last indorser, and should not be applied otherwise than by his assent; but with the assent of the last indorser, the money, instead of being passed to his credit, might be otherwise applied; with his consent, it might be applied to the satisfaction of another note, for which he was indorser, without his checking for the amount; and his consent may be implied, from circumstances, as all other facts may be. Fullerton *v.* Bank (U. S.), 1 Pet. 604, 7 L. Ed. 280.

"In what are called renewals of bank loans, the lending is qualified and not absolute; and when credit is given and money advanced upon a note of that description, it is not an advance on general account, but only for the purpose of a specific application. Any act done by the bank, therefore, whatever be the mere form, if it have for its end the carrying of the contract into effect, in its true spirit and intent, must be binding upon all the parties to the contract." Fullerton *v.* Bank (U. S.), 1 Pet. 604, 7 L. Ed. 280.

56. Consideration for renewal.—A bill of exchange, which had been discounted in bank, was sent by the bank to the drawee for collection, indorsed by the cashier of the bank to the drawee or order; and was by the drawee, without the knowledge or consent of the bank, indorsed and delivered to a third party, who had no notice of the rights of the parties, except what appeared on the bill itself. After maturity of the bill, and while it was so in the hands of such third party, the drawer, ignorant of the fact that the bill had been so transferred, gave to the bank his second bill as a renewal or payment of the first; and the first bill was subsequently procured by the bank and tendered to the drawer. Held, that there was a sufficient consideration to support the second bill, and that the bank might maintain an action thereon against the drawer. Bank *v.* Haynes, 23 O. St. 637.

57. Hays *v.* Bank, 8 Tenn. (M. & Y.) 179.

58. Moseby *v.* Bedford County Bank (Pa.), 8 Atl. 166, 3 Sad. 62.

newal, the bank held the note and received interest thereon for several years, it will be presumed the note was returned to and accepted by the bank.[59]

Determining Whether Renewal or Original Note.—Whether the discount of a note by a bank is in renewal of a prior note or is an original transaction, depends upon the intention of the parties, to be gathered from the circumstances of the discount and the previous dealings of the parties.[60]

Different Makers.—The mere fact that the renewal note contained different names from the original is not sufficient to charge the bank with notice of fraud where the note had been several times renewed and the parties charged.[61]

Under Statute Relating to Banks of New Orleans.—In order to obtain the benefit of the statute providing that the banks of New Orleans should renew debts, the debtor should make a direct application to the directors, stating his security, and such security must be found satisfactory by the directors.[62]

59. **Presumption of acceptance.**—In an action by a bank on a note, plaintiff claimed that there had been an agreement between its agent and defendants extending the time of payment, and that, in consideration of such extension, certain of defendants had become parties thereto, signing the same as makers, and defendants insisted that the alleged agreement was not operative until accepted by plaintiff and approved by the inspector of finance. It appeared that plaintiff continued to hold the note for several years after the alleged agreement, without objection by defendants and apparently with the approval of the said official. It also received interest thereon for several years. Held, that it might be presumed that plaintiff's agent returned the note to plaintiff, and that the inspector and plaintiff were satisfied. Lyndon Sav. Bank v. International Co., 78 Vt. 169, 62 Atl. 50, 112 Am. St. Rep. 900.

60. **Series of notes.**—"If a bank discount a note for a customer with the understanding that when it falls due he may have a similar discount to enable him to pay and take up the first, and afterward a series of notes of the same amount, and with the same parties, are regularly discounted on the days when the successive notes fall due, said notes being regularly paid and taken up on those days, the conclusion is irresistible that these several transactions were intended by the parties to be renewal discounts, the considerations for the first discount running through and entering into all the successive renewals and discounts." Gates & Co. v. Union Bank, 59 Tenn. (12 Heisk.) 325.

61. **Different makers.**—In assumpsit by a bank against the makers of a note discounted by it, it appeared that the original transaction was a joint purchase of real estate, and that the note was discounted to pay purchase money originally on joint account; that the president and cashier of the bank were parties to the transaction; that the note was renewed from time to time, sometimes with all the names of the six parties, and sometimes with the omission of two or more of the joint debtors, as suited their convenience, they having mutual confidence in each other. On the last renewal the names of the president and cashier were omitted, the note in suit having been signed by the other four debtors. Defendants contended that the note was delivered to the president and cashier with an understanding that they were to sign it before it was discounted, and that they fraudulently discounted it without signing it. There was no evidence that there was such an understanding. Held, that the bank was not bound to suspect a fraud merely because the names offered in renewal of the note were different, at different times, and show negatively that there was no such understanding as was contended for by defendants. Irvine v. Lumbermen's Bank (Pa.), 2 Watts & S. 190.

62. **Under statute relating to banks of New Orleans.**—Act Feb. 5, 1842, § 3, provides that the boards of directors of the banks of the city of New Orleans shall renew the debts due

§ 185. Repayment of Loans—§ 185 (1) What Amounts to Payment.—Cancellation of Note.—Where a bank by mistake cancels an unpaid note, it still has the right to recover the amount thereof from the principal and his sureties.[63]

Charge to Account.—Where a bank which has discounted a note for the payee charges the note, on its maturity, to the account of the payee for nonpayment, the charge will not operate as payment of the note and a bar to an action by the bank against the maker.[64]

Deposit to Bank's Credit.—A general custom which has been acquiesced in by a customer and a bank, by which the customer was allowed to pay his indebtedness to a bank by a deposit in any one of several banks, is defeated by a special contract to pay in a particular bank.[65]

them on the passage of the act on application being made to that effect by the respective parties on the following conditions: First, the payment of 10 per cent exclusive of interest, on the maturity of the debts, and the balance at twelve months, renewable until fully paid, on the payment of 15 per cent each year on the original amount, provided ample and satisfactory security on real estate be furnished by the applicant; second, the payment of 10 per cent, exclusive of interest, on the maturity of the debts, and the balance by equal installments of six, twelve, eighteen, and twenty-four months, provided the applicant furnished good and sufficient personal security. Held, that the act contemplated that every debtor desiring to obtain the extension of time for which the statute provides should make a direct application to the board of directors of the bank to which it was due, stating the security which he proposed to furnish, and that such security, whether real or personal, should be examined and found satisfactory by the board before allowing the extension. Plauche v. Roy (La.), 7 Rob. 453.

Statute applies only to debts due.—Act Feb. 5, 1842, § 3, reviving the charters of the banks of the city of New Orleans, provides that the respective boards of directors may consider the whole of the debts due them on the passage of the act as forming a part of their "dead weight," and it is their duty to renew such debts now due, or that may hereafter mature on the application being made to that effect by the respective parties on certain conditions. Held, that the delays granted to the debtors of the banks by the statute apply only to the debts due to the banks at the time of the passage of the act. Plauche v. Roy (La.), 7 Rob. 453.

63. **Cancellation of note.**—A. gave his promissory note to a bank, to which B. and C. were sureties. When the note became due, A. offered to discharge it by a draft on New York, which the bank declined, but offered to send on the draft for collection, and, if it was paid at maturity, to apply the proceeds to the discharge of the note. Afterwards the cashier of the bank, by mistake, supposing the draft to be paid, canceled the note, and delivered it up to A., the principal. It was soon ascertained that the draft had been protested, and had never in fact been paid. Held, that the bank was entitled to recover from both principal and sureties the amount of the note so canceled and delivered up. Dewey v. Bowers, 26 N. C. 538.

64. Bank v. Ralston (Pa.), 3 Phila. 328.

65. **Deposit to bank's credit.**—A general custom and usage, which is acquiesced in by a party, allowing him to pay his indebtedness to a bank by depositing to the credit thereof, money for the purpose in any one of several banks, but the indebtedness is not to be discharged until notice of the deposit is given to the bank where the indebtedness exists, is defeated by a special contract to pay in a particular bank so far as notice being required of the deposit in the particular bank; it being by the special contract made the agent of the creditor to receive the amount of the indebtedness. And it is immaterial whether or not the deposit was made at or before the maturity of the note upon which the indebtedness is based. Exchange Bank v. Cookman, 1 W. Va. 69.

Of Loan to Bank.—The giving of a depositor in a savings bank credit for the amount of a loan on the books of the bank, the same being entered in her passbook to her credit, and being subject to her check, is a payment to her of a loan, and therefore she is not entitled to a deduction from her indebtedness to the extent of the amount of the loan on deposit on the insolvency of the bank.[66]

§ 185 (2) Medium of Payment.—Money.—A defendant can not retain in his hands the amount specified in the promissory note on which the action is brought by a bank, although the bank may have in its possession money, dividends of stock, or other profits, to the same or greater amount, belonging to the defendant. He can only claim to have deducted from the note money or other funds in the possession of the bank belonging to him.[67] But it has been held that a stockholder in a bank may sell or convey slaves by mortgage to the bank in payment of a debt he owes the bank.[68]

State Bonds.—Under statutes providing that debts due to a bank may be discharged in the bonds of a state, or in the interest due thereon, a debtor may so discharge his note held by the bank, notwithstanding it is held under an assignment, and was originally payable in specie.[69]

Bank's Stock.—Stock in a bank is not a set-off against a note given to the bank.[70]

Bank Notes.—A bank should be compelled to receive its own paper in payment of debts, and also in discharge of judgments, whether obtained in its own name or in behalf of some other name for its benefit,[71] but there are decisions to the contrary,[72] especially where the note was not discounted

66. Hannon *v.* Williams, 34 N. J. Eq. 255, 38 Am. Rep. 378.

67. **Medium of payment.**—Whittington *v.* Farmers' Bank (Md.), 5 Har. & J. 489.

68. Governor *v.* Baker, 14 Ala. 652.

69. Fagan *v.* Stillwell, 19 Ark. 282.

70. Harper *v.* Calhoun (Miss.), 7 How. 203.

71. **Bank notes.**—Dundas *v.* Bowler, Fed. Cas. No. 4,141, 3 McLean 397.

All the paper held by a bank is, under the Act of 1832, payable in the bills of the bank. Moise *v.* Chapman, 24 Ga. 249.

A bank is bound by law to take its own bills or notes in payment of debts. Niagara Bank *v.* Roosevelt (N. Y.), 9 Cow. 409.

Implied from charter.—When a bank is authorized by its charter to issue bills to circulate as the representative of money, the law tacitly annexes to the grant of the franchise the condition that the bank shall accept its own bills in payment of debts due it. Blount *v.* Windley, 68 N. C. 1, 12 Am. Rep. 616.

Equivalent to payment in specie.—Payment into court, or tender, in notes of a bank, as between the bank itself and its debtors, is equivalent to payment in specie. Northampton Bank *v.* Balliet (Pa.), 8 Watts & S. 311, 42 Am. Dec. 297.

72. Hevener *v.* Kerr, 4 N. J. L. 58.

In an action by a banking company, the defendant can not set off the depreciated bills or notes of such company. Hallowell, etc., Bank *v.* Howard, 13 Mass. 235. See Sargent *v.* Southgate (Mass.), 5 Pick. 312, 16 Am. Dec. 409.

In an action of assumpsit, by a banking company on a promissory note executed to it by defendants, defendants can not pay into court bills of the bank payable to bearer, whose face value is equal to the amount of the note, and claim the same as set-off to plaintiff's demand. Halloweli, etc., Bank *v.* Howard, 13 Mass. 235.

Purchased after suit.—Where notes of a bank were introduced by way of set-off in a suit where the bank was the plaintiff in interest, it was held to be incumbent on the defendant to

in such notes.[73] A bank, as long as it is solvent, or rather, as long as it has control of its assets, is bound to take its own bills in payment of debts due to it;[74] but when it becomes insolvent, and goes into liquidation, making an assignment of all its assets for the benefit of its creditors, the rights of all its creditors attach equally, and a debtor then takes the bills of the bank subject to the rights of other creditors to enforce his obligations against him for the equal benefit of all.[75] The notes of a bank purchased and procured by garnishees after proceedings were commenced against them, can not be offset against, or paid upon, the debts due by them to the bank.[76]

prove to the satisfaction of the jury that he held them when the suit was commenced. Kelly *v.* Garrett (Ill.), 1 Gilman 649.

73. Not discounted in bank notes.—A bank discounting a promissory note is entitled to recover the full amount thereof, and its recovery can not be limited to the value of the note in depreciated bills of the bank at the time of the maturity of the note, which the bank had not discounted in its depreciated bills, and tender of payment thereof at maturity not having been made in such bills. Commercial Bank *v.* Atherton, 9 Miss. (1 Smedes & M.), 641.

74. Farmers' Bank *v.* Willis, 7 W. Va. 31.

75. Farmers' Bank *v.* Willis, 7 W. Va. 31.

Under the Act of February 12, 1866, entitled "An act requiring the banks of the commonwealth to go into liquidation," the trustee is not obligated to receive the notes of the bank in payment of debts due the bank. Alexandria, etc., R. Co. *v.* Burke, 63 Va. (22 Gratt.) 254, citing Exchange Bank *v.* Knox, 60 Va. (19 Gratt.) 739, reaffirmed in Saunders *v.* White, 61 Va. (20 Gratt.) 327; Bank *v.* Marshall, 66 Va. (25 Gratt.) 378.

In a suit in the circuit court of the United States against the Bank of the Valley, the court, on September 21, 1869, made an order that the receiver receive the notes of the bank in payment of debt due to the bank. After the decision of the cases of Exchange Bank *v.* Knox, 60 Va. (19 Gratt.) 739, the court set aside this order. A plea of tender of these notes in payment of debts of the bank, filed in a case pending in a state court, after the rescinding of the order of the United States court, the notes having been obtained after the execution and recording of the deed of the bank and notice thereof to the defendant, is not a valid defense to the action. Bank *v.* Marshall, 66 Va. (25 Gratt.) 378, citing Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491.

Stoppage of payment.—The refusal of a bank to pay specie, and the consequent stoppage of its bills, are not sufficient evidence of its insolvency to prevent, on that ground, a bona fide holder of its bills, after that time, from setting off such bills in a suit against him by the bank. Jefferson County Bank *v.* Chapman (N. Y.), 19 Johns. 322.

76. Procured by debtor after commencement of action.—Seamon *v.* Bank, 4 W. Va. 339.

"It was held by the supreme court of appeals of this state, in the case of the Farmers' Bank *v.* Gettinger, 4 W. Va. 305, that a debtor of a bank, summoned as a garnishee, could not afterwards procure the notes of the bank and pay them or set them off, in satisfaction or discharge of the debt. We can not see that the right of the assignee in trust for creditors is inferior to that of an attaching creditor." Farmers' Bank *v.* Willis, 7 W. Va. 31.

When, after the Farmers' Bank of Virginia has assigned its assets to trustees for its creditors, of which the debtor had notice, he acquired and tendered notes of the bank in payment of his debt before the passage of the Act in 1873, which provides that debts due to the banks or their trustees or representatives, may be paid in the issue of the banks or their branches, the tender can not now by force of the statute, be treated as a payment. And a judgment rendered then, which was correct, should not now be reversed to enable the debtor to make the payment, or otherwise have the benefit of the legislation. If he could pay the debt in that manner, without the judgment, he can pay it notwithstanding the judgment. Farmers' Bank *v.* Willis, 7 W. Va. 31.

Under the Act of February 12, 1866, requiring the banks of the common-

Statutory Provisions.—By statute in some states a bank is compelled to take its own notes in payment of indebtedness to it.[77] A bank is not compelled to take its notes issued in pursuance of a statute passed after the indebtedness was incurred. A statute requiring it to do so is unconstitutional as impairing the obligation of contract.[78] The provision of a statute that a bank's notes should be received in payment of debts to the bank applies only while the debts remain due to the bank and not after assignment of which the debtor has notice at the time he acquired the notes.[79] Such statute does not apply to promissory notes which have not been indorsed but have passed through the bank.[80] A statute compelling an assignee of the bank to take the bank's notes in payment of the assigned claim is unconstitutional as to prior assignments but constitutional as to subsequent.[81]

After Assignment.—In the absence of statute, where the debt due a bank has been assigned in good faith, and the bank has no interest left in it, the assignee is not bound to receive the notes of the bank in discharge of it.[82] In some states the assignee is bound by statute to accept the bank's

wealth to go into liquidation, the banks, being insolvent, execute deeds conveying all their property, including debts due to them, to trustees for the payment of their debts. Held, that a debtor of the bank can not set off notes of the bank bought up by the debtor after the execution and recording of the deed and notice thereof to the debtor. Exchange Bank *v.* Knox, 60 Va. (19 Gratt.) 739; Saunders *v.* White, 61 Va. (20 Gratt.) 327; Bank *v.* Marshall, 66 Va. (25 Gratt.) 378.

77. **Statutory provisions.**—Bank *v.* Hart, 67 N. C. 264.

Judgment debtor.—The statute providing that the debtors to banks, when garnished, may pay the judgment of the court against them in the notes of the bank as whose debtor they are garnished, extends also to the case of a debtor of a bank whose indebtedness has been by judicial proceedings in another state attached and sold, against whom a suit has been instituted by the purchaser at such sale. Riggs *v.* Dyche (Miss.), 2 Smedes & M. 606.

In an action by a bank on a note payable in its own issues, the bank will be entitled to recover the full amount of the note and interest, because defendant can, if he chooses, after judgment, discharge the debt with the issues of the bank. Abbott *v.* Agricultural Bank (Miss.), 11 Smedes & M. 405.

78. **Statute enacted after indebtedness.**—The Act of May, 1862, does not in terms require the banks to receive the small notes issued under its authority in payment of debts due to it; but if it did do so in terms or by necessary implication it would be void, because it would impair the obligation of contracts, in requiring the bank to receive, not the notes which, under its charter it agreed (by accepting the conditions of the charter), to receive in payment of debts due to it but to receive a worthless currency issued by its branch without its consent, not in conformity to its charter, but in direct violation of it. Yeaton *v.* Bank, 62 Va. (21 Gratt.) 593.

Y., a debtor before the war, of the Bank of D., at Alexandria, can not, after the war, pay his debt by notes issued under the Acts of March 29 and May 16, 1862, by the branch bank at P. Yeaton *v.* Bank, 62 Va. (21 Gratt.) 593.

79. When a negotiable promissory note discounted by the Farmers' Bank of Virginia had been assigned by the bank to trustees, for the payment of antecedent debts, and the maker, having notice of the assignment, afterwards acquired notes of the bank, he could not, with these, pay his debt so assigned, or set them off against it. Farmers' Bank *v.* Willis, 7 W. Va. 31.

80. Bruce *v.* Hawley, 31 Vt. 643.

81. Dundas *v.* Bowler, Fed. Cas. No. 4,141, 3 McLean 397.

82. **After assignment.**—Dundas *v.* Bowler, Fed. Cas. No. 4,141, 3 McLean 397; Pancoast *v.* Ruffin, 1 O. 381.

When a bank has in good faith parted with its interest in a debt, the debtor is not at liberty, under the statute of Ohio regulating "judicial proceedings in which banks and bankers

notes.[83] An act which compels the assignee to receive the notes of the bank in payment, by the assignee, as regards prior contracts, is unconstitutional

are parties," to pay the assignee in the paper of the bank. McDougal *v.* Holmes, 1 O. 376.

There was judgment in trover against defendant by a bank to the use of a third person, to whom the bank had assigned a loan. Defendant took a rule to show cause why the judgment should not be paid in notes of the bank. Held, that the rule must be refused, because the judgment was not a debt due to the bank, but to the assignee. Northampton Bank *v.* Winder (Pa.), 3 Clark 284.

Assignment not absolute.—It is contended that the bank did not transfer the whole of its interest in the choses in action specified, as they exceed the amount of the debt secured by more than two millions of dollars, and the complainants are bound to account to the bank for the surplus. This is true, but the assignment is absolute until, from the proceeds, full payment shall be made to the creditor banks. Dundas *v.* Bowler, Fed. Cas. No. 4,141, 3 McLean 397.

The term "stock note" has no technical meaning, and may as well apply to a note given for the purchase of stock from a bank as to a note given on account of an original subscription to stock; and therefore a judgment in favor of the assignees of the Bank of Illinois on a stock note may be discharged in notes and certificates of the bank, in the absence of evidence showing the original consideration of the note. Dunlap *v.* Smith, 12 Ill. 399.

Purchase after notice of assignment.—If the obligor of a bond to a bank holds the notes of the bank at the time he receives notice of the assignment of the bond, the assignee is bound to receive them in cash, as payment of it; but, if he obtained them after notice, they would be no defense, either as payment or set-off, in a suit on the bond by the assignee in the name of the bank. Northampton Bank *v.* Balliet (Pa.), 8 Watts & S. 311, 42 Am. Dec. 297.

A maker of a nonnegotiable note in favor of a bank can not discharge his obligation by tendering paper of a bank to one receiving the note by assignment from the bank, where he obtained such paper when it was almost worthless, after the bank had failed, and after he knew of the assignment of the note. Bank *v.* Gates, 1 O. Dec. 63.

Where a debtor purchases depreciated notes of a bank after he has knowledge that the bank has assigned his debt to it, to a bona fide purchaser for a valid consideration, he can not use such notes as a set-off against his debt, and it is immaterial how the knowledge of the assignment was acquired. Philips *v.* Bank, 18 Pa. 394.

83. By statute.—By the provisions of the Act of March 12, 1842, the assignees of the Bank of Pennsylvania are bound to receive, in payment of debts due to said bank, its own notes and obligations, at par, whether held by the defendant at the time of the commencement of the suit or acquired afterwards. Bank *v.* Spangler, 32 Pa. 474.

Not applicable to bona fide assignees.—In providing that in actions by banks, "or persons claiming as their assignees, or under them in any way for their use and benefit," the execution in their favor may be paid in the banks' paper, the legislature did not have in mind bona fide assignees suing in their own right; hence the statute does not apply to such. Pancoast *v.* Ruffin, 1 O. 381.

Note not payable at bank.—Negotiable paper, not payable upon its face or by direct indorsement to a bank, is not, after the bank has ceased to be the owner thereof, subject to the provisions of Comp. St., c. 84, § 82, providing that the bills of a bank shall be deemed payable at the bank, and shall be received by it on all judgments, executions, and demands payable to or the property of the bank. Bruce *v.* Hawley, 31 Vt. 643.

Charter provision.—A debtor to the Bank of Bennington has a right to pay to an equitable assignee of the bank, who is prosecuting the claim in the name of the bank for its own benefit, the amount of the debt in the bills of the bank, though they were of nominal value, under the section of the charter of the bank which provides that the bills of the bank shall be received on all demands originally due to the bank; but the assignee can not be compelled to receive the costs which accrued in the prosecution of the claim by him in such bills, the defendant having had notice of the assignment. Bank *v.* Booth, 16 Vt. 360.

Of debt to branch bank.—The provision in the Code that, "though a bank had a branch, * * * all its notes

and void as impairing the obligation of contract.[84] On subsequent contracts it can have a constitutional operation. The effect of the act on future contracts is to restrain the negotiability of notes given to banks, by declaring that the equities, as between the original parties, shall remain open in the hands of the assignee.[85]

Option to Pay in Notes or Species.—Where the law declares that all debts due to the banks of the state may be paid at any time in the notes of such banks, one who is indebted to a bank is entitled, at his option, to pay either in the notes of the bank or in specie.[86]

In Notes of Debtor Bank.—Where the defendant bank is indebted to the plaintiff bank, which also holds bills of the defendant, the plaintiff may take bills of exchange of the defendant in payment of such indebtedness and of the bank bills, though the bank bills are depreciated.[87]

Remedy of Debtor.—The proper mode of obtaining relief, under a statute which makes the notes of a bank a set-off against judgments and executions already obtained by such bank, is by a rule upon the plaintiff requiring him to show cause why he shall not accept the bills of the bank in payment of the debt, and have satisfaction of the judgment entered of record.[88]

Forged Bank Notes.—When a payment is made bona fide to a bank in notes purporting to be its own, and they are received as cash, but are afterwards discovered to be forged, the bank can not maintain an action against the payor for the amount.[89]

§ 185 (3) Particular Loans.—Debts Due Branch Bank.—The mother bank has a right to receive payment of any debt due the branch.[90]

Debts Due in Installments.—A debt due a bank in installments becomes due in toto upon the failure to pay any installments, under a statute or agreement providing therefor.[91]

should be received in payment of debts to the bank, whether contracted at the parent bank or a branch," applied only while the debts remained due to the bank. Farmers' Bank *v.* Willis, 7 W. Va. 31.

84. Under Laws Ohio, p. 360, § 9, providing that when suit is brought by a bank, or by assignees for its benefit, the sheriff shall receive notes of the bank in discharge of the judgment, where the United States Bank assigned in good faith certain securities in trust to be collected, and the proceeds paid on debts of the bank, the surplus remaining thereafter to be paid back to the bank, the assignee is not required to receive notes of the bank in payment of the securities. Dundas *v.* Bowler, Fed. Cas. No. 4,141, 3 McLean 397.

85. Dundas *v.* Bowler, Fed. Cas. No. 4,141, 3 McLean 397.

86. Railey *v.* Bacon, 26 Miss. 455.

87. Lafayette Bank *v.* Bank, Fed. Cas. No. 7,987, 4 McLean 208.

88. Mann *v.* Blount, 65 N. C. 99.

89. Forged bank notes.—Bank *v.* Bank (U. S.), 10 Wheat. 333, 6 L. Ed. 334; Gloucester Bank *v.* Salem Bank, 17 Mass. 33.

90. Debts due branch bank.—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688; Farmers' Bank *v.* Willis, 7 W. Va. 31.

91. Debts due in installments.—Where a note is made for the payment of a debt due a bank in one, two, and three years, under the provisions of the second section of the Act of 1837, it does not become due in toto upon a failure to pay the first installment. Lightfoot *v.* Branch Bank, 2 Ala. 345.

Where a stockholder in the Union Bank of Louisiana, in addition to the usual amount loaned on stock, bor-

Of Unauthorized Loan.—A bank is not entitled to recover for the depreciation in gold between the time of an authorized payment to a third person for the defendant and the time of the defendant's offer to repay.[92]

Loan for Illegal Purpose.—In an action by an assignee of a bank on a note, the maker can not set up the defense that the money was loaned in pursuance of an illegal agreement between himself and the bank to purchase the bank's own stock.[93]

§ 185 (4) Application of Payments.—Payments made on an indebtedness to a bank should be applied as intended by the parties, where, under an agreement by which the bank redeemed certain bills given by the borrower, the bank properly applied payment made by the borrower to the commissioners for redemption.[94]

rows 15 per cent on his stock, it will be regarded as a stock loan, within the charter provisions for an increased rate of interest and accelerated maturity in default of installment payments. Bermudez v. Union Bank, 7 La. Ann. 62.

The charter of the Union Bank of Louisiana (§ 24) provides that "the mortgages for stock and loans granted, by virtue of this act shall bear ten per cent interest per annum, after maturity, if not punctually paid." Section 31 provides that loans made on the credit of stock, and evidenced by notes, shall bear interest, payable annually in advance, and that "the principal shall be paid in equal installments, so that the whole shall be paid at the expiration of twenty years from the passage hereof." Held, that on default in the payment of the annual installment and interest in advance at 7 per cent, as fixed by the charter, the whole amount of the loan matures, and is exigible with 10 per cent interest thereafter. Bermudez v. Union Bank, 7 La. Ann. 62.

92. **Of unauthorized loan.**—Plaintiff agreed to sell gold coin for currency to a third person. The parties were members of the Gold Exchange of the city of New York, under whose rules the contracts for the sale of gold were to be settled by a bank. The bank, distrusting its ability to settle the transactions on the date of the sale, requested its customers to settle their sales between themselves. Plaintiff did not deliver any notice of the transaction to the bank. The third person delivered such notice to the bank, and it thereupon, without notice from plaintiff, paid the gold called for by the transaction to the third person. Plaintiff soon after the transaction learned from the third person the manner of the settlement, and immediately applied to the bank for the amount of currency, offering to deliver the gold. The bank passed into the hands of a receiver. Held, that the bank was not entitled to the depreciation in the price of gold during the interval between the payment thereof to the third person and the offer of plaintiff to repay it, as, if the gold had been retained by the bank, the same loss, by depreciation of its value, would have been sustained by it. Fowler v. New York Gold Exch. Bank, 6 Hun 186.

93. **Loan for illegal purpose.**—In an action by the assignee of a bank against the maker of a note, defendant set up that the note was given for money furnished by the bank, and used by defendant, for the purpose of buying shares of the bank's own stock for its own use. Held that, as the bank was not authorized to purchase its own stock, it could not enter into such an agreement whereby defendant could purchase such stock for its benefit; and that such agreement was, therefore, no defense. St. Paul, etc., Trust Co. v. Jenks, 57 Minn. 248, 59 N. W. 299.

94. **Application of payment.**—A loan in bank bills was made by a bank, secured by bills of exchange drawn by the borrower on a third person, with an agreement that the circulation of the money so advanced should be protected by the borrower, and that from time to time, as the banks should redeem the bills, he should furnish them with drafts to be applied to the payment of the amount of the bills so redeemed, which were to be returned to him on receipt of such drafts. In a suit against the defendant, who was

§ 186. Discount of Forged or Fraudulent Paper.—Forged Bill of Lading Attached to Draft.—Where a factor had in his possession a number of genuine drafts, which his principal had drawn on him, and which a certain bank had discounted, and the bank discounted a series of other drafts, which the factor paid, the latter must stand the loss on its being discovered that the last series were forgeries.[95] A bank in discounting a draft does not warrant to the acceptor bills of lading attached thereto as security.[96] A consignee who has paid drafts to which forged bills of lading were attached has no recourse against a bank which had discounted the drafts in the ordinary course of business and without knowledge of the fraud.[97]

surety both upon the original drafts and also upon new notes substituted in lieu thereof, it was held that the defendant's claim that the original loan had been repaid by the funds furnished by the borrower to the plaintiffs in the payment of redemptions made by the latter, and a commission of one-half of 1 per cent on such redemptions, was not well founded. The contract for the reimbursement of redemptions was not illegal in itself, and the money having been furnished by the borrower for that purpose, and by the plaintiffs applied thereto, the law will not make a different application of it to the payment of the original loan, nor treat the money paid by way of commission on such redemption as anything else than what the parties intended it should be—a compensation to the plaintiffs for doing what the borrower should have relieved them from the necessity of doing. Farmers' Bank *v.* Burchard, 33 Vt. 346.

A bank is at liberty to make further loans to the party for whose benefit a guaranty was given and to discharge them without reference to the loans for which the guarantors became bound, and, as a matter of law, payments made upon subsequent loans need not be credited back upon the loans guaranteed. National Bank *v.* Garn, 23 O. C. C. 447.

95. Draft with forged bill of lading attached.—Howard *v.* Mississippi Valley Bank, 28 La. Ann. 727, 26 Am. Rep. 105.

96. Goetz *v.* Bank, 119 U. S. 551, 30 L. Ed. 515, 7 S. Ct. 318.

97. A consignor, who had been in the habit of drawing bills of exchange on his consignee with bills of lading attached to the drafts drawn (it being part of the agreement between the parties that such bills should always attend the drafts), drew bills on him with forged bills of lading attached to the drafts, and had the drafts with the forged bills of lading so attached discounted in the ordinary course of business by a bank ignorant of the fraud. The consignee, not knowing of the forgery of the bills of lading, paid the drafts. Held, that there was no recourse by the consignee against the bank. Hoffman & Co. *v.* Bank (U. S.), 12 Wall. 181, 20 L. Ed. 366.

Plaintiffs agreed to accept and sell a shipment of cotton and to advance 85 per cent of its value pending sale on the shipper's draft for that amount. A draft with a bill of lading and insurance policy attached, covering 600 bales of cotton and drawn on plaintiffs to the credit of the shipper's home bank for $39,000, was delivered to such bank and discounted, and after indorsement was sent to defendant bank for collection. The draft contained no reference to the papers attached to it and on presentation to plaintiffs was accepted and paid to defendant bank and the proceeds promptly remitted to the bank of discount, after which plaintiffs discovered that the bills of lading were forgeries and the shippers had been adjudicated bankrupt. Held, that neither the bank of discount nor defendant was under any obligation, before discounting or presenting the draft, to determine the validity of the papers securing it, nor did they, by indorsing the draft before presentment for acceptance, guarantee the validity of the bill of lading attached as security, the burden resting on plaintiff to determine the validity of the bill before accepting the draft, and, there being no defect in the draft itself, plaintiff could not recover the money from defendant bank as money paid under a mistake of fact. Springs *v.* Hanover Nat. Bank, 145 App. Div. 188, 130 N. Y. S. 87, affirming order 127 N. Y. S. 178.

Where bank collected and remitted

Paper Held by Agent or Partner.—A bank discounting negotiable paper, with knowledge that the person from whom it is taken holds it as agent only, is bound to ascertain the extent of the authority of the agent; but, in the absence of knowledge of any limitation upon the authority apparently conferred by the principal, it may rely upon such apparent authority.[98] Where the maker of a note indorsed by a firm carries it to a bank for discount on his own account, the bank discounting the note must, at its peril, ascertain whether there was any special authority, express or implied, for one partner to sign the partnership name as an accommodation indorser.[99]

Liability of Person Discounting.—A person who procures notes to be discounted by a bank impliedly warrants the genuineness of the signatures of the makers and indorsers.[1] But the bank can not recover a loan made by the cashier without authority from the directors upon the promise of the person having a forged paper discounted to pay the amount of such paper.[2] Where one partner has given the firm note, and forged the name of the payee to procure its discount at the bank, the bank can not maintain a suit under the assignment, but it may sustain an action in the name of the payee

to discount bank.—Where drafts, to which forged bills of lading for cotton were attached, were deposited in the drawer's home bank for discount and the bank, after discounting the draft in good faith, sent it to defendant bank for collection, and plaintiffs, the drawees, accepted to draft, and the proceeds were remitted by defendant to the bank of discount before the forgery was discovered, defendant was but the agent of the discounting bank, which was a bona fide holder for value, and defendant having received payment, and paid over the proceeds to such bank without knowledge that the bill of lading was spurious was freed from liability. Springs v. Hanover Nat. Bank, 145 App. Div. 188, 130 N. Y. S. 87.

98. Merchants', etc., Nat. Bank v. Ohio Valley Furniture Co., 57 W. Va 625, 50 S. E. 880, 70 L. R. A. 312.

99. Lemoine v. Bank, Fed. Cas. No. 8,240, 3 Dill. 44.

1. **Liability of person discounting.**—Cabot Bank v. Morton (Mass.), 4 Gray 156.

Bank can cancel credit.—Where a person, under false representations, induced a bank to discount a note and give him credit for the proceeds, the bank had a right at any time thereafter, upon discovering the fraud, to cancel the credit given, which right related back to the time when the transaction was commenced, and the person's administratrix, upon his death, taking only such rights as intestate had, could not recover the credit after cancellation Flatow v. Jefferson Bank, 135 App. Div. 24, 119 N. Y. S. 860.

The maker of a note, with a forged indorsement, who had the same discounted by a bank and proceeds credited to his account, having died before maturity of the note, the bank, on discovery of the fraud, has a right to charge off the apparent balance due upon the account of the decedent, which is to withdraw the credit which had been given him when the contract was made. Cornelius v. Lincoln Nat. Bank, 15 Pa. Super. Ct. 82.

2. **Loan made without authority.**—The plaintiff seeks to recover the amount due upon four notes, which are admitted to be forgeries as to the makers, which notes it claims to have rediscounted for the defendant in reliance upon the latter's promise to pay plaintiff the amounts they call for, when they become due. Plaintiff dealt with defendant's cashier only. Held, that the transaction was a loan, but that inasmuch as it does not appear that the cashier was authorized to make such loan by the directors of the defendant bank, or that his acts were ratified by them, the defendant is not liable therefor. First Nat. Bank v. Michigan City Bank, 8 N. Dak. 608, 80 N. W. 766.

for its benefit.[3] Where the bank discounts a forged note on account of a third person who was indebted to a debtor of the bank to discharge the debtor's indebtedness to the bank, such indebtedness is discharged and the note is to be discounted on account of such third person.[4]

Liability of Indorser.—A bank taking a note from a second indorser may recover of the latter, though the payee's name was forged, and though the note was discounted on presentation of the maker.[5]

Security Given for Forged Paper.—Where the president of one bank discounts forged paper at another bank and gives without authority as security therefor the negotiable bonds of his own bank the title to the bonds passed with delivery.[6]

§ 187. Actions on Loans or on Paper Discounted—§ 187 (1) In General.—Parties.—A bank may recover on a note for the benefit of an accommodation indorser.[7] Where a chartered bank is the holder of a promissory note, it is embraced within the provisions of a statute, authorizing the security or indorser to notify the holder of such note to sue the principal maker within three months.[8] Where a debtor of a bank transfers a negotiable note by special indorsement to the cashier and the banker signs its interest in the note to him, the cashier may maintain an action in his own name.[9] A national bank that makes a loan on the security of a warehouse

3. York Bank *v.* Asbury, Fed. Cas. No. 18,142, 1 Biss. 230.

4. **Person authorizing discount.**—H. was indebted to a bank, and R. agreed to let him have the money to pay the bank; and K., being indebted to R., sent a note by P. to the bank, to ascertain if it could be discounted. P. brought back the note, with encouragement that it would be discounted. The note was thereupon delivered to H., who sent it to the bank by P., where it was discounted, and the discount applied to the payment of H.'s debt to the bank. It was held that the note must be considered as discounted on account of K. or R., and, although the note was a forgery, H.'s debt must be considered as paid and satisfied. Grafton Bank *v.* Hunt, 4 N. H. 488.

5. State Bank *v.* Fearing (Mass.), 16 Pick. 533, 28 Am. Dec. 265.

6. **Security given for forged paper.**—The president of a bank procured from another bank the discount of two promissory notes, apparently held by his bank, but in fact forged by him, together with the discount of another note signed by him, without authority, as the promissory note of his bank. He converted the proceeds to his own use, and, without authority, pledged as collateral security certain bonds belonging to his bank. Held, in action of trover by the defrauded bank to recover of the other bank the pledged bonds, that, the bonds being negotiable securities, the title passed by their delivery to the bank in whose possession they were, and that their negotiable quality was not impaired by the fact that the notes were forgeries, and that the plaintiff bank's note was made without authority. Fifth Ward Sav. Bank *v.* First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318.

7. **Action by bank for benefit of indorser.**—Defendant signed a note payable to plaintiff bank as accommodation for the other makers. The latter, representing that the bank, which had refused to discount the note, would shortly do so, obtained a third person to advance the amount. The latter gave the note to the bank, to collect for his benefit, and afterwards defendant notified the bank not to discount it. Held, that by retaining the note the bank adopted payment made by the third person, and could recover on the note for his benefit. Bank *v.* Beach (Vt.), 1 Aiken 62.

As to actions generally, see post, "Actions," §§ 213-231.

8. Bank *v.* Mumford, 6 Ga. 44, decided under Act of Dec. 26, 1831.

9. **Assignee from bank.**—Where the debtor of a bank transfers a negotiable note, in payment of his indebtedness,

receipt for merchandise is a proper party defendant to a suit in replevin by the consignor and owner of the merchandise against the warehouse keeper to whom the same has been committed by the consignee for storage.[10] A bank which discounts a bill drawn by an agent in his own name, but the principal therein being disclosed, can not afterwards sue the principal, nor prove the claim against his estate in insolvency, although such principal had the proceeds of the draft; the whole transaction arising out of the bill, and there being no prior indebtedness from the principal to the bank.[11] By statute in Ohio a bank may, in an action on a loan, join all the makers, drawers and indorsers.[12]

Questions of Law and Fact.—Where a bank furnishes a live stock buyer with money for paying his checks for the purchase price of stock, purchased under an agreement that, as the stock was shipped, the bills of lading with drafts for the proceeds should be delivered to the bank and that it should have a certain sum for furnishing the money, the question whether or not the arrangement was affected with fraud was for the jury.[13]

Instructions.—A note drawn by a lumber company, in which the defendant bank was a large stockholder, was averred by the plaintiff to have been deposited by him with the bank for discount at the request of the vice-president of the bank, who represented it in the management of the affairs of the lumber company, but the bank claimed the note was merely left for collection. The note was subsequently paid by a certified check of the lumber company on the bank. The refusal to instruct that the fact that the bank was a stockholder in the lumber company did not tend to prove it was liable to pay the note was error, since the jury might easily have given such an inference too great weight in determining whether or not the note was discounted.[14]

Relief in Equity.—Equity can not interfere to aid a bank against a deceased indorser, when there is judgment against the principal and another indorser, although the principal be insolvent, unless it be shown that nothing can be made at law, from the existing judgment, against the indorser.[15]

to the cashier of such bank, by special indorsement, and thereupon the bank, to enable the cashier to bring suit thereon, assigns its interest in the note to him, the cashier may maintain an action on the note in his own name, notwithstanding he may be accountable to the bank for the proceeds when collected. White *v.* Stanley, 29 O. St. 423.

10. Cleveland, etc., Co. *v.* Shoeman, 40 O. St. 176.

11. Bank *v.* Hooper (Mass.), 5 Gray 567, 66 Am. Dec. 390.

12. Joinder of parties.—Act of March 8, 1845, re-enacted Act of Jan. 28, 1824. Clinton Bank *v.* Hart, 19 O. 372.

Action by foreign bank.—A joint action against a drawer and indorser may be brought as well by a foreign bank as by banks incorporated in the state. Lewis *v.* Bank, 12 O. 132, 40 Am. Dec. 469.

In order that a foreign bank may avail itself of the privilege conferred by the statute upon domestic banks, of maintaining a joint action against a drawer and indorser, a formal averment of the fact of incorporation is not necessary, where it is apparent upon the face of the declaration that the suit is brought by a bank. Lewis *v.* Bank, 12 O. 132, 40 Am. Dec. 469.

13. Clary *v.* Tyson, 97 Mo. App. 586, 71 S. W. 710.

14. Davis *v.* Standard Nat. Bank, 50 App. Div. 210, 63 N. Y. S. 764.

15. Bank *v.* Yoe, 4 O. 125.

§ 187 (2) Defenses.—Improper Organization of Bank.—A debtor can not, collaterally, in an action on the debt, avail himself of the defense of the invalid organization of the bank.[16] Where an accommodation drawer of a bill of exchange did not know that the acceptor intended to discount it at a certain bank, and was not present and took no part in the negotiation, he is not estopped, in a suit against him on the bill, to deny the proper organization of the bank.[17]

Want, Demand and Notice.—Where a note, discounted by the bank at which it is payable, is in the bank at maturity, this is sufficient demand, and the onus of proving payment is on the parties liable thereon.[18] Where the

16. **Improper organization of bank.**—Allison *v.* Hubbell, 17 Ind. 559; Davis *v.* Watkins, 56 Neb. 288, 76 N. W. 575; Campbell *v.* Perth Amboy, etc., Engineering Co., 70 N. J. Eq. 40, 62 Atl. 319; Gregg Medicine Co. *v.* Merchant's Bank, 14 N. Y. S. 16, 59 Hun 561; Bartholomew *v.* Bentley, 1 O. St. 73; Owen *v.* Purdy, 12 O. St. 73; Bank *v.* Renick, 15 O. 322; Myers *v.* Manhattan Bank, 20 O. 283; Citizen's Bank *v.* Jones, 117 Wis. 446, 94 N. W. 329. See ante, "Defective Incorporation or Organization," § 27.

Debtors of the State Bank can not raise the objection that the bank is unconstitutional. Snyder *v.* State Bank (Ill.), 1 Breese 161.

A debtor to a bank can not, collaterally, in a suit on the debt, avail himself of fraud in the organization of the bank to defeat its charter, it having always acted as if well organized. Southern Bank *v.* Williams, 25 Ga. 534.

Paper not payable to bank.—In an action of assumpsit by a bank upon a promissory note payable to itself, it is not competent for the court, at the instance of defendant, to inquire into the organization of the bank. Smith *v.* Mississippi, etc., R. Co. (Miss.), 6 Smedes & M. 179.

17. Marion Sav. Bank *v.* Dunkin, 54 Ala. 471.

18. **Demand and notice.**—Modern decisions go to establish, that if a note be at the place where it is payable, on the day it falls due, the onus of proving payment falls upon the parties who are liable to pay it; and the instructions of the circuit court, in this case, were more favorable to the parties to the note, where the court said, upon the sufficiency of the demand, that on an article or a note made payable at a particular bank, it is sufficient to show that the note had been discounted, and become the property of the bank, and that it was in the bank, and not paid when at maturity. Fullerton *v.* Bank (U. S.), 1 Pet. 604, 7 L. Ed. 280.

Where a bank loans money to defendant on his draft on persons to whom he has shipped goods, and such bank, discovering that the draft was drawn with intent to defraud it, repudiates it and sues defendant on account for money loaned, it is proper to refuse to charge that the whole contract between the bank and defendant was in the draft, and therefore no action could be maintained on account for money loaned, and that no recovery could be had against the drawer without notice of dishonor of the draft. Massengill *v.* First Nat. Bank, 76 Ga. 341.

In a suit by the Central Bank, no proof of notice, demand or protest, is necessary to charge the endorser. But in a case where the holder of an endorsed paper fails to give notice of the dishonor, where notice is necessary to charge the endorser, and the endorser is therefore released in law, and the holder then transfers the paper to the Central Bank, and the endorser is sued, although on the trial the bank is not bound to prove notice, demand or protest, yet the endorser would be let into his defense, and by proof would be permitted to show his discharge for want of notice. Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Central Bank *v.* Whitfield, 1 Ga. 593; Mahone *v.* Central Bank, 17 Ga. 111.

Paper not payable at bank.—Section 26 of the Central Bank charter, dispensing with proof of demand and notice, in order to charge indorsers, applies to suits upon notes payable elsewhere, as well as to those payable at that bank. McDougald *v.* Central Bank, 3 Ga. 185.

indorser of any note or bill which is negotiated to a bank is discharged for want of demand and notice, it is his duty to plead it by way of defense.[19]

Limitation of Actions.—The statute of limitations does not run against debts due to the Central Bank of Georgia. This is neither because the state is the owner of its assets, nor because it has transferred any portion of its sovereignty to the bank, but because it has made this provision by express legislation.[20]

Failure to Sell Security.—A failure of the bank to sell notes transferred absolutely to it as security is in defense to an action for the loan.[21]

Assignment of Paper by Bank.—Under a statute prohibiting assignments by banks of their bills receivable and evidences of debt, a plea in a suit by a bank on a note that plaintiff had, since suit was begun, transferred the note, is a good plea in abatement of the action.[22]

Fraud upon Bank by Officer.—Although the receipt by the director of an insolvent bank of negotiable papers against third persons in payment of a debt due and payable from the bank to him may be a breach of his duty to the bank, such circumstance constitutes no ground of defense for the person liable on the papers so long as the stockholders of the bank do not complain of it.[23]

Counterclaim.—Under the banking law of New York fixing the rate of interest for banks and making them equal to national banks, while a counter-

19. McDougald *v.* Central Bank, 3 Ga. 185.

20. Mahone *v.* Central Bank, 17 Ga. 111.

21. **Failure to sell security.**—A plea which merely alleges that certain shares of stock were transferred absolutely to a bank, as collateral security for a loan, the president of the bank refusing to make the loan without such transfer, is no defense to a suit on the notes to secure which the transfer was made. Napier *v.* Central Georgia Bank, 68 Ga. 637.

Where shares of stock were deposited with a bank as collateral security for the payment of notes, with power in the creditor to sell such stock and apply the proceeds to the payment of the notes if they were not paid promptly at maturity, without further notice to the debtor, a mere failure on the part of the bank to sell the stock at the maturity of the notes constituted no defense to a suit thereon, and gave the defendant no right to damages. Napier *v.* Central Georgia Bank, 68 Ga. 637.

22. **Assignment of paper by bank.**—Farmers' Bank *v.* Sharp, 12 Miss. (4 Smedes & M.) 17, decided under Act of Mississippi of 1840.

Where a note is payable or belongs to a bank, and has been assigned by such bank since the Act of 1840, prohibiting assignments by banks of their notes and other evidences of debt in an action upon such assigned note the only mode of the defendant's availing himself of the defense is by plea in abatement. Lanier *v.* Trigg (Miss.), 6 Smedes & M. 641, 45 Am. Dec. 293; Hazlip *v.* Leggett (Miss.), 6 Smedes & M. 326.

Defendants in an action by the assignee of a promissory note executed to a bank can raise the objection that the assignment of the note was made in violation of Act 1840, p. 15, § 7, providing that "it shall not be lawful for any bank in this state to transfer by indorsement or otherwise any note," and declaring that the banks within the state "shall at all times receive their respective bills at par in the liquidation of their bills receivable and other claims due" only by plea in abatement. Commercial Bank *v.* Thompson (Miss.), 7 Smedes & M. 443.

23. Bruce *v.* Hawley, 31 Vt. 643.

claim and set-off might be allowed in an action on a note for illegal commissions which have not been paid, none could be maintained for illegal interest or commissions which have been paid.[24]

24. Carnegie Trust Co. *v.* Chapman, 138 N. Y. S. 715, decided under Bank Law, § 74.

CHAPTER XII.

F. Exchange, Money, Securities, and Investments.

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F. EXCHANGE, MONEY, SECURITIES, AND INVESTMENTS.

§ 187½. In General.—For all practical purposes in modern mercantile transactions, a teller's check is but a substitute for a certified check and much more closely resembles it than it does a bill of exchange, strictly speaking, and it is none the less a check because drawn by an executive officer of the bank upon the institution he serves.[1] "Exchange bought and paid for" means bills drawn against shipments, and purchased by advances made to the shippers upon the strength of documents to be furnished by them with the bills, to repay the advances so made.[2] A provision in the charter of a bank that all promissory notes and inland bills of exchange which may be discounted and owned by said bank shall be put on the foot-

1. **Exchange, money and securities.**—Hannon v. Allegheny Bellevue Land Co., 44 Pa. Super. Ct. 266.

2. A New York bank authorized a New Orleans bank to draw on it in advance to the amount of $100,000 "against exchange purchases," to be forwarded to the New York bank for collection, to secure which advances a deposit of city bonds was made. In addition to exchange purchases, the New Orleans bank forwarded drafts of its own on third persons, a number of which were protested for nonpayment. Held, that the drafts of the New Orleans bank were not within the term "exchange purchases," and that the New York bank had no lien on the bonds pledged for advances on the protested drafts. Reynes v. Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486.

ing of foreign bills of exchange, will be construed to apply only to notes and bills made negotiable and payable in bank.[3]

§ 188. Power to Deal in Exchange, Money, and Securities.—Buying and selling exchange is an exercise of a banking franchise.[4] An undertaking for a consideration by the cashier of a bank to transmit a draft for a customer of the bank to a neighboring bank is a transaction clearly within the legitimate business of a bank; and where the bank fails in its undertaking, it will be liable to the customer for all proximate damages resulting therefrom.[5] A bank that is prohibited by its charter from vesting, using, or improving any of its moneys, or goods, in trade or commerce, may nevertheless lawfully take notes payable in bills of other banks, and receive such bills at a discount in payment for their notes.[6]

Through Agent.—When a bank is authorized to do banking business in a certain county, the buying and selling exchange through an agency in another county is illegal, as buying and selling exchange is, in effect, discounting paper, and an exercise of a banking franchise.[7]

Power to Charge Premium of Exchange.—The first section of the act of New York of 1835, which makes it unlawful for any moneyed incorporation to charge or receive the premium of exchange on any draft made by it which shall be used or applied in the payment of any bill or note discounted by such corporation, does not apply to individual bankers.[8]

§ 189. Issue and Payment of Drafts—§ 189 (1) In General.—A banker's check, as popularly understood, is a check, draft, or other order for payment of money, drawn by an authorized officer of a bank upon either his own bank or some other bank in which funds of his bank are deposited.[9] Cashing by one bank of checks or drafts drawn on another is legitimate banking business.[10]

Presumption of Payment.—Where a cashier of a bank has issued drafts of the bank for himself or for his private use, there is no presumption that

3. Payne v. Bank (Ky.), 10 Bush 176.

4. **Power to deal in exchange, money, and securities.**—People v. Oakland County Bank (Mich.), 1 Doug. 282.

Bonds.—Under the statutory charter giving authority to buy and sell negotiable and nonnegotiable paper, "as well as all kinds of commercial paper," Missouri state banks are authorized to handle negotiable water bonds. Mt. Vernon Bank v. Porter, 52 Mo. App. 244.

• Defendant had in its hands certain United States bonds belonging to plaintiff. Its cashier, in the spring of 1870, for a sufficient consideration, agreed to exchange the same for registered bonds. This the bank neglected to do, and in November, 1870, the bonds were stolen. In an action to recover their value, held, that the agreement was not ultra vires, and hence the bank was liable. Yerkes v. National Bank, 69 N. Y. 383, 25 Am. Rep. 205.

As to national banks, see post, "Dealings in Exchange, Money and Securities," § 271.

5. Bank v. Howell, 74 Mo. App. 315.

6. Portland Bank v. Storer, 7 Mass. 433.

7. People v. Oakland County Bank (Mich.), 1 Doug. 282.

8. Cuyler v. Sanford, 8 Barb. (N. Y.) 225.

9. **Issue and payment of drafts.**—Holland v. Mutual Fertilizer Co., 8 Ga. App. 714, 70 S. E. 191.

10. Murray v. Bull's Head Bank (N. Y.), 3 Daly 364.

they were paid for when issued, and the burden is on the party claiming that they were thus paid for to prove it.[11]

§ 189 (2) Rights and Liabilities of Parties—§ 189 (2a) Of Drawee.—Draft Drawn by Agent of Drawee.—Where, in an action by a bank to recover on drafts drawn on the defendant and paid by the bank, it is found that the drawer of the drafts to whom the bank paid the money was the defendant's agent in issuing the drafts, it is immaterial whether the defendant requested the plaintiff to pay the drafts.[12]

To Retain Draft for Claim against Indorser.—A drawee bank has no right to retain the amount of a draft to satisfy a claim against an intermediate indorser, and if it does so the payee can recover what he paid for the draft.[13] Where a bank certifies a draft made payable at its counters, its obligation based on the certificate becomes negotiable; and when the draft is transferred it will not be subject to any offset which the bank may have had against the payee.[14]

Fraudulent Security Given.—In an action against a bank on a cashier's check assigned to plaintiffs, pleas that plaintiffs, or one of them, procured the check to be issued by false representations as to the security given or to be given to the bank to secure a loan by the bank to the payees of the check, which the check represented, and that, as a part of the scheme to defraud the bank, plaintiffs, or one of them, had the check indorsed and signed to him, stated a complete defense.[15]

Not Estopped by Taking Security.—Where a bank claimed that a cashier's check, representing a loan, had been procured from it by plaintiff's fraud and then transferred to plaintiff, the act of the bank's cashier in taking a mortgage from the payees of the check to secure a loan, which the check represented, did not estop the bank from setting up plaintiff's fraud as a defense to the check.[16]

Bound by Payment.—A payment of a draft by the drawee concludes him, and he can not avoid the transaction by showing that he was mistaken

11. Mendel v. Boyd, 71 Neb. 657, 99 N. W. 493.

12. **Rights and liabilities of drawee.**—In an action by a bank to recover on drafts drawn on defendant and paid to the drawer by the bank, it appeared that a part of the money remained on deposit to the credit of the drawer, who was defendant's agent. Held, that the bank, having failed to credit such deposit on the drafts, could recover from defendant the full amount thereof. Farmers' Bank v. Fudge, 109 Mo. App. 186, 82 S. W. 1112.

13. **To retain draft for claim against indorser.**—A. purchased of the agent of a bank a draft thereon, payable to his own order, and indorsed the same to B., to whom it was sent to pay a debt which A. owed him, which debt B. had assigned to C. The draft was presented for payment by C. The bank refused payment on the ground that B. was their debtor, and they claimed a right to retain the amount of the draft as creditors in possession. Held, that A. might maintain an action for money had and received against the bank to recover the amount he had paid for the draft. Randolph v. Planters', etc., Bank (S. C.), 7 Rich. L. 134.

14. Flour City Nat. Bank v. Traders' Nat. Bank (N. Y.), 35 Hun 241.

15. Bank v. McGilvray & Co., 167 Ala. 408, 52 So. 473.

16. Bank v. McGilvray & Co., 167 Ala. 408, 52 So. 473.

in supposing that he had money in his hands to pay it.[17]

§ 189 (2b) Of Payee.—On Insolvency of Drawee.—The plaintiff bank, having been notified of a deposit in another bank, subject to its draft, in favor of the defendant, paid the amount to the defendant, taking his draft on the latter bank, with which the plaintiff had had no previous dealings. The plaintiff did not act as the agent of the drawee bank, so as to preclude it from recovering from the defendant on the draft, after the drawee bank had become insolvent.[18]

On Insolvency of Drawer.—The failure of the payee of a draft to present it to the drawee does not constitute a defense in an action against the drawer bank, which had become insolvent, unless prejudice is shown under a statute that the court shall disregard error not affecting a substantial right.[19]

Against Drawee.—Where the amount of a draft is stated in figures as larger than in writing, the payee pays the amount stated in figures but the drawee pays only the amount stated in writing, the payee upon the insolvency of the drawer can recover the balance of the amount stated in figures from the drawee.[20]

§ 189 (3) Forged and Fraudulent Draft.—Where a person fraudulently induces the defendant bank to draw on the plaintiff bank the former

17. **Bound by payment.**—Bank *v.* First Nat. Bank, 109 Mo. App. 665, 83 S. W. 537.

An acceptance is an admission that the drawee has the funds in his hands to pay. A payment is also such an admission, and, in addition, a discharge of the debt. And it is no defense that the drawees were mistaken in supposing that they would have funds in their hands to pay the bill. A mistake of this kind would not relieve them. Northwestern Nat. Bank *v.* Bank, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102, was a case where the draft was drawn on the plaintiff bank, who paid it, supposing the signature of the drawer to be genuine, while in fact it was a forgery. Plaintiff was denied the right to recover on the ground that the law conclusively presumed that the drawee knew the signature of the drawer. And so it was held in Third Nat. Bank *v.* Allen, 59 Mo. 310; Stout *v.* Benoist, 39 Mo. 277, 90 Am. Dec. 466; Hoffman & Co. *v.* Bank (U. S.), 12 Wall. 181, 20 L. Ed. 366; Goetz *v.* Bank, 119 U. S. 551, 30 L. Ed. 515, 7 S. Ct. 318. Bank *v.* First Nat. Bank, 109 Mo. App. 665, 83 S. W. 537.

18. Placer County Bank *v.* Freeman, 126 Cal. 90, 58 Pac. 388.

19. **On insolvency of drawer.**—Within an hour before defendant bank failed, plaintiffs procured drafts of it, giving their checks therefor on funds deposited by them in the bank. The drafts were not accepted by the payees therein, and were returned to plaintiffs without having been presented at the drawee bank. Held, in an action for the amount of the drafts, that the failure of plaintiffs or the payees to present the drafts at the drawee bank for payment, and to have them protested, was not, in the absence of proof that defendant was prejudiced thereby, a defense, in view of Rev. St., § 4231, providing that the court shall disregard error which does not affect a substantial right. Wheeler *v.* Commercial Bank, 5 Idaho 15, 46 Pac. 830.

20. **Against drawee.**—The cashier of the bank of W. drew a draft on a bank in another city in favor of R., which stated the amount in figures as $500, and in writing, "five and no-100 dollars." The purchaser paid the cashier $500 for the draft, and supposed it was for that amount. The drawee refused to pay more than $5. The Bank of W. was afterwards declared insolvent, and placed in the hands of a receiver. Held, that R. was entitled to be paid $500 in the hands of the drawee. State *v.* Bank, 34 Neb. 175, 51 N. W. 749.

is liable, where the latter pays the draft;[21] but, where the latter does not pay the draft but instead applies it to an indebtedness of the imposter, the latter can be compelled to surrender the draft to the former.[22] The drawer of a draft fraudulently obtained by the payee has no recourse against the drawee bank paying such draft where the draft, though fraudulently obtained, was made payable to the person intended;[23] the draft was obtained by the fraudulent giving of a release at the request of the drawer;[24] the payee was treated by the drawer as the person he pretended to be.[25]

21. Forged or fraudulent draft.—A person pretending to be H., the owner of lots, negotiated with B. for a loan thereon, sent notes and mortgage to the D. bank to deliver to B. on payment of the money, and to remit the proceeds, which said bank did by a draft on defendant bank. The person pretending to be H. then indorsed and sold the draft to plaintiff bank, which presented it to the defendant bank, which accepted it, but afterwards refused payment, the facts being learned. Held, that defendant was liable. First Nat. Bank v. American Exch. Nat. Bank, 49 App. Div. 349, 63 N. Y. S. 58, 30 Civ. Proc. R. 298, judgment affirmed in 170 N. Y. 88, 62 N. E. 1089.

Where a drawee bank pays the draft upon a forged indorsement of the payee, it is liable to the drawer bank for the amount so paid. Sims v. American Nat. Bank, 98 Ark. 1, 135 S. W. 356.

22. M. being insolvent, by false and fraudulent misrepresentations, induced the W. Bank to send to the G. Bank, for credit to M., its draft in payment of a fraudulent check issued by M. to the G. Bank for collection and deposit. The W. Bank discovered the fraud on the day the draft was sent, and notified the G. Bank of such fraud on the evening of that day, and while the draft was yet unapplied, and in the original envelope, and at the same time demanded a return to it of said draft. Prior to such notice, and on the same evening, the G. Bank had determined, at a meeting of its directors, to apply said draft on its overdue promissory note against M. by crediting said draft as a deposit to M.'s account, and itself making a check against such deposit. The G. Bank refused to surrender said draft to the W. Bank, but applied it the next morning upon M.'s overdue note in the manner previously determined upon. M. did not direct such application on his note. Held, that the G. Bank did not part with value or change its position on the faith of the draft before notice of the fraud, and had no right to withhold the draft from the W. Bank. Gibsonburg Banking Co. v. Wakeman Bank Co., 10 O. C. D. 754, 20 O. C. C. 591.

23. Fraudulent person intended as payee.—An unknown person, assuming the name of one G., obtained a loan from S. upon G.'s land, and executed his notes and mortgages for the loan in the name of G. S. sent the amount of the loan by draft by mail to the person executing the notes and mortgages, who said his name was G., and made the draft payable to the order of G., intending thereby the person to whom he sent the draft. A bank received this draft for a valuable consideration, in good faith, from the same person to whom it was sent, whom the bank believed to be G., and who indorsed the draft by that name. Held, although S. was mistaken and deceived in the transactions, the person he dealt with was the person intended by him as the payee of the draft, and that his indorsement of it was the indorsement of the payee of the draft by that name; and S. could not recover his loss from the bank. Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 11 Pac. 141, 57 Am. Rep. 171.

24. Draft obtained by fraudulent release.—Where A., on receipt of a release, made at request, of all claim against an estate, purporting to have been made by B., procures a draft to his own order, and indorses it to B.'s order, and sends it by mail to B.'s address, and it is there received by the person executing the release and indorsed in B.'s name, A. has no right of action against a bank, which pays the draft to the holder, supposing him to be B., though he is in fact an imposter. Hoffman v. American Exch. Nat. Bank, 2 Neb. 217, 222, 96 N. W. 112.

25. Payee held out by drawer as person he pretended to be.—Where one applied, under a certain name, for a

§ 190. Payment of Forged or Altered Paper—§ 190 (1) In General.—What Constitutes Payment.—A bank draft was certified by the drawee in ignorance that it had been raised. It was then deposited in another bank, and on the next day included in the drawee's clearing-house balance, which the drawee paid in the usual manner. On receipt of the draft, the drawee's check clerk compared it with the certification book, and canceled it. The draft was paid when so canceled.[26] Where the plaintiff collected a draft from the defendant, but, on discovery of its forgery, refunded the amount, the act of the defendant in treating its draft as paid, and crediting the drawee bank with the amount thereof, does not establish its liability to the plaintiff.[27]

What Constitutes Forgery.—The fact that the genuine signature of the drawer had been touched up a little with a brush or quill, but not essentially altered, does not constitute it a forgery.[28] Where a special deposit of borrowed money in a bank was subject to the borrower's check only when countersigned by the lender, the lender, as a matter of law, had power to limit the payment of the borrower's check on the fund or draft purchased with such check to a particular person, and hence the borrower's indorsement of the payee's name on the back of the draft so purchased, without authority, constituted a forgery, and passed no title to the holder, nor did it authorize the drawee bank to charge the draft to the drawer's account.[29]

§ 190 (2) Recovery of Payment—§ 190 (2a) In General.—Wherever any value is erroneously received as a consideration in the transfer of any negotiable instrument, and the signature of any person represented to be a party thereto is forged, the amount so paid may be recovered back from the person holding or negotiating the same.[30] When money is

loan on land owned by a man of that name, and was treated with by the lenders and their agents as the applicant, and signed the bond and mortgage, and received a draft for the proceeds the real owner knowing nothing about it, a bank is not liable for paying the applicant such draft, on his identification by an officer as having acknowledged the mortgage before him. Crippen, etc., Co. *v.* American Nat. Bank, 51 Mo. App. 508.

26. Payment of forged or altered paper.—Continental Nat Bank *v.* Tradesmen's Nat. Bank, 36 App. Div. 112, 55 N. Y. S. 545.

27. Sims *v.* American Nat. Bank, 98 Ark. 1, 135 S. W. 356.

28. United States Nat. Bank *v.* National Park Bank, 129 N. Y. 647, 29 N. E. 1028, affirming 59 Hun 495, 13 N. Y. S. 411, without opinion.

29. National City Bank *v.* Third Nat. Bank, 177 Fed. 136.

30. Recovery of payment.—A draft on a bank to the order of the drawers passed into the hands of another bank, and was paid through the clearing house. Two days afterwards, the signatures were found to be forged, and repayment was demanded, and refused. Held, that the first bank could recover from the second under Act April 5, 1849, § 10. Tradesmen's Nat. Bank *v.* Third Nat. Bank, 66 Pa. 435.

A railroad company drew its check on a bank in favor of a depositor of defendant. On the same day, the check, purporting to be indorsed by the depositor, was presented to defendant by a third person, and it issued to the order of the depositor a draft on a Chicago bank for a part of the check, and delivered the draft to the third person who forged the name of the depositor and obtained the proceeds of the draft. There was nothing to show that the third person received

paid upon a raised draft, without any negligence upon the part of the person paying the same, it can be recovered from the party to whom it was paid.[31]

Usage and Custom.—In an action to recover back the payment of a forged draft, evidence of a local custom of relying on the indorsement of a draft as satisfactory evidence of the genuineness of the drawer's signature is inadmissible.[32] It is no defense to an action against the bank for wrongfully paying the draft on a forged indorsement of the payee's name that such payment was made in the regular course of business, in good faith, and with nothing to excite suspicion, to a holder in good faith, for value, under the indorsement of a person bearing the same name as the payee.[33]

the difference between the draft and the check, or that he was the one who forged the indorsement on the check. Held, that defendant was not guilty of actionable negligence in issuing and delivering the draft to the third person, rendering it liable to plaintiff, a subsequent indorsee of the draft, for though it knew that the third person had forged the indorsement on the check, it was not put on notice that the third person would commit a second forgery by indorsing the draft. Missouri-Lincoln Trust Co. *v.* Third Nat. Bank (Mo.), 133 S. W. 357.

Recovery by payee on forged indorsement.—A draft was issued from the United States treasury upon the First National Bank of Washington, which was a depository and financial agent of the government, payable to a resident of Tennessee, and, after being delivered to the payee's agent, was cashed by a bank in Tennessee on a forged indorsement of the payee's name, and sent by said bank to a bank in New York, by which it was forwarded to the drawee bank. The drawee, relying on the indorsement as genuine, and acting as agent of the government, paid the draft, and transmitted it to the treasurer of the United States, who acted upon the indorsement as genuine, and gave full credit for the amount of the draft in the account of the drawee bank. Thereafter, when the draft was on file in the treasury department, payment thereof was demanded from the drawee, on behalf of the payee, who had never had possession of the draft. Held, that the drawee was liable to the payee for the amount of the draft. Kimbro *v.* First Nat. Bank, 1 MacArthur (8 D. C.) 415.

Indorsed to order of fictitious person.—The indorsement of a bank draft by the payee to the order of a fictitious person in good faith, and believing him to be real, is not in law an indorsement to bearer, such not being the intention of the indorser; and the indorsement of the name of the fictitious indorsee by a third person without authority is a forgery, and does not protect the bank in payment of the draft. Chism *v.* First Nat. Bank, 96 Tenn. 641, 36 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863.

Right to rely on genuineness of indorsement.—A bank paying a check has a right to rely on the indorsements thereon, where one transmitting it to the bank for payment guaranties the indorsement, and the bank supposes that the check is going through the regular course. Greenwald *v.* Ford, 21 S. Dak 28, 109 N. W. 516.

31. Metropolitan Nat. Bank *v.* Merchants' Nat. Bank, 77 Ill. App. 316, affirmed in 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180.

32. **Usage and custom.**—Moody *v.* First Nat. Bank, 19 Tex. Civ. App. 278, 46 S. W. 660.

In an action by the drawer of a draft against the drawee for payment on a forged indorsement, a custom of banks to accept items for deposit bearing the indorsement of payees on the responsibility of the depositor, without examing the genuineness of the indorsement or signature of the payee or person other than the depositor, was irrelevant as not going to the extent of exhibiting a custom that a failure to examine a title conferred a good title, or that a banker's reliance on a customer's indorsement of a bad title exempted the banker from liability on his own indorsement. National City Bank *v.* Third Nat. Bank, 177 Fed. 136.

33. Graves *v.* American Exch. Bank, 17 N. Y. 205.

Estoppel by Negligence.—The plaintiff may be estopped by his negligence to recover payment on a forged check.[34]

34. **Duty of inquiry.**—In an action to recover back the payment of a forged draft, testimony of witnesses that the person who sold the draft to a bank, to which it was paid, had, at about the time the sale occurred, made a trade with one of them, agreeing to purchase from him a stock of groceries, and that he had told another he had bought land, furnishing an abstract he wished witness to examine, was admissible to show that, if the purchaser had made inquiries, it would have ascertained facts tending to increase its confidence in the reliability of the person who sold it the draft. Moody v. First Nat. Bank, 19 Tex. Civ. App. 275, 46 S. W. 660.

Check forged by clerk.—A bank clerk, whose duty it was to prepare exchange for the cashier's signature, so drew a draft for $25 to his own order that the amount could be readily altered, and, after procuring the cashier's signature by pretending that he wished to make a remittance of that amount, altered the draft so that it presented the appearance of a genuine draft for $2,500, and thereafter indorsed it, and procured it to be discounted. Held, that the forgery by the clerk, and not the negligence of the bank, was the proximate cause of the loss, and the bank was not liable therefor. Exchange Nat. Bank v. Bank, 58 Fed. 140, 7 C. C. A. 111, 22 L. R. A. 686.

Delay in examination.—Where a bank pays a forged acceptance, and sends it by mail to a firm whose name is forged, the firm is under no legal obligation to immediately examine the acceptance with a view to ascertaining whether or not it is genuine, and is not chargeable with negligence for not discovering the forgery immediately; but it is sufficient to avoid liability to give notice to the bank when the forgery is discovered. First Nat. Bank v. Tappan, 6 Kan. 456, 7 Am. Rep. 568.

Failure to compare signature.—Plaintiffs, at the time they accepted and paid certain forged drafts drawn on them, had in their possession a number of other drafts of the same drawer, drawn upon them, which they knew to be genuine, and had the means of comparing the genuine signature of their correspondent with the forged signatures, as well as various other means of determining the character of the spurious bills. Held, that the loss should fall rather upon the plaintiffs than upon the bank which had cashed the drafts. Howard v. Mississippi Valley Bank, 28 La. Ann. 727, 26 Am. Rep. 105.

Discovered after three years.—A United States paymaster gave to B.'s attorney a draft on a bank, payable to B. The attorney forged B.'s indorsement, and the bank paid the draft to another bank, which had cashed it. The payment and forgery were first ascertained three years after at the treasury department, B. in the meantime having obtained payment of his claim through another paymaster. The United States notified the bank of the fact of the forgery six days after knowledge of it, and in nine days from that time furnished it with proofs thereof. Held, that a contention that the United States had lost its remedy by delay was untenable. United States v. Republic Bank, 2 Mackey, 289.

A delay of four months between the cashing of the draft by plaintiff and the demand on it by defendant to refund the amount of the draft did not estop defendant from claiming restitution from plaintiff. Sims v. American Nat. Bank, 98 Ark. 1, 135 S. W. 356.

Mistake of cashier.—Plaintiff paid defendant bank $500, requesting a draft for that amount to a third person's order. Defendant's cashier drew a draft having the characters "$500" at the top of it, but in words directing the payment of "five thousand dollars." Plaintiff did not examine the draft, but at his request the envelope in which he inclosed it was addressed by the cashier to the payee, and posted with the bank's mail. Some unauthorized person added a cipher to the characters "$500," and the drawee paid on the draft $5,000. Held, that plaintiff, having received no benefit from the cashier's mistake or the alteration of the draft, was not liable to the bank for the $4,500 lost by it. City Nat. Bank v. Stout, 61 Tex. 567.

Notice to principal or agent.—In an action by a bank for money paid on a forged check, defendant testified that he received the check as security for a loan from a comparative stranger, whom he supposed was a gambler, and that he did not know or make any inquiry as to the alleged signer of the

§ 190 (2b) From Drawee.—A bank on which a draft is drawn is bound at its peril to pay it to the genuine payee, or other person author-

check, the body of which was written by the same person who wrote the name of the payee on the back thereof. The check was deposited with a bank for collection. The check bore the indorsement of the alleged payee and defendant, and the bank guarantied the previous indorsements. The bank receiving the check for collection as agent of defendant was advised of the forgery several days before forwarding to the alleged payee a certificate of deposit for the amount thereof. It was not shown that the certificate of deposit received from the collecting bank had ever been paid. Defendant had received the money loaned to the alleged payee before the certificate was forwarded to him. Held, that since Rev. Civ. Code, § 1687, providing that as against a principal both principal and agent are deemed to have notice of whatever either has notice, etc., defendant must be deemed to have had notice of the forgery before the transmitting of the certificate of deposit to the alleged payee of the check, rendering him liable for the repayment thereof. Greenwald *v.* Ford, 21 S. Dak. 28, 109 N. W. 516.

Reliance on indorsement.—P., having loaned money to B., deposited in a special bank account subject to checks only when countersigned by P., countersigned a check on the deposit to purchase a draft payable to the B. M. Company. B. purchased the draft, and, forging an indorsement of the B. M. Company, deposited it to the credit of his personal account in another bank, by which it was collected from the drawee and charged to the drawer's account. Held, that the drawer was entitled to rely, in the absence of notice that its reliance was misplaced, on the assumption that the drawee would not pay the draft on such forged indorsement, and hence neither the drawer nor P. were chargeable with any negligence that misled or contributed to misleading either the bank in which the draft was deposited after forgery, or the drawee in paying the draft on such indorsement. National City Bank *v.* Third Nat. Bank, 177 Fed. 136.

Failure to give notice of presentment by payee.—Where a draft was drawn by one bank upon another, payable to a third person, and the drawer bank was notified by the drawee bank that the payee's indorsement had been forged, and had refused to repay the amount of the draft to the drawee, or to give it credit therefor, it could not complain that it received no notice of presentment of the draft by the rightful payee, as such notice could have been of no benefit to it. Sims *v.* American Nat. Bank, 98 Ark. 1, 135 S. W. 356.

Correspondence with forger.—An executor received letters purporting to be signed by a legatee. As a matter of fact the legatee was dead, and the letters were written and signed by her husband. The executor bought a draft for the amount of the legacy to the order of the legatee, and sent it in a letter addressed to the legatee. The husband forged the name of his deceased wife and secured the money. Held, that the executor had no right of recovery against the bank which had paid the draft. States *v.* First Nat. Bank, 17 Pa. Super. Ct. 256.

Plaintiff's father died, and by his will plaintiff was named as executor, and directed to pay his sister $1,000 in one year. She had lived in another state, but died three months before her father's death, leaving seven children, to whom the legacy passed, and a husband. Plaintiff did not know of her death, and her husband compelled a daughter to write, in her mother's name, for the legacy. After some correspondence in this way a compromise for $900 was agreed on, and the daughter executed and acknowledged a release—personating her mother—on receipt of which plaintiff purchased from defendant bank a draft for $900, payable to the order of his sister, which was received and cashed at a local bank by her husband, after being indorsed in her mother's name by the daughter. The draft, in usual course, was paid by defendant's correspondent, and returned. About two months later, plaintiff learned of his sister's death, and of the date thereof. About four months thereafter the local bank which cashed the draft failed, and two years later her husband died. Thereafter such children, through the orphans' court, compelled plaintiff to pay them the legacy. Plaintiff then, nearly four years after the draft was purchased, informed defendant that his sister, the payee therein, was dead before the draft was issued, and sued to recover the amount paid for the draft. Held, that having by his

ized by him to receive payment[35] and for the correct amount.[36] But where a bank pays an altered check signed by the genuine signature of its correspondent it can recover.[37] Where a draft drawn by one bank on another, payable to a third person, was paid by the drawee bank upon a forged indorsement of the payee, there was no privity of contract which would entitle the payee to sue the drawee bank; the payment by the drawee not amounting to an acceptance releasing the drawer.[38]

Where Draft Delivered to Forger.—Where a bank pays a draft on a forged indorsement, and the person who committed the forgery and received the money was in fact the person to whom the drawer delivered the check, the fact that the fraud was accomplished by prior correspondence to which the purchaser of the draft gave credence does not make the bank liable.[39]

Extent of Liability.—Where the plaintiff is compelled to pay an altered

own act induced the bank to issue the draft to a dead person, and thereby enabled her husband to perpetrate the fraud, plaintiff could not recover. States *v.* First Nat. Bank, 203 Pa. 69, 52 Atl. 13.

Forger introduced by reliable person.—A bank purchased a forged draft on the introduction of the seller under an assumed name by a person it knew to be reliable, he informing it that the seller intended to go into business, had bought some lots, and purchased, or was about to purchase, a business, and wanted a place for deposits. An introduction by some person known to be reliable was the usual means of identification of persons presenting paper for payment, and the bank made no further inquiries. Held, that it was not guilty of negligence in making the purchase. Moody *v.* First Nat. Bank, 19 Tex. Civ. App. 278, 46 S. W. 660.

35. Liability of drawee.—Graves *v.* American Exch. Bank, 17 N. Y. 205.

A bank on which a draft is drawn is bound to know the signature of its correspondent, and, if it accepts and pays a draft to which such signature has been forged, to a bona fide holder, it is bound by its act, and can neither repudiate the acceptance nor recover the money paid. National Park Bank *v.* Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310, affirming 55 Barb. 87, 7 Abb. Prac., N. S., 120, 138.

Where the drawee of a bank draft paid it on the forged indorsement of the payee's name by a person having no property in the draft or right to indorse the payee's name, proof of such facts establishes a cause of action against the drawee, on behalf of the drawer, under the rule that it is the drawee's duty to pay the draft only to the payee, or to some one who by indorsement or otherwise has good title, or as to whom plaintiff is estopped to deny title. National City Bank *v.* Third Nat. Bank, 177 Fed. 136.

After a bank draft which had been paid to one who held it under a forged indorsement was returned to the drawer, the latter redelivered it to the payee, who demanded payment, which was refused, whereupon the drawer paid the draft after protest. Held, that the drawer had a right of action against the drawee for its refusal of payment. Citizens' Nat. Bank *v.* Importers', etc., Bank, 119 N. Y. 195, 23 N. E. 540, affirming 44 Hun 386.

36. City Nat. Bank *v.* Stout, 61 Tex. 567.

37. Where a bank in New Orleans drew a bill upon the plaintiffs' bank in New York for $105, payable to "J. Durand," and after it was issued there was a fraudulent substitution of the word "thousand" for "hundred," and of the name "Bonnet" instead of "Durand," and it was indorsed "J. Bonnet," and paid by the plaintiffs to the defendant's bank in New York, which had received it from a Charleston bank for collection, it was held, that the plaintiffs could recover the money so paid, they being in no way guilty of negligence in not discovering the forgery before paying the bill, and having given notice thereof as soon as the forgery was discovered. Bank *v.* Union Bank, 3 N. Y. 230.

38. Sims *v.* American Nat. Bank, 98 Ark. 1, 135 S. W. 356.

39. States *v.* First Nat. Bank, 17 Pa. Super. Ct. 256.

draft negotiated by a bank, the liability of the bank is the amount of the altered draft less the amount of the original draft.[40]

§ 190 (2c) From Indorser.—When a bank receives a draft for value on the forged indorsement of the payee's name, and then indorses it, and it is paid by the drawee without notice of the forgery, and without negligence the latter, having been compelled to pay the amount of the payees, may recover it of the bank.[41] Where a bank, without instructions, pays a forged acceptance, and sends the same by mail to the firm whose names are forged as acceptors, it does not become thereby entitled to a credit for the amount thereof against the firm.[42]

Indorsed for Collection.—When a bank purchases a draft on the indorsement of the payee, and then indorses it to its correspondent for collection, it does not thereby negotiate it so to become responsible for the genuineness of the signature of the drawer; and therefore, where such bank receives payment, it does not become liable to the drawee if the draft proves to be a forgery.[43] The fact that the purchaser of a forged draft indorsed it

40. Extent of liability.—Metropolitan Nat. Bank *v.* Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180.

A draft for $12.50, drawn on plaintiff by a correspondent, was raised to $5,000, and, as so raised, cashed by plaintiff upon defendant's presenting it indorsed for collection. Held that, upon discovery of the fraud, plaintiff could recover from defendant the amount paid to it, less $12.50, unless the signature of the drawer was also a forgery. United States Nat. Bank *v.* National Park Bank, 129 N. Y. 647, 29 N. E. 1028, affirmed in 13 N. Y. S. 411.

A draft drawn by plaintiff on its New York correspondent was raised by the payee, and, as so raised, deposited with defendant, which gave the payee credit for the full amount of the raised draft. Defendant subsequently forwarded the draft to plaintiff's New York correspondent, which paid defendant the full amount of the draft as raised, and charged that amount to plaintiff. Subsequently, defendant, having ascertained that the draft had been raised, directed plaintiff to procure the draft from its New York correspondent, make affidavit to the correct amount, and send the draft to defendant, when it agreed to remit the difference. Held, that plaintiff's acceptance of and compliance with this proposition obligated defendant to pay plaintiff the face of the raised draft less the amount for which it was originally drawn. National Bank *v.* Manufacturers', etc., Bank, 122 N. Y. 367, 25 N. E. 355.

41. Liability of indorser.—Where a draft was drawn on an insurance company for loss on a policy, and delivered to the local agent, who forged the payee's name, and obtained the money from a bank which indorsed it, and received the money thereon from the company, which did not know of the forgery until notified by the payee that he had not received the money, when it immediately notified the bank—its notice was reasonably given, so as to entitle it to recover of the bank. Star Fire Ins. Co. *v.* New Hampshire Bank, 60 N. H. 442.

Bank not relieved from diligence.—Where a draft was drawn for the amount of loss due on an insurance policy, and delivered to the company's local agent to give to the payee, the fact that the agent, who was not a party to the draft, indorsed it with his own name, and forged that of the payee, does not relieve the bank, to which the agent delivered it, from using due diligence to ascertain the genuineness of the indorsements, so as to relieve it from liability to the company, the drawee, which paid it without notice of the forgery. Star Fire Ins. Co. *v.* New Hampshire Bank, 60 N. H. 442.

42. First Nat. Bank *v.* Tappan, 6 Kan. 456, 7 Am. Rep. 568.

43. Paper indorsed for collection.—A certain person presented to defend-

to another solely for collection would not authorize the bank on which it was drawn to assume that he thereby purposed to guaranty its genuineness.[44]

Effect of Indorsement as Paid.—An indorsement that a draft was paid through a clearing house to the defendant indicates that the draft was not deposited for collection merely, but for general deposit to the credit of the indorsee. The indorsement is not restrictive, nor does it disclose the relation of mere agency in the defendant for collection only. The draft became the property of the defendant.[45] The offer to prove that the indorsement to the defendant, by local usage of bankers, had a larger scope and meaning than its terms indicated, and than given by settled legal con-

ant bank at Kansas City a letter of introduction from a bank at Nevada, showing his genuine signature, and also a certificate of deposit, a small portion of which he collected, leaving the balance on deposit. He rented an office, and December 22d employed a bookkeeper, and deposited with defendant a draft for $3,500, and on December 23d drew $2,500. The same day he deposited a draft for $4,000, drawn by an Omaha bank on plaintiff bank at Chicago, and the next day he drew $4,500. Defendant sent the draft of $4,000 to its correspondent in Chicago, "for collection," and it was paid by plaintiff, the drawee, through the Chicago clearing house. Later it was found to be a forgery. Held, that defendant was not guilty of any negligence which renders it liable to the drawee for the money received. Northwestern Nat. Bank v. Bank, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102.

44. Moody v. First Nat. Bank, 19 Tex. Civ. App. 278, 46 S. W. 660.

45. Indorsed as paid.—On February 17th, plaintiff, discovering the fraud, left the draft with defendant, demanding its redemption. On the same day defendant returned the draft to plaintiff, stating that the A. Bank had declined to redeem it, and on February 19th defendant refused to redeem it because the A. Bank had refused. After the draft was received by the A. Bank and indorsed by H., and before defendant presented it to plaintiff for payment, it was stamped, "A. T. Bank. Paid. * * * February 14, 1894. Paid through Chicago Clearing House to M. Bank [defendant]." At the time of said transactions plaintiff knew that defendant cleared for the A. Bank, and plaintiff's president and others testified that said indorsement so indicated, but there was no other evidence that plaintiff had any such knowledge prior to February 17th, or that plaintiff knew of the relations between the A. Bank and defendant. The evidence was conflicting as to whether or not bankers generally understood said indorsement to mean that appellant was agent in the clearing house of the A. Bank in addition to the ordinary import of the same. From February 14th to February 20th the A. Bank had various sums in excess of the amount of the draft on deposit with defendant, and during that time checks and drafts drawn upon or deposited with the A. Bank were cleared through defendant, who received them as deposits, and credited them to the A. Bank, against which account the A. Bank drew. Held, that the effect of both of said indorsements was that the draft became the property of defendant. Judgment, 77 Ill. App. 316, reversed. Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180.

Both said indorsements constituted more than mere agency to collect, and were requests that the respective banks deposit the sum named in said draft to the credit of the customer, and gave each bank, respectively, power to act with it, as their judgment dictated, to make it more available in their possession. Judgment, 77 Ill. App. 316, affirmed. Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180.

As defendant had not paid over the amount of the draft to the A. Bank, but had merely credited that bank with the amount, and had the amount thereof on deposit when the demand of redemption was made, defendant was liable for the amount of the same, if it were the agent of the A. Bank. Judgment, 77 Ill. App. 316, affirmed. Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180.

struction, is inadmissible.[46]

§ 190 (2d) From Bank Certifying.—The fact that the bank on which it was drawn has certified a check after it has been altered is not conclusive against such bank, nor does it preclude it from showing the fact of such alteration, nor prevent a recovery from the party who received the check on the faith and credit of the certification alone,[47] the amount paid less the amount of the original check.[48] The certification does not warrant the genuineness of the body of the check, either as to the payee or the amount or warrant the genuineness of the indorsements but only the signa-

46. Metropolitan Nat. Bank *v.* Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180.

47. **Certification of altered draft.**—On February 7th, the F. Bank drew its draft on the plaintiff bank, in favor of H., for $35. On February 13th, the draft, fraudulently changed to $3,500, was presented to plaintiff, who, without discovering the fraud, certified it, and charged $3,500 to the F. Bank. On February 14th, the draft was deposited by H. with the A. Bank, which credited it to his account. Subsequently, on February 14th, the draft was delivered by the A. Bank to defendant bank, and on that day plaintiff paid defendant $3,500 through the clearing house on the draft. Subsequently defendant credited the amount to the A. Bank, which had a running account with defendant, but there was no other evidence that defendant paid said sum to that bank. Plaintiff, discovering the fraud, returned the draft to defendant, and demanded its redemption, which defendant refused, and returned the draft to plaintiff, who sued defendant for $3,500, minus the original amount of the draft, and either before or after suit was brought plaintiff credited the $3,500 to the F. Bank. Held, that plaintiff was entitled to recover from defendant the amount paid to it above the original amount of the draft, on the ground that the payment and certification were both made without consideration and by mistake. Judgment 77 Ill. App. 316, affirmed. Metropolitan Nat. Bank *v.* Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180.

The certification of the draft after it was fraudulently changed did not preclude plaintiff from recovering from defendant, although defendant received the same solely on the faith and credit of the certification, as the certification warranted only the genuineness of the drawer's signature, and that the drawer had sufficient funds on deposit to pay the purported amount, which should not be withdrawn. Judgment 77 Ill. App. 316, affirmed. Metropolitan Nat. Bank *v.* Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180.

Where a check or draft drawn upon a bank has been fraudulently raised or altered after it was drawn, the rule is well settled that money which has been paid by a bank upon such a fraudulently raised or altered check may be recovered back from the party to whom it was paid, in an action for money had and received, on the ground that the payment was without consideration and made by mistake. Metropolitan Nat. Bank *v.* Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180.

Certified supra protest.—A bank discounted a draft, and sent it to defendant bank for collection. The drawees refused to accept, and the draft was given to a notary for protest. During the absence of the notary from his office, plaintiff called, and, on being told by the notary's clerk that the notary had such a draft, and being desirous to prevent notice of protest, gave the clerk a certified check, thus paying it supra protest. The draft turned out to be a forgery. Held, that plaintiff was entitled to recover the money as paid under mistake of fact. Goddard *v.* Merchants' Bank, 4 N. Y. Super. Ct. 247.

48. **Recovery of amount of alteration.**—Plaintiff's crediting back the $3,500 to the F. Bank before or after suing was immaterial, as, on discovering the fraud, the F. Bank could be rightly charged with only the original amount of the draft. Judgment 77 Ill. App. 316, affirmed. Metropolitan Nat. Bank *v.* Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180.

ture of the maker and the fact that he has funds to pay the check.[49] However to entitle the bank to recover money mistakenly paid on a raised check, the payment must have been made without culpable negligence on its part. It may be estopped to recover by negligence.[50]

§ 190 (2e) From Holder for Value.—A bank which pays a forged draft purporting to be drawn by a regular customer, in the hands of an innocent purchaser for value who is without negligence, cannot recover the payment thus made, when it discovers the forgery.[51] The rule that a drawee cannot recover back money paid on a forged draft is not available in favor of the holder, who by his own negligence contributed to the success of the

49. First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247, citing Smith *v.* Chester, 1 Term R. 654; Robinson *v.* Yarrow, 7 Taunt. 455, 2 E. C. L. 445, cited in Metropolitan Nat. Bank *v.* Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180.

50. Estopped from negligence.—Continental Nat. Bank *v.* Tradesmen's Nat. Bank, 36 App. Div. 112, 55 N. Y. S. 545.

Where a bank negligently certified a raised draft, and paid the amount of it to a bank with which the draft had been deposited, and which, with reliance on the acceptance, payment, and retention of the instrument by such bank, paid the depositor, its liability rests on the estoppel arising from its subsequent acts, and from its negligence until it was too late to protect the bank with which the draft was deposited or itself from loss, and not on the mere certification. Judgment 69 N. Y. S. 82, 59 App. Div. 103, affirmed. Continental Nat. Bank *v.* Tradesmen's Nat. Bank, 173 N. Y. 272, 65 N. E. 1108.

One who, without negligence, pays money on a raised draft, can recover it back from the person to whom it was paid. National Park Bank *v.* Eldred Bank, 90 Hun, 285, 35 N. Y. S. 752, 70 N. Y. St. Rep. 497.

Where a bank paid out part of the proceeds of a deposit, consisting of a raised draft, relying on the certification of the drawee before notice of the alteration, the drawee, having certified and paid the draft, in negligent disregard of facts which would have shown the forgery, can recover from it only the amount of such deposit remaining in its hands. Continental Nat. Bank *v.* Trademen's Nat. Bank, 36 App. Div. 112, 55 N. Y. S. 545.

Negligence question for jury.—A bank having an active account with the drawee bank drew a draft, No. 2,269, for $76, payable to T., notice of which was given, according to its custom, in its daily letter of advice of drafts drawn that day, which the drawee received, and filed, to be checked off as the drafts were paid, on the succeeding morning. Six days later, the draft was presented for certification, having been raised to $7,660, and the date changed to the day preceding presentment. The bookkeeper pronounced it "all right," and it was certified without checking the advice, and entered in the certification book without entering its number, as was customary; and, on the bookkeeper posting from the certification book, he noticed the omission, remembered that no advice for a draft of that amount had been received, and notified the general bookkeeper. The payee deposited the certified draft on the same day, and it was received by the drawee through the clearing house next morning, at 10:30 o'clock, when it was compared with the certification book, and canceled, between 11 and 1 o'clock. Defendant bank, in which it was deposited, having received no notice from the drawee, paid the amount to its depositor; and at 4 o'clock the drawee's bookkeeper took the canceled draft from its receptacle, and by comparing it with the advice, and by inquiry from the drawer, discovered the forgery, of which defendant was at once notified. Held, that whether the drawee had been so negligent in paying the draft as to prevent it from recovering the amount paid from defendant was a question for the jury. Continental Nat. Bank *v.* Tradesmen's Nat. Bank, 36 App. Div. 112, 55 N. Y. S. 545.

51. Moody *v.* First Nat. Bank, 19 Tex. Civ. App. 278, 46 S. W. 660.

fraud, and whose conduct misled the drawee.[52]

§ 190 (2f) Procedure.—Tender and Demand.—Before a payor of a raised draft can bring suit for the recovery of the money, a return or proper tender of the draft is essential, or some act shown on the part of the defendant making such return or tender useless.[53] But no tender of an altered draft by the plaintiff to the defendant is necessary to the plaintiff's action, after a formal demand for its payment was made and refused. His return of the draft with demand of redemption is a sufficient tender of the same to allow the plaintiff to recover.[54]

Limitation and Laches.—On a question of want of diligence in suing a bank for the amount of a draft on which the payee's indorsement had been forged, it is irrelevant that the payee had previously sued the bank for possession of the draft and recovered judgment.[55]

Evidence.—In an action by a bank to recover money paid by it on an alleged forged check, it appeared that the body of the check was in the handwriting of the payee. Experts testified that the signature of the check was a forgery, and the alleged maker denied signing it. There was no contradictory evidence. The evidence was sufficient to establish forgery of the check as a matter of law.[56]

§ 191. Letters of Credit.—A letter of credit is a letter containing a general or special request to pay the bearer or person named money, or sell him some commodity on credit, or give him something of value, and look to the writer of the letter for recompense, and which partakes of the nature of a negotiable instrument.[57]

Letter of Special Credit.—A letter of special credit binds the writer to no person other than the person to whom addressed.[58] Where a letter of special credit was written to a bank to induce it to make advances to a

52. Woods *v.* Colony Bank, 114 Ga. 683, 40 S. E. 720, 56 L. R. A. 929.

53. Tender and demand.—Continental Nat. Bank *v.* Metropolitan Nat. Bank, 107 Ill. App. 455.

54. Metropolitan Nat. Bank *v.* Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180.

55. Garthwaite *v.* Bank, 123 Cal. 132, 55 Pac. 773.

56. Greenwald *v.* Ford, 21 S. Dak. 28, 109 N. W. 516.

57. Letters of credit.—A letter written by an officer of a national bank, addressed "To whom it may concern," and reciting, "This letter will be presented to you by [a person named] in the interest of [a company] who are valued customers of this bank. Their business has always been very satisfactory to us, and we consider them wide-awake business men. Any favors shown to him will be highly appreciated," is not a letter of credit. Liggett *v.* Levy, 233 Mo. 590, 136 S. W. 299.

58. Letter of special credit.—At the request of A. that defendants recommend him to a bank, to enable him to get advances, so that he might hold eggs purchased until the price advanced, defendants wrote to the bank, stating the facts, and that they did not think there was any risk in his so holding them; adding that they guarantied the payment of drafts drawn by A. on them, as they had done in the past, and that the risk incurred by plaintiff amounted next to nothing. Held, that this was a letter of special, and not of general, credit, and could not be relied on by another bank than the one to which it was written. Lyon *v.* Van Raden, 126 Mich. 259, 85 N. W. 727.

certain person on produce purchased by him, on the bank going out of business and being succeeded by another banking corporation such succeeding bank could not rely on the letter of credit, and recover from the writers for advances made thereon.[59] A letter authorizing the addressee to allow the bearer to draw on specific property does not bind the writer to pay drafts drawn on other property.[60]

Letter Requiring Indorsement of Drafts.—Drafts by the bearer of a letter of credit, providing that drafts should be indorsed on the letter, but not so indorsed, cannot be applied in the extinguishment of the letter, as against another bank honoring drafts on the faith of the letter.[61]

Letter for Continuous Drafts.—A bank which has accepted and acted upon a letter of credit which, by its terms, constitutes a continuing guaranty for advances made to the holder thereof, has a right to rely on such guaranty until terminated by adequate notice from the person giving it; and a

59. Lyon *v.* Van Raden, 126 Mich. 259, 85 N. W. 727.

60. For draft on specific property.—Defendant authorized plaintiff, a foreign bank, to allow a foreign firm to draw for defendant's account against a certain number of bales of Manilla hemp to be purchased and shipped by a certain vessel, advice to be given plaintiff, accompanied by a bill of lading, with abstract of invoice indorsed. Plaintiff accepted and cashed drafts against "bales of hemp." An abstract of invoice for "bales of Manilla hemp" was indorsed on each bill by the consignor after it had been signed by the captain, but without his knowledge. A letter of advice described the shipment as "bales of hemp." Held, that the plaintiff can not recover of defendants the amount paid on the drafts accepted against the matting. Bank *v.* Recknagel, 109 N. Y. 482, 17 N. E. 217, affirming 52 N. Y. Super. Ct. 334.

61. Letter requiring indorsement of drafts.—Where a bank executed a general letter of credit, addressed "To Whom It may Concern," obligating itself to pay checks of the bearer to the amount of $1,000—checks paid to be indorsed on the back of the letter—checks drawn by the bearer of the letter, and cashed by a bank which had no notice of the letter, and therefore did not cash the same on the faith thereof, or indorse them on the back of the letter, could not be applied in extinguishment of the amount named in the letter, as against another bank subsequently cashing the bearer's checks on the faith of the letter, to an amount apparently remaining undrawn thereunder, as disclosed by the indorsements. Bank *v.* First Nat. Bank, 105 Mo. App. 722, 78 S. W. 1092; Bank *v.* Tanger (Mo.), 79 S. W. 1197.

The fact that the bank issuing the letter of credit may have thought and assumed that the previous checks cashed by the bank without notice of the letter had been cashed on the faith thereof was immaterial. Bank *v.* First Nat. Bank, 105 Mo. App. 722, 78 S. W. 1092; Bank *v.* Tanger (Mo.), 79 S. W. 1197.

A bank gave a letter of credit to a person, guarantying the payment of drafts which might be drawn by the latter on a firm named in the letter, to the amount of $14,000, the letter providing that indorsements might be made thereon. A draft for $6,000, and another for $2,000, were drawn and indorsed on the letter. The latter draft was forwarded for collection to the bank giving the guaranty, which was advised that it was drawn under the letter of guaranty. The holder of the letter then made a draft for $4,000, which was not indorsed on the letter, nor, in sending the bill for collection to the same party as before, was any reference made to the letter of guaranty; but the draft was paid by the drawees. He then drew for $6,000, the draft purporting on its face to be drawn against the letter of credit, which was returned to the bank which gave it, with this draft, for collection. This last draft was protested. All the drafts except the first were drawn in favor of the same party. In a suit by the latter upon the guaranty to recover the amount of the draft for $6,000, which was protested, held, that the defendant was not liable. Omaha Nat. Bank *v.* First Nat. Bank, 59 Ill. 428.

change of the holder's business does not affect the liability of the guarantor for subsequent advances.[62]

Letter as Contract.—A bank is bound by a promise in a letter of credit,[63] which may be enforced by a person acting on the faith thereof,[64] and the bank can not escape liability because of the insolvency of the person to whom addressed.[65] There must, however, be a valuable consideration.[66]

Persons to Whom Credit Given.—A letter of credit or of recommendation which presents both an agent and his company includes both the agent and the company.[67]

62. White's Bank *v.* Myles, 73 N. Y. 335, 29 Am. Rep. 157.

63. Letter as contract.—Defendant addressed a letter to his banker, authorizing plaintiff, M.'s banker, to draw to the amount of £3,000, and delivered the letter to M., who deposited it with plaintiff, and secured advances thereon. The advances being unpaid, plaintiff drew drafts in accordance with the letter, which was dishonored. Held, that defendant was liable for the amount advanced. Lafargue *v.* Harrison, 70 Cal. 380, 9 Pac. 259, 11 Pac. 636, 59 Am. Rep. 416.

64. Action by third person.—Upon a letter from persons in New Orleans, addressed to one in Cincinnati, stating that bills to the extent of $10,000 would be duly honored by them up to a certain date, the same being accompanied by a bill of lading of shipments to their address, by steamboats, an action may be maintained for a breach of promise to accept, in his own name, by a third person, who, upon the faith of such letter, has taken bills drawn according to its provisions. Such a letter of credit does not, as in the case of commercial guaranties, require notice to be given either of its acceptance or of bills drawn under it. Lonsdale *v.* Lafayette Bank, 18 O. 126.

With notice of dishonor.—If a letter of credit provides that drafts drawn under its authority shall be used only for the purpose of being discounted at a particular bank, persons taking such drafts, with notice that they have been offered to the bank for discount and refused, can not recover thereon. Sherwin & Co. *v.* Brigham, 39 O. St. 137, affirming 4 O. Dec. 94, 482.

65. Insolvency of addressee.—Where a bank issues a letter to another bank, stating that its account has been credited with a sum for the use of the holder of the letter, the bank issuing the letter can not, after the insolvency of the bank to which it is directed, retain the funds as against the depositor for a debt due from the insolvent bank. Cutler *v.* American Exch. Nat. Bank, 53 N. Y. Super. Ct. 163, affirmed in 113 N. Y. 593, 21 N. E. 710, 4 L. R. A. 328.

Plaintiffs, desiring to remit a sum of money to H. at Leadville, deposited the amount with defendant bank, and the latter gave plaintiffs the following letter of advice: "Bank of Leadville, Leadville, Colorado. Your account is credited this day $500, received from Cutler, Hall & Co., for the use of" H. This letter plaintiffs sent to H., but before he received it the Bank of Leadville failed, and refused to pay, whereupon plaintiffs tendered the letter of advice back to defendant. Held, that they could recover the $500 of defendant, as there was no contractual relation between the bank of Leadville and these parties which would require plaintiffs to look to that bank for the money. Cutler *v.* American Exch. Nat. Bank, 113 N. Y. 593, 21 N. E. 710, 4 L. R. A. 328, affirming 53 N. Y. Super. Ct. 163.

66. Consideration.—In order to render the writer of a letter of credit liable, either upon an implied acceptance or an agreement to accept drafts taken on the faith of such letter, the drafts must be taken for a valuable consideration. Sherwin & Co. *v.* Brigham, 39 O. St. 137, affirming 4 O. Dec. 94, 482.

A promise to have the drafts discounted, and to take up notes on which the persons taking the drafts are liable as indorsers, is not a valuable consideration. Sherwin & Co. *v.* Brigham, 39 O. St. 137, affirming 4 O. Dec. 94, 482.

67. Persons to whom credit given.—A letter written by an officer of a national bank, addressed "To whom it may concern," and reciting, "This letter will be presented to you by (a person named) in the interest of (a company) who are valued customers of this bank. Their business has always been very satisfactory to us, and

Where Writer Is Agent of Person Credited.—Where the plaintiff purchased a cable transfer from the defendant and the latter as his agent undertook to transmit a check for the amount to a certain person pursuant to instructions, but violated such instructions by sending the check to such person to take up an indebtedness of the defendant and such person became insolvent and the plaintiff was compelled to pay the amount himself, the plaintiff can hold the defendant responsible.[68]

Conflict of Laws.—A promise in a letter of credit to accept bills for a certain amount is governed by the laws of the state of the addressee.[69]

§ 192. Purchase and Sale of Exchange.—A bank has a prima facie authority to purchase bills of exchange.[70]

§ 193. Purchase and Sale of Money or Bullion.—A bank received money to sell, and sold it with other money, receiving for the whole amount a check, which was attached, as the property of the bank, by its creditors. The bank was liable to the depositor, as it is not permitted to force him to pursue his remedy against the attaching creditor.[71]

§ 194. Purchase and Sale of Stock or Securities.—Corporate Stock.—Buying and selling shares of stock is not a part of the legitimate business of a bank, under the laws of Michigan, enumerating the various

we consider them wide-awake business men. Any favors shown to him will be highly appreciated"—if construed as a letter of credit or a letter of recommendation, includes the person named, as well as the company named. Liggett *v.* Levy, 233 Mo. 590, 136 S. W. 299.

68. Where writer is agent of person credited.—Plaintiff purchased of defendant in New York a cable transfer of £5,000 to M. & Co., of Glasgow, and directed that a check for that amount should be sent by mail from defendant's London office to Glasgow. Defendant knew that this money belonged to plaintiff, and was sent to M. & Co. for the purpose of paying a draft he had drawn on them therefor. Defendant cabled the order to its London office, and the amount was placed to M. & Co.'s credit at the Bank of Scotland in London, pursuant to general instructions from M. & Co., and M. & Co. were notified by letter which reached them February 28th, and expressed their assent. The next day M. & Co. suspended, and the £5,000 in question was appropriated by the Bank of Scotland to the payment of overdrafts of their account, so that plaintiff derived no benefit therefrom and was afterwards compelled to pay his draft. Held, that defendant, being plaintiff's agent, and dealing with property known to be his, is liable for the loss resulting from its failure to follow his instructions. Bank *v.* Cooper, 137 U. S. 473, 34 L. Ed. 759, 11 S. Ct. 160, affirming 30 Fed. 171.

69. Lonsdale *v.* Lafayette Bank, 18 O. 126.

70. Purchase and sale of exchange.—Bank *v.* Ellery (N. Y.), 34 Barb. 630.

The purchase of negotiable paper by a bank is as clearly within its legitimate powers, as is the collection of such paper by the bank as an agent. Taft *v.* Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387.

Prior to June 3, 1840, when the law of 1840 (chapter 363) took effect, banking associations, formed under the law of 1838 (chapter 260) had the right to draw and sell time bills of exchange, and to give, as security for money borrowed by them, their obligation, payable at a future time, with interest, and not intended to be loaned or circulated as money. Curtis *v.* Leavitt, 15 N. Y. 9, affirming 17 Barb. 309. See ante, "Payment of Forged or Altered Drafts," § 190.

71. Spears, etc., Co. *v.* Ohio Life Ins., etc., Co., 3 O. Dec. 338.

things which a bank may lawfully do.[72] A complaint alleged that plaintiff owned certain securities, which he gave to defendant, a corporation, under an agreement that it should sell the same at its discretion, within a certain time, defendant agreeing that plaintiff should receive for the stock a named sum of money; that thereafter plaintiff placed the stock at defendant's disposal, and repeatedly tendered it to defendant, but that the time had passed without payment of the amount agreed on. The plaintiff, under such agreement, was not entitled to recover the amount defendant had agreed plaintiff should receive for the stock, but only for breach of defendant's covenant of sale, and hence the complaint was demurrable for failure to allege a breach of such covenant or that plaintiff had sustained damage thereby.[73]

State Bonds.—The banking department of the Citizens' Bank of Louisiana having the right to purchase as an investment the bonds of the state issued in aid of the bank, such purchase did not extinguish the bonds, and the banking department is entitled to the benefits of the funding scheme, created by the Act of Jan. 24, 1874, in reference to the bonds it may hold, to the same extent as any other person.[74]

Liability on Ultra Vires Purchase.—Where a banking corporation takes a mortgage whereby it undertakes to carry on the mortgagor's manufacturing business, which agreement is invalid, under a statute, as being unauthorized by its articles of incorporation, the mortgagee is not liable for a breach of a contract in the mortgage for the sale of the goods, made by the mortgagor as its agent.[75]

§ 195. Loans and Investments by Bank for Others.—The lending of money on deposit for a customer is within the range of the legitimate business of a bank, unless prohibited by its charter.[76] In so doing the bank acts as the agent for the depositor.[77]

Duty to Loan to Responsible Person.—When a banker accepts money of a person to be loaned by him generally, the law implies an obligation on his part to use due care to loan it to responsible persons; and hence, where such money was lost by the banker's loan of it to an irresponsible party without security, the bank is liable,[78] although acting without compensa-

72. 2 Comp. Laws, § 6093, subd. 7; Preston *v.* Marquette County Sav. Bank, 122 Mich. 696, 81 N. W. 920.

73. Gause *v.* Commonwealth Trust Co., 100 App. Div. 427, 91 N. Y. S. 847.

74. **State bonds.**—The banking department of the Citizens' Bank of Louisiana, created under Acts 1853, No. 246, having the power to conduct the general banking business, and not being liable for the bonds of the state, had the capacity to purchase, as an investment of separate funds or in current business, the bonds of the state issued in aid of the Citizens' Bank, in the same manner as any other bank or third person could do. Hope *v.* Board, 108 La. 315, 32 So. 547.

75. Ky. St., § 567; Bletz & Co. *v.* Bank, 21 Ky. L. Rep. 1554, 55 S. W. 697.

76. **Loans for others.**—Bobb *v.* Savings Bank, 23 Ky. L. Rep. 817, 64 S. W. 494.

77. Wykoff *v.* Irvine, 6 Minn. 496 (Gil. 344), 80 Am. Dec. 461.

78. **Duty to loan to responsible persons.**—Watson *v.* Roth, 91 Ill. App. 111, affirmed in 191 Ill. 382, 61 N. E. 65.

Where, in a suit against a banker for negligently loaning money,

tion.[79] The bank may be released of liability by the ratification of its act by the depositor;[80] but not by the failure of the depositor to attempt to col-

whereby plaintiff lost the loan so made, it appears that defendant made the loan on his own judgment to irresponsible persons, and failed to exercise ordinary care, a verdict for plaintiff will not be disturbed. Watson v. Fagner, 105 Ill. App. 52, affirmed in 208 Ill. 136, 70 N. E. 23.

Loan to persons known to be irresponsible.—A loan by a bank of a certain sum to persons who are known by its cashier to be in a precarious condition, and with knowledge that the loan was to pay losses incurred in speculative enterprises, does not show reasonable care to loan such sum on good security. Deposit Bank v. Fleming, 19 Ky. L. Rep. 1947, 44 S. W. 961.

Fraud on depositor.—Where a bank receives a special deposit to loan on real estate security, it is guilty of fraud in loaning the money to an insolvent without taking security therefor. Larsen v. Utah Loan, etc., Co., 23 Utah 449, 65 Pac. 208.

A bank receiving money to loan on real estate security is guilty of fraud in transferring notes so secured and owned by it to its principal, which it is not willing to recommend without qualification. Larsen v. Utah Loan, etc., Co., 23 Utah 449, 65 Pac. 208.

Duty to take security.—In an action against a bank for failure to take warehouse receipts for cotton and bills of lading as collateral security for an indebtedness of a third person to plaintiff, on account of money deposited by plaintiff to pay such person on deposit of collateral for plaintiff's benefit, it could not avail the bank to show that there had been a shrinkage in the value of cotton, unless it showed that it had taken receipts or bills sufficient to cover the amount. First Nat. Bank v. Henry, 159 Ala. 367, 49 So. 97.

79. Bank acting without compensation.—Clinton Nat. Bank v. National Park Bank, 165 N. Y. 629, 59 N. E. 1120.

A banker who acts as agent for his depositor in making loans, though without compensation, is bound to exercise ordinary care and diligence. Judgment, 105 Ill. App. 52, affirmed. Watson v. Fagner, 208 Ill. 136, 70 N. E. 23.

80. Ratification by depositor.—Where, in an action by a bank against another bank to recover damages for failing to take sufficient security for a loan, it was claimed that the plaintiff had ratified the acts or omissions of the defendant, an instruction that, if the plaintiff at the time of accepting the note and collaterals knew all the facts touching the loan and affecting the value of the security which were then known to the agent, and with such knowledge received them and treated them as its own, the agent was discharged from liability, was erroneous, as the ratification by a principal of the acts of his agent is only binding when made with a full knowledge of the facts as they actually exist, and not merely as the agent believed them to exist. Bank v. Western Bank, (Ky.), 13 Bush. 526, 26 Am. Rep. 211.

Plaintiff bank directed the cashier of another bank to loan certain money which it had on deposit. The cashier made a loan, taking stock of a Louisville bank as security. Before plaintiff received the note and collaterals and brought suit against the maker and the Louisville bank it knew that the latter claimed a lien on the stock pledged to secure the note for an amount exceeding its value, and it also appeared that the cashier informed the plaintiff bank that before the loan was made the bank at Louisville agreed to release its lien. It was not settled that the Louisville bank had a lien on the stock until a judgment in its favor was rendered. Held that, as the bank and the cashier were necessarily ignorant as to the lien, there was not such a ratification as would release the cashier and his bank from liability if its conduct had been such that it was otherwise liable. Bank v. Western Bank (Ky.), 13 Bush. 526, 26 Am. Rep. 211.

A banking company had in their possession funds belonging to the plaintiffs, who were incorporated, and in the exercise of banking powers. The cashier of the defendants, who was also one of the managers of the plaintiffs' bank, loaned a portion of these funds, to be repaid upon demand, and notified the cashier of the plaintiffs of the loan, by letter, which was duly received. The investments were acknowledged by plaintiff's cashier to be satisfactory. Subsequently, the managers of plaintiffs met, and took action in relation to their affairs, but no objection was made or disapproba-

lect the money loaned.[81]

Degree of Care Required of Bank.—When a banker loans the funds of his depositor by authority, he becomes his agent, and as such is only liable for a failure to exercise good faith and reasonable diligence;[82] but

tion expressed as to the loan. Held, that the plaintiffs were chargeable with notice that the loan had been made as soon as that notice was received by their cashier, or at least from the time of the meeting of their board of managers, and that, inasmuch as by their silence they had ratified it, they could not complain that the loan was made without authority. New Hope, etc., Bridge Co. *v.* Phenix Bank, 3 N. Y. 156.

81. Failure of depositor to collect.—A banker who agrees to loan a depositor's money to safe borrowers, and look after and collect the loans and reloan the money, is not relieved of responsibility for the loss of a negligent loan by the fact that the depositor made no attempt to collect it. Judgment, 105 Ill. App. 52, affirmed. Watson *v.* Fagner, 208 Ill. 136, 70 N. E. 23.

82. Reasonable diligence.—Watson *v.* Fagner, 99 Ill. App. 364.

A bank is not chargeable with negligence for receiving spurious bonds as collateral for a loan which it was negotiating for another, where the latter accredited the person who delivered the bonds and obtained the loan as safe and trustworthy to deal with, and the bank made such examination of the bonds as was usual and customary among bankers under similar circumstances, though a careful examination might have enabled it to ascertain that the bonds were not genuine. Judgment, 37 App. Div. 601, 56 N. Y. S. 244, affirmed. Clinton Nat. Bank *v.* National Park Bank, 165 N. Y. 629, 59 N. E. 1120.

Whether or not compensated.—Isham *v.* Post, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 766.

Where a bank has undertaken to negotiate a loan for another, it is bound to use the ordinary care which is customary and usual among bankers engaged in such transactions, under similar circumstances, whether it is acting gratuitously or for a consideration. Judgment, 37 App. Div. 601, 56 N. Y. S. 244, affirmed. Clinton Nat. Bank *v.* National Park Bank, 165 N. Y. 629, 59 N. E. 1120.

Loan in good faith.—The receipt by bankers of moneys to be loaned out, the principal and interest, less charges, to be accounted for, constitutes the bankers agents for the depositor, and, if they loan the money in good faith, they are not liable by reason of the subsequent failure of the borrower. Wykoff *v.* Irvine, 6 Minn. 496 (Gil. 341), 80 Am. Dec. 461.

A banker who holds himself out as dealing in "choice stocks," and who promises his customers "careful attention" in all their financial transactions, is bound to exercise the skill of a banker in loaning money for a customer, even though his services are rendered gratuitously. Isham *v.* Post, 141 N. Y. 100, 35 N. E. 1084, 38 Am. St. Rep. 766, 23 L. R. A. 90.

Where inquiry would be fruitless.—A banker with whom funds have been placed to be loaned can not be held negligent for failure to inquire as to the solvency of the firm to whom he loaned such funds, where they were reported to be solvent at the time of the loan, and where it does not appear that such inquiry would have yielded him any information concerning the company that he did not already possess. Isham *v.* Post, 141 N. Y. 100, 35 N. E. 1084, 38 Am. St. Rep. 766, 23 L. R. A. 90.

In an action for the loss resulting from a loan by a banker on certificates of stock, it appeared that he did not examine the certificates himself, and though his clerk, who negotiated the loan and accepted the certificates, had the necessary skill to perform such duty, he gave them only a cursory examination. Held, that it was competent to show that the forgery of the certificates had been executed with such skill that they had been used for years as collaterals for loans without having been detected by bankers and brokers through whose hands they passed, as such fact would tend to justify the failure of the clerk to discover the forgery. Isham *v.* Post, 141 N. Y. 100, 35 N. E. 1084, 38 Am. St. Rep. 766, 23 L. R. A. 90.

Failure to verify certificates of stock taken as security.—On an issue whether a banker with whom funds

when he loans such funds without being authorized to do so, he becomes an agent from his own wrong, and is absolutely responsible for the money.[83]

Liability for Acts of Officers.—Where, in an action by a bank against another bank to recover damages for failing to take sufficient security for a loan made for it, it is averred that the defendant bank made the loan and took the security, it cannot be insisted that the cashier and not the bank was the agent, and made the loan, and that the bank was not responsible.[84] A prima facie cause of action against a bank, for failing to return money pursuant thereto, is made out by the production of a writing, purporting to be a receipt for money deposited to be loaned, signed by a person as cashier of the bank and appearing as cashier in the list of officers at the head of the receipt.[85]

Unauthorized Loans.—Where a customer of a bank has left with it for investment a particular sum of money and the bank invests on his account a larger sum of money, no title to the security taken by such bank, either legal or equitable, passes to such customer where he did not by word or act accept the security so taken.[86]

have been placed to be loaned was negligent in failing to verify at the company's office certificates of stock accepted as collateral on such loan, and on which the numbers had been raised, it appeared that they had been issued, six years before the loan, directly to a member of the borrowing firm, who knew that they were genuine when transferred to him on the company's books; that no suspicion could attach to them, except on a doubt of the integrity of such member, which no known fact warranted; that there was no custom for bankers to present such certificate for verification. Held, that no negligence could be imputed to such banker for failing to verify the certificates. Isham *v.* Post, 141 N. Y. 100, 35 N. E. 1084, 38 Am. St. Rep. 766, 23 L. R. A. 90.

83. Watson *v.* Fagner, 99 Ill. App. 364.

84. Liability for officers.—Bank *v.* Western Bank (Ky.), 13 Bush 526, 26 Am. Rep. 211.

85. An instrument headed by the name of a bank and a list of its officers, reciting that plaintiff had left a sum of money to be loaned for his use, "Payable not to exceed six months, on return of this memorandum," and signed with the name of the person represented at the top of the paper to be the cashier, the signature being followed by a scroll composed of the letters "chr.," shows prima facie a cause of action against the bank for a return of the money loaned. Squires *v.* First Nat. Bank, 59 Ill. App. 134.

86. National Life Ins. Co. *v.* Mather, 118 Ill. App. 491.

CHAPTER XIII.

G. Circulating Notes.

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G. CIRCULATING NOTES.

§ 196. Nature and Requisites—§ 196 (1) Definitions and Distinctions.—What Are Current Banknotes.—The words "current banknotes" mean that which circulates currently as money, and which, in the absence of proof to the contrary, is presumed to be of value equal to money.[1]

What Is Bank Money.—Bank money means that species of money called banknotes.[2]

Banknotes Distinguished from Other Negotiable Securities.—Banknotes differ essentially from promissory notes and other negotiable securities for money. They are not, properly speaking, evidences of debt

1. **Current bank notes deferred.**—Coffin *v.* Hill, 48 Tenn. (1 Heisk.) 385; Moore *v.* Gooch, 53 Tenn. (6 Heisk.) 104; Baker *v.* Jordan, 24 Tenn. (5 Humph.) 485. See, to the same effect, English *v.* Turney, 49 Tenn. (2 Heisk.) 617; Hicklin *v.* Tucker, 10 Tenn. (2 Yerg.) 448; Williams *v.* Basfield, 17 Tenn. (9 Yerg.) 270.

2. **Bank money defined.**—Hopson *v.* Fountain, 24 Tenn. (5 Humph.) 140.

or security for money; but are treated as money, in the ordinary course and transaction of business, by the general consent of the community.[3]

§ 196 (2) Banknotes as Money—§ 196 (2a) In General.—As a general rule it may be said that "money" is a generic term, embracing, according to the subject matter of the discourse or writing, every species of coin or currency, guineas, napoleons, eagles and banknotes, as well as dollars.[4] Strictly speaking, the notes of state banks, intended to circulate as

3. **Bank notes distinguished from other negotiable securities.**—F. &. M. Bank *v.* White, 34 Tenn. (2 Sneed) 481. See, also, Scruffo *v.* Gass, 16 Tenn. (8 Yerg.) 175.

4. **"Money" a generic term.**—Crutchfield *v.* Robins, etc., Co., 24 Tenn. (5 Humph.) 15, 42 Am. Dec. 417; Hopson *v.* Fountain, 24 Tenn. (5 Humph.) 140; McDowell, etc., Co. *v.* Keller, 44 Tenn. (4 Coldw.) 258.

In Crutchfield *v.* Robins, Tingley & Co., it was insisted that bank notes are not money, and that nothing is but that which constitutes a legal tender under the constitution of the United States; but Judge Turley, in delivering the opinion of the court, said: Such is not our opinion. Money is a generic term, and covers everything, which, by consent, is made to represent property, as passes as such currently from hand to hand. Crutchfield *v.* Robins, etc., Co., 24 Tenn. (5 Humph.) 15, 42 Am. Dec. 417; McDowell, etc., Co. *v.* Keller, 44 Tenn. (4 Coldw.) 258. And see Hopson *v.* Fountain, 24 Tenn. (5 Humph.) 140, citing above case to the same proposition.

"The case of Hopson *v.* Fountain, 24 Tenn. (5 Humph.) 140, was an action of covenant upon an instrument by which the maker promised to pay Fountain, ninety days after date, in current bank money of the state of Mississippi, the sum of $293.73 * * * and it was held, the measure of damages was the value of current Mississippi bank notes, where the covenant was payable; and the judgment of the circuit court was reversed." McDowell, etc., Co. *v.* Keller, 44 Tenn. (4 Coldw.) 258.

"The case of Baker *v.* Jordan, 24 Tenn. (5 Humph.) 485, was an action of covenant upon an instrument by which Baker promised, one day after date, to pay to Jordan $2,821.27, in current Tennessee bank notes. The defendants pleaded covenants performed. Upon the trial the plaintiff read the covenant, and this was the only evidence in the cause. The jury found for the plaintiff, $3,170.24; and it was insisted in this court that the plaintiff was entitled to nominal damages only, because he did not prove the value of Tennessee bank notes at the time the covenant was broken. Judge Greene, in delivering the opinion of the court, said: 'The words "current bank notes," mean that which circulate currently as money, and which, in the absence of proof to the contrary, is presumed to be of value equal to money, prima facie it is of such value, and if a defendant in such action is not willing it shall be so considered, he may introduce proof to show that it is of less value.'" McDowell, etc., Co. *v.* Keller, 44 Tenn. (4 Coldw.) 258.

In 1 Roper on Legacies 282, it is said that the word "money," unaided by the context, will include cash, bank notes, money at the bankers, notes payable to bearer, etc., because they are not to be considered as choses in action, but money of the person in whose possession they are. But choses in action, promissory notes not payable to bearer, government stock, etc., will not pass under the word money. Most of the cases on the meaning of this phrase were reviewed by the lord chancellor in the case of Parker *v.* Marchant, 19 Eng. Ch. R. 355, where it was held, that the testator's balance at his banker's passed under the words "ready money." Dabney *v.* Cottrell, 50 Va. (9 Gratt.) 572.

Current convertible bank notes are money.—Haynes *v.* Bridge, etc., Co., 41 Tenn. (1 Coldw.) 32; Wood *v.* Cooper, 49 Tenn. (2 Heisk.) 441; Turner *v.* Collier, 51 Tenn. (4 Heisk.) 89; Crockett *v.* Alexander, 52 Tenn. (5 Heisk.) 106; Douglas *v.* Neil, 54 Tenn. (7 Heisk.) 437; Burford *v.* Memphis Bulletin Co., 56 Tenn. (9 Heisk.) 691; Miller *v.* McKinney, 73 Tenn. (5 Lea) 93; Crutchfield *v.* Robins, etc., Co., 24 Tenn. (5 Humph.) 15, 42 Am. Dec. 417.

In Crutchfield *v.* Robins, etc., Co., 24 Tenn. (5 Humph.) 15, 42 Am. Dec. 417; Graham *v.* State, 24 Tenn. (5 Humph.) 40, and Hopson *v.* Fountain,

money, are not money; that is, they are not legal tender, but are merely promises to pay.[5] Nevertheless they are intended to constitute the currency of the country, thereby becoming a medium of exchange for the public benefit.[6] Even before the national banking act, and the deposit secured notes of national banks, banknotes were a part of the common currency of the country and ordinarily passed as money, being receipted for as such where they were current at par. They were a good tender as money unless specially objected to.[7] They are not merely the representatives of money, but in the course of business, and by common usage, are substantially treated and employed for most purposes, as actual money or cash.[8] And although they occupy for some purposes the position of securities yet, in

24 Tenn. (5 Humph.) 140, it is held, that current available bank paper is money. Whiteman v. Childress, 25 Tenn. (6 Humph.) 303.

Current unconvertible paper.—The doctrine is extended to current although unconvertible paper, such as confederate treasury notes and bank paper, so far as public officers were concerned during the civil war. Turner v. Collier, 51 Tenn. (4 Heisk.) 89; Douglas v. Neil, 54 Tenn. (7 Heisk.) 437. But not as private agents. Scruggs v. Luster, 48 Tenn. (1 Heisk.) 150; Neely v. Woodward, 54 Tenn. (7 Heisk.) 495; Crutchfield v. Robins, etc., Co., 24 Tenn. (5 Humph.) 15, 42 Am. Dec. 417.

5. Strictly speaking—Not legal tender.—Howe v. Hartness, 11 O. St. 449, 78 Am. Dec. 312; Johnson v. State, 11 O. St. 324; Turner v. State, 1 O. St. 422; Morris v. Edwards, 1 O. 189.

Bank notes are not money in a strict sense. They are not a lawful tender in discharge of debts and obligations solvable in money; but for most purposes in the transaction of business, and by common consent, they are considered and treated as money. "They are not esteemed," says Lord Mansfield, "as goods, securities, or documents of debts; but are looked on as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money to all intents and purposes." They are as much money as guineas themselves are, or as any other current coin that is used as money or cash. Tancil v. Seaton, 69 Va. (28 Gratt.) 604, 26 Am. Rep. 380.

6. Intended as currency.—Williams v. Union Bank, 21 Tenn. (2 Humph.) 339.

"By almost universal consent, it has become the medium of exchange, and the representative of property. It has taken the place of the precious metals, and is regarded as money. This, however, is by consent, and not by law." Ware v. Street & Co., 39 Tenn. (2 Head) 608; McDowell, etc., Co. v. Keller, 44 Tenn. (4 Coldw.) 258. And see Taylor v. Neblett, 51 Tenn. (4 Heisk.) 491; Wood v. Cooper, 49 Tenn. (2 Heisk.) 441.

7. Prior to National Banking Act.—Bank v. Bank (U. S.), 10 Wheat. 333, 6 L. Ed. 334.

"Bank notes constitute a part of the common currency of the country, and ordinarily pass as money. When they are received as payment, the receipt is always given for them as money. They are a good tender as money, unless specially objected to; and, as Lord Mansfield observed, in Miller v. Race, 1 Burr. 457, they are not, like bills of exchange, considered as mere securities or documents for debts. If this be true, in respect to bank notes in general, it applies, a fortiori, to the notes of the bank which receives them, for they are then treated as money received by the bank, being the representative of so much money admitted to be in its vaults for the use of the depositor." Bank v. Bank (U. S.), 10 Wheat. 333, 6 L. Ed. 334.

But the doctrine that bank bills are a good tender, unless objected to at the time, on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. Ward v. Smith (U. S.), 7 Wall. 447, 19 L. Ed. 207.

8. Course of business and common usages.—Edmunds v. Digges, 42 Va. (1 Gratt.) 359, 42 Am. Dec. 561.

addition, they are considered as money.[9] They are payable on demand, by the authority of the charter. They are negotiable by delivery; they pass in a bequest of the testator's money or cash. Possession is prima facie evidence of property in them. The holder is not affected by the fraud of a previous holder in obtaining them, unless he is in privity with him. They are never overdue, and not liable to any equity between the bank and parties who have subsequently received them or between intermediate parties. These qualities fit them for currency, and some of them distinguish them from the mere evidence of a debt; they are not money by authority of law, but are considered so by usage and the course of business, and by the consent of the people.[10] They are issued for the purpose of being used as money by the banks, and the state is a party to the consent that they shall be so considered, because the power to issue is a grant from the legislature.[11] So it is held that assumpsit will lie to recover banknotes wrongfully detained.[12] And evidence of the receipt of them will support an action for money had and received.[13] In some states a state banknote has been held money to the extent that a note payable in current banknotes might be negotiable as being payable in money.[14] Thus it is held that the terms "banknotes," "cur-

9. Bank notes considered money.—Dougherty *v.* Western Bank, 13 Ga. 287.

"And for certain purposes, and in fact for every purpose, in the ordinary transaction of business, bank notes, it is believed, ever have been and still are considered as money. They do not come under the denomination of goods, wares and merchandise. * * * By the universal consent of mankind, when they pass from one to another, they pass as money. In the course of business, they are charged and credited as cash, as money. They have been estimated as money, not only by men of business, but by courts of justice." Morris *v.* Edwards, 1 O. 189.

"In the case of Johnston *v.* State, 8 Tenn. (M. & Y.) 129, this point was brought before the court. The charge was for gaming for money; and the proof, that the playing was for bank notes; objection being made, as in this case, to the admissibility of the evidence, and the court having overruled the objection, it was held to be error. The cases are parallel; and these being the only counts on which he is found guilty, this point is sufficient to reverse the judgment." Garner *v.* State, 13 Tenn. (5 Yerg.) 160. See also, citing same case, McAuly *v.* State, 15 Tenn. (7 Yerg.) 526.

10. Qualities fitting them for current use.—Dougherty *v.* Western Bank, 13 Ga. 287.

11. Issue for purpose of money.—Dougherty *v.* Western Bank, 13 Ga. 287.

12. Assumpsit will lie to recover bank notes wrongfully detained by the defendant. The court said: "I think that in no case could the exercise of the right to elect between an action in tort and assumpsit be more appropriate than in this. The bank notes were received and treated by the testator as money, and as such were received and retained by the defendant, and though trover might lie to recover the notes, the law will imply a promise to pay the amount to the plaintiff." Lawson *v.* Lawson, 57 Va. (16 Gratt.) 230. See Tancil *v.* Seaton, 69 Va. (28 Gratt.) 604, 26 Am. Rep. 380.

13. Support action for money had and received.—Morris *v.* Edwards, 1 O. 189.

14. Negotiability of note payable in current bank notes.—Citizens' Nat. Bank *v.* Brown, 45 O. St. 39, 11 N. E. 799, 4 Am. St. Rep. 526; Howe *v.* Hartness, 11 O. St. 449, 78 Am. Dec. 312; White *v.* Richmond, 16 O. 5; Swetland *v.* Creigh, 15 O. 118; Morris *v.* Edwards, 1 O. 189; Dugan *v.* Campbell, 1 O. 115.

A note given to be paid at maturity, in current bank notes, is not a note for money, generally, but for a particular kind of money. McDowell, etc., Co. *v.* Keller, 44 Tenn. (4 Coldw.)

rent banknotes," and "current funds," when used in notes and obligations, import generally, in their signification, such as are convertible into gold and silver at par.[15] However, it has been decided that debt will not lie upon a note payable in current banknotes, because current banknotes do not mean gold and silver.[16] Such decisions are manifestly based upon the ground that the words current banknotes do not mean money in the sense that is necessary to constitute a valid promissory note.[17]

258; Simpson *v.* Moulden, 43 Tenn. (3 Coldw.) 429.

Foreign notes as money.—The reasoning of the cases holding bank notes to be money within the law relating to negotiable instruments made the rule applicable, not merely to Ohio bank notes, but to all such bank notes as, by general usage and consent, were regarded by the community as money. Howe *v.* Hartness, 11 O. St. 449, 78 Am. Dec. 312.

15. Meaning of terms "Bank Note," "Current Bank Note" and "Current Funds."—Williams *v.* Arnis, 30 Tex. 37.

Bank notes not being authorized or issued by law in this country have within its boundary but a limited circulation; and the terms "current bank notes" are rarely employed as descriptive of the currency in which an obligation is to be discharged. But such terms as "bank notes," "good bank notes," or "current bank notes," when employed in this community, import, in their ordinary acceptation, such bank bills only as are redeemable in gold and silver, or are equivalent thereto in the nearest great commercial mart, viz: the city of New Orleans. Fleming *v.* Nall, 1 Tex. 246.

In a suit upon a promissory note payable in current bank notes, it can not be charged as error that the court rendered judgment thereon as a liquidated demand without the intervention of a jury. Fleming *v.* Nall, 1 Tex. 246.

Where a note for a certain sum of money is made payable in goods or specific articles of property, the obligor on a default of the contract becomes bound to pay the amount in specie. But bank notes, promissory notes of Texas, or other evidences of a circulating paper medium are not, in such contracts, understood or treated as specific articles. Fleming *v.* Nall, 1 Tex. 246.

16. Debt will not lie.—McDowell, etc., Co. *v.* Keller, 44 Tenn. (4 Coldw.) 258; Kirkpatrick *v.* McCullough, 22 Tenn. (3 Humph.) 171, 39 Am. Dec. 158; Whiteman *v.* Childress, 25 Tenn. (6 Humph.) 303; Gamble *v.* Hatton, 7 Tenn. (1 Peck) 130; Childress *v.* Stuart, 7 Tenn. (1 Peck) 276.

By a writing obligatory, the obligors promise, on or before a specified day, to pay the obligee $813.79 in notes of the United States bank or either of the Virginia banks, and debt is brought on this writing; held, the action can not be maintained, because debt only lies for money, and bank notes are not money for the purposes of this action. Beirne *v.* Dunlap, 35 Va. (8 Leigh) 514. The court said: "Bank notes are not money, although they passed generally as money by common consent, and answer in some sort the purposes of money. Money is the coin issued or adopted by the sovereign authority, and made a legal tender in payment of debts. The obligation upon which this suit is brought promises to pay 'the sum of 813 dollars, 79 cents, in notes of the United States bank or either of the Virginia banks,' on or before the first day of September, 1834. Is this a note for the payment of money, with a condition, or is it, in substance as well as form, a stipulation to pay bank paper currently passing among us as a substitute for money, and 'which is enumerated in dollars and cents as specie is?' See Campbell *v.* Weister (Ky.), 1 Litt. 30. I think it is substantially a mere contract to pay bank notes to a certain specified amount, expressed in words as appropriate as any other to signify how much bank paper was to be paid, and is equivalent to an engagement to pay bank notes amounting to 813 dollars, 79 cents, or so many bank notes as on their face will nominally make that sum."

17. Basis of decision.—Whiteman *v.* Childress, 25 Tenn. (6 Humph.) 303.

"In Whiteman *v.* Childress, 25 Tenn. (6 Humph.) 303, before referred to, it is said: 'The reason why a note payable in current bank notes of Tennessee is not a promissory note, is, because it is not for the payment of money in specie; that is, for the payment of money generally,

Payment in Money Essential.—An obligation payable in goods only is not an obligation intended to circulate as money.[18]

As Creating Debt or Obligation.—Where the bills are current at the time, a debt or obligation arising from the receipt of them is enforceable, although the bank was chartered illegally.[19]

without limitation or restriction, which, in legal acceptation, would mean gold and silver;' and to these may now be added legal tender United States treasury notes, they having also been made a legal tender for the payment of debts." McDowell, etc., Co. *v.* Keller, 44 Tenn. (4 Coldw.) 258.

The principle laid down in the above cases, that a note payable in current bank notes is not a note for money, and, therefore, not negotiable, rests upon a highly technical distinction, as is manifested by the subsequent cases of Crutchfield *v.* Robins, etc., Co., 24 Tenn. (5 Humph.) 15, 42 Am. Dec. 417; Graham *v.* State, 24 Tenn. (5 Humph.) 40; Hopson *v.* Fountain, 24 Tenn. (5 Humph.) 140; Baker *v.* Jordan, 24 Tenn. (5 Humph.), 485; Whiteman *v.* Childress, 25 Tenn. (6 Humph.) 303; and Draper *v.* State, 38 Tenn. (1 Head) 262. Wolfe *v.* Tyler, 48 Tenn. (1 Heisk.) 313. See, also, Shaw *v.* State, 35 Tenn. (3 Sneed) 86.

"Bank notes are treated as depreciated cash, and their value must be ascertained by the assessment of a jury, which can not be done in this form of action." Deberry *v.* Darnell, 13 Tenn. (5 Yerg.) 451.

"In the case of Crutchfield *v.* Robins, etc., Co., 24 Tenn. (5 Humph.) 15, 42 Am. Dec. 417, * * * the learned judge says: 'But it may be said, in cases of contracts to pay so many dollars of Tennessee bank notes, it has been held, that debt will not lie, and that the contract is not for money. This class of cases is sui generis, and have been determined upon their own peculiar circumstances; they are contracts made with a view to a depreciation of the paper; they are not contracts for so many dollars of money in general, but for so many of that particular kind of money, and in this respect stand upon somewhat the same footing as contracts to pay so much foreign money, viz: of sovereigns, moidores, rix dollars, or rupees, the value of which is unknown, it depending upon the rate of exchange and usage.' The necessary consequence of which is that the action upon them sounds in damages, and so the contract to pay bank notes has been held to be a contract to pay so many dollars of that particular money; and inasmuch as it may be worth less than the standard dollar, which it is intended to represent, it is to be scaled, and therefore the action sounds in damages, and debt will not lie, and, as a legal consequence, it is not a contract for the payment of money in numero." McDowell, etc., Co. *v.* Keller, 44 Tenn. (4 Coldw.) 258.

18. Payment in money essential.—United States *v.* Van Auken, 96 U. S. 366, 24 L. Ed. 852; Hollister *v.* Zion's Co-Op. Mercantile Inst., 111 U. S. 62, 28 L. Ed. 352, 4 S. Ct. 263. See post, "Right to Exercise Function," § 197 (2).

Under the second section of the act of congress approved July 17, 1862 (12 Stat. 592), which declares that "no private corporation, banking association, firm, or individual shall make, issue, circulate, or pay out any note, check, memorandum, token, or other obligation, for a less sum than one dollar, intended to circulate as money, or to be received or used in lieu of lawful money of the United States," A was indicted for circulating obligations in the following form:——

"Bangor, Mich., Aug. 15, 1874.

"The Bangor Furnace Company will pay the bearer, on demand, fifty cents, in goods, at their store, in Bangor, Mich.

(Signed.)

"A. B. Hough, Pres.

"Chas. D. Rhoder, Treas."

The indictment charged that he intended them to circulate as money, and to be received and used in lieu of lawful money of the United States. Held, that, as the obligations were payable in goods and not in money, and the sum of fifty cents was named merely as the limit of the value of the goods demandable, the indictment was bad on demurrer. United States *v.* Van Auken, 96 U. S. 366, 24 L. Ed. 852.

19. Bills current—Bank chartered illegally.—It is no defense to a suit for debt that the debt arose from the receipt of the bills of a bank that was chartered illegally and for fraudulent purposes, and that the bills were void

§ 196 (2b) As Medium of Payment—§ 196 (2ba) In General.—The delivery and receipt of current banknotes in discharge of a debt will be considered as payment of so much money, not as accord and satisfaction.[20]

Implied Contract of Payer.—Ordinarily, where bank bills are paid, there is an implied contract on the part of the payer that they are current and will pass readily in mercantile and business transactions as money.[21]

Uncurrent Bills.—But where the bank bills are uncurrent the bank having stopped payment, a payment made in such bills does not release the payer. He must sustain the loss, although the bank's failure was not known at the place at the time of payment,[22] provided the payer be guilty of no laches in retaining them for an unreasonable time.[23]

Payment in Counterfeit Banknotes.—If a debtor makes payment to his creditor in a banknote which afterwards turns out to be counterfeit, he will still be liable for the amount so paid, provided the note be returned to him within a reasonable time.[24]

in law, and finally proved worthless in fact; the bills themselves having been actually current at the time the defendant received them, and they not having proved worthless in his hands, nor he being bound to take them back from persons to whom he had paid them away. Orchard *v.* Hughes (U. S.), 1 Wall. 73, 17 L. Ed. 560.

20. Considered as so much money.—Morris *v.* Edwards, 1 O. 189.

A payment made in current convertible bank notes, either to the principal, or his agent, or a public officer authorized to receive payment, is, in the absence of instructions to the contrary, a good payment. Haynes *v.* Bridge, etc., Co., 41 Tenn. (1 Coldw.) 32; Wood *v.* Cooper, 49 Tenn. (2 Heisk.) 441; Turner *v.* Collier, 51 Tenn. (4 Heisk.) 89; Crockett *v.* Alexander, 52 Tenn. (5 Heisk.) 106; Douglas *v.* Neil, 54 Tenn. (7 Heisk.) 437; Laird *v.* Folwell, 57 Tenn. (10 Heisk.) 92; Burford *v.* Memphis Bulletin Co., 56 Tenn. (9 Heisk.) 691; Miller *v.* McKinney, 73 Tenn. (5 Lea) 93; Crutchfield *v.* Robins, etc., Co., 24 Tenn. (5 Humph.) 15, 42 Am. Dec. 417.

Satisfaction of judgment.—"In that case, it was sought to set aside a payment made in current bank notes of the state of Tennessee, by a judgment debtor to the clerk of the court, in satisfaction of a judgment; and it was held, the receipt by such officer of current bank paper, is a discharge of the judgment, unless it be objected to before its reception; and the principles of that case were afterwards referred to and approved in the case of Graham *v.* State, 24 Tenn. (5 Humph.) 40." McDowell, etc., Co. *v.* Keller, 44 Tenn. (4 Coldw.) 258. See, to the same effect, Burford *v.* Memphis Bulletin Co., 56 Tenn. (9 Heisk.) 691.

Note taken between individual without fraud or duress.—Bank of Tennessee notes issued after April, 1861, taken between citizens of the state, without fraud or duress, in payment of obligations, were a valid discharge of the debts for which so taken. Crockett *v.* Alexander, 52 Tenn. (5 Heisk.) 106.

21. Implied contract of payor.—Kottwitz *v.* Bagby, 16 Tex. 656.

22. Payment in uncurrent bank notes.—Where bank bills were transferred and received as money, in payment of a debt, after the bank by which they were issued had stopped payment, though its failure was not yet known at the place of payment, nor by either of the parties, the loss in such case, in the absence of any special agreement, had to be borne by the party paying the bills. Westfall, etc., Co. *v.* Braley, 10 O. St. 188. Contra, Imbush *v.* Mechanics', etc., Bank, 1 O. Dec. 8.

23. Laches—Unreasonable delay.—Westfall, etc., Co. *v.* Braley, 10 O. St. 188. Contra, Imbush *v.* Mechanics', etc., Bank, 1 O. Dec. 8.

24. Payment in counterfeit bank notes.—Pindall *v.* Northwestern Bank, 34 Va. (7 Leigh) 617. See Edmunds

§ 196 (2bb) Debts Due Bank.—When at the time notes of a bank are issued and put in circulation, the law is that such bank should take its own circulation in payment of debts due to the bank, such law is a part of the contract between the bank and the holders of the notes so issued.[25] A charter provision that the notes of a banking company shall be received by the bank for debts owing to it is a contract which attaches to the notes in the hands of any one to whom they may come.[26] When no rights of third parties interfere, the extent to which mutual obligations may be set off against each other, and the mode of doing it, are wholly subject to legislative control. A statute, therefore, as that of North Carolina, passed after the bank or its commissioner had obtained a judgment, which authorizes the defendant to set off against it the circulating notes of the bank which he procured after the judgment, is, as between him and the bank or its commissioner, valid, and does not impair the obligation of the contract sued on, or of the judgment.[27] In some cases the law requires its officers to re-

v. Digges, 42 Va. (1 Gratt.) 359, 42 Am. Dec. 561.

Failure to return within reasonable time.—On November 19, 1824, the plaintiffs, in the course of business received from the defendant a bank note, and the defendants obtained from the plaintiffs the value thereof, upon the supposition that the note was genuine; the note was passed on by the plaintiffs, but was afterwards, on March 8, 1825, returned to them as counterfeit; they did not return it to the defendant, nor give him notice of its being counterfeit, until May, 1825, although plaintiff's place of business and defendant's place of residence were only 110 miles apart, and a mail passed between those places regularly once a week. Held, there was such negligence on the part of the plaintiffs, as precluded them from recovering. Pindall *v.* Northwestern Bank, 34 Va. (7 Leigh) 617.

25. Debts due bank.—The law being such at the time the notes of the bank issued after May 6, 1861, commonly known as the "new issue," were emitted, it is held, that a debtor had the right to discharge his debt to the bank in such notes at their face value. State *v.* Bank, 64 Tenn. (5 Baxt.) 1.

"A majority of the court hold that in the case of The Bank *v.* Jamison, the circuit judge committed no error in sustaining Jamison's right to pay his debt to the bank, in the new issue notes of the bank at their face value. The judgment in that case is therefore affirmed. This holding rests upon the doctrine that when the notes of the bank were issued and put in circulation, the law which makes them good in payment of debts to the bank was in force, and constituted part of the contract between the bank and all holders of the notes so issued and put in circulation by the bank. On this point Judge McFarland dissents." State *v.* Bank, 64 Tenn. (5 Baxt.) 1.

Debt due to a bank could, under the eighth section of the Act of March, 1842 to regulate judicial proceedings where banks and bankers were parties, be paid in the notes of such bank. McDougal *v.* Holmes, 1 O. 376; Pancoast *v.* Ruffin, 1 O. 381.

26. Charter provision as contract.—Knox *v.* Exchange Bank (U. S.), 12 Wall. 379, 20 L. Ed. 287, 414.

Where in such case, the bank has made an assignment under a state insolvent act, the trustee, if he is to be considered as occupying the place of the bank, is compellable to receive the notes of the bank as provided by the charter. But where the state court has decided that the trustees in such case does not occupy the place of the bank, and that parties defendant in suits brought by such trustee can not pay the demands of the trustee against them in the notes of the bank, no question of impairment of the obligation is raised to which the federal supreme court can take cognizance. Knox *v.* Exchange Bank (U. S.), 12 Wall. 379, 20 L. Ed. 287, 414, reaffirmed in Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301, 24 S. Ct. 843.

27. Set-off of its notes against debts due the bank.—Blount *v.* Windley, 95 U. S. 173, 24 L. Ed. 424.

But if the rights of either creditors

ceive banknotes in satisfaction of execution in favor of a bank.[28] But it has been held that under such a law, the debtor could not pay the assignee of a bank, even when the note assigned was not negotiable, in the notes of such bank, unless he had the notes prior to notice of assignment.[29] In Georgia the fifteenth section of the Act of 1832, "to secure the solvency of all the banking institutions in this state," provided that paper discounted and held by a bank, is payable in the bills of the bank.[30] And by the general law of the land, as well as by § 6 of the Act of 1841 (Cobb, 139), the notes and bonds payable and discounted at any bank, may be paid in the bills of that bank; and that, too, notwithstanding said notes or bonds may be transferred to any other bank; and the right continues, even after the note or bond has been carried into judgment.[31]

of the bank, or other parties interested in the judgment, were such that they could exact payment of the judgment in lawful money, the case would be different. Blount *v.* Windley, 95 U. S. 173, 24 L. Ed. 424.

"And though it may be held that the bank had ceased to exist, it is clear that the stockholders, whose interest in that case would be represented by the commissioner, have no equity superior to that of the defendant, or which could be interposed to prevent the exercise of the right of set-off under the statute. That the right to set-off is by the statute extended to obligations of the bank, bought by defendant after the judgment was rendered against him, does not necessarily make it unconstitutional." Blount *v.* Windley, 95 U. S. 173, 24 L. Ed. 424.

28. Satisfaction of execution.—The provisions of Act of March, 1842, to regulate judicial proceedings where banks and bankers were parties, requiring the sheriff to receive bank notes in satisfaction of execution in favor of a bank, etc., were constitutional. Bank *v.* Domigan, 12 O. 220, 40 Am. Dec. 475.

The ninth section of the Act of 1824, to regulate proceedings where banks and bankers were parties, among other things, provided that, in all suits or actions prosecuted by a bank or banker, or persons claiming as their assignees, etc., and for their benefit, the sheriff, upon any execution in his hands, in favor of such bank or banker, their or his assignees, etc., should receive the note or notes of such bank or banker from the defendant, in discharge of the judgment, and that, if such notes were refused to be received from the sheriff, he should not be liable to any proceedings whatever, at the suit, or upon the complaint, of such bank or banker, or his or their assignee. Swan's Stat. 147. The Act of 1842 (O. L., vol. 40, p. 33), declared the meaning and intention of the Act of 1824 (§ 9) was that payment might be made by the debtor of such bank, etc., in the notes or obligations thereof, issued as currency, etc., as against the assignees, whether such bank retained an interest therein or not, but provided the act should not extend to any assignee who, theretofore, should have become such, bona fide, in the settlement of his claims against such bank or banker. These enactments were thought severe and unjust, by some, but seemed to be called for by the circumstances of the times. At all events, their constitutionality could not be seriously questioned, for they affected only the remedy, which is always subject to the legislative will; and in refusing to permit proceedings to be instituted against the sheriff they did not impair the validity of the contract. Bank *v.* Domigan, 12 O. 220, 40 Am. Dec. 475.

29. Where obligation assigned by bank.—Bank *v.* Gates, 1 O. Dec. 63.

This privilege extended only to cases where the action was prosecuted against the debtor for the use and benefit of the banker, and did not extend to cases where the bank had parted with its interest in the debt. McDougal *v.* Holmes, 1 O. 376; Pancoast *v.* Ruffin, 1 O. 381.

30. Paper discounted by bank.—Moise *v.* Chapman, 24 Ga. 249.

31. Paper payable and discounted at bank.—Robinson *v.* Bank, 18 Ga. 65.

The notes or bills of a bank, which form the common currency or circulating medium of the country, should be protected in preference to every other class of debts; and all statutes passed for this purpose, should be

Effect of Bona Fide Payment in Forged Notes.—The receipt by a bank of forged notes, purporting to be its own, must be deemed an adoption of them. It has the means of knowing if they are genuine; if these means are not employed, it is certainly evidence of a neglect of that duty, which the public have a right to require.[32]

§ 196 (2bc) Taxes or Other Money Due State.—In the case of the Bank of Tennessee the charter provided that the tax collector should receive its bills and notes in payment of all taxes or other moneys due the state.[33] The right of such holders depends upon the legality of the issue

literally construed, to effectuate this policy. Robinson *v.* Bank, 18 Ga. 65.

The debts contracted by a bank must sometimes, if necessary, be paid in property or in stock of the bank itself, or of some other bank. In either case it continues a part of the capital stock, to which the stockholders have no immediate claim; and is a fund to which the creditors of the bank must look for payment of their claims; and for the unpaid installments upon such stock, the corporation, and not the stockholders, is responsible. Robinson *v.* Bank, 18 Ga. 65.

32. When notes are forged but bank accepts same.—The principle that, in general, a payment received in forged paper, or in any base coin, is not good, and if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand, does not apply to a payment made bona fide to a bank, in its own notes, which are received as cash, and afterwards discovered to be forged. Bank *v.* Bank (U. S.), 10 Wheat. 333, 6 L. Ed. 334.

In case of such a payment upon general account, an action may be maintained by the party paying the notes, if there is a balance due him from the bank, upon their general account, either upon an insimul computassent, or as for money had and received. Bank *v.* Bank (U. S.), 10 Wheat. 333, 6 L. Ed. 334.

"Many considerations of public convenience and policy would authorize a distinction between cases where a bank receives forged notes, purporting to be its own, and those where it receives the notes of other banks in payment, or upon general deposit. It has the benefit of circulating its own notes as currency, and commanding thereby the public confidence. It is bound to know its own paper, and provide for its payment, and must be presumed to use all reasonable means, by private marks and otherwise, to secure itself against forgeries and impositions." Bank *v.* Bank (U. S.), 10 Wheat. 333, 6 L. Ed. 334.

This decision was said, in Leather Mfg'rs Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657, to have been based substantially upon the doctrine of estoppel by conduct.

33. Payment of taxes or other moneys—In case of bank of Tennessee.—Furman, etc., Co. *v.* Nichol, 43 Tenn. (3 Coldw.) 432; Marr *v.* State, 78 Tenn. (10 Lea) 470.

For certain purposes, it was constituted a fiscal agent of the state; and, as a means of further aiding in the accomplishment of the objects of its charter, it was declared, that the bills or notes of the bank should be received at the treasury of the state, and by all tax collectors, and other public officers, in payment of all taxes, or other moneys due the state. Furman, etc., Co. *v.* Nichol, 43 Tenn. (3 Coldw.) 432.

Nondue certificates in redemption of new issue.—The sureties of a party liable to the state for taxes collected by him, which liability was merged into a judgment, October 4, 1884, can not discharge the judgment in nondue certificates issued under the Act of March 29, 1883, in redemption of the new issue of the Bank of Tennessee. Gaines *v.* Galbreath, 82 Tenn. (14 Lea) 359.

"The decisions of this court in the cases of Keith *v.* Clarke, 72 Tenn. (4 Lea) 718, and Marr *v.* State, 78 Tenn. (10 Lea) 470, to the effect that notes of the bank issued subsequent to May 6, 1861, and not shown to have been issued in aid of the confederate government, were receivable in payment of all taxes and debts due the state, including judgments or sums due from defaulting or delinquent revenue collectors, can afford no aid to the plaintiffs in error in this case. For, conceding that they could have satisfied the judgment against them

of the notes and his status as a bona fide holder prior to the repeal of that part of the bank's charter.[34] So such notes, if issued in aid of the Southern forces during the late state's rights war, are not receivable in payment, not being legally issued.[35] The state was not entitled to any notice of the nonpayment of the notes before it was bound to receive them for taxes.[36]

Repeal of Such Part of Bank Charter.—The legislature of the state had the right, at any time, to repeal that part of the charter.[37]

Termination of Obligation by State.—Where a state publicly promised that the notes of a bank in which it was the sole stockholder, and for whose bills it was liable, should be taken in payment of taxes and all other debts due to the state, and so impressed the credit of the state upon the notes, when the state afterwards intended to terminate its obligation (as it could do upon reasonable notice as to after-issued bills), it was bound to do it openly, and in language not to be misunderstood. As a doubtful or obscure declaration would not be a proper one for the purpose, so it was not to be imputed.[38]

with the issues of the bank, when they exchanged them for certificates issued under the act of the legislature in redemption of such issues, or purchased such certificates, they took them impressed, as to the state, with the virtues and paying qualities stipulated by the act, and none others. The question, then, is 'was the judgment in this case payable in nondue certificates issued in lieu of the notes of the bank under the act before recited?' We think not." Gaines *v.* Galbreath, 82 Tenn. (14 Lea) 359.

34. To entitle a party to pay his taxes in the notes of the Bank of Tennessee, they must have been lawfully issued, and such person must have become the bona fide holder of such notes, before the repeal of the twelfth section of the charter. Furman, etc., Co. *v.* Nichol, 43 Tenn. (3 Coldw.) 432.

Sections 33, 36, Acts, 1865, expressly repealing the provision of § 12 of the act incorporating the Bank of Tennessee, does not impair the obligation of any contract existing between the state of Tennessee and the holders of the bills or notes of the Bank of Tennessee, except a bona fide holder of the notes of the bank, lawfully issued, who received them prior to the repeal of the twelfth section of the act chartering the bank. Furman, etc., Co. *v.* Nichol, 43 Tenn. (3 Coldw.) 432.

Notes of the Bank of Tennessee issued by the bank subsequent to May 6, 1861, and not proven to be issued in aid of the rebellion, must be received in payment of all debts due the state. Marr *v.* State, 78 Tenn. (10 Lea) 470.

The notes of the Bank of Tennessee, lawfully issued after the 6th of May, 1861, notwithstanding the act suspending specie payment from January, 1861, till July, 1862, ch. 5, p. 9, of the acts of the general assembly at the extra session in January, 1861, have always been payable on demand in gold and silver coin within the meaning of the 12th section of the charter of the Bank of Tennessee, Acts of 1837-38, ch. 107, p. 153, and therefore receivable for taxes due the state. Clark *v.* Keith, 76 Tenn. (8 Lea) 703.

Contra authority.—State *v.* Sneed, 68 Tenn. (9 Baxt.) 472.

"Upon the question, whether a bona fide holder of the notes of the bank, who received them prior to the repeal of the twelfth section of the charter, has or has not the right to pay taxes, which have accrued to the state since the repeal, we express now on opinion." Furman, etc., Co. *v.* Nichol, 43 Tenn. (3 Coldw.) 432.

35. Issued in aid of civil war.—Clark *v.* Keith, 76 Tenn. (8 Lea) 703; State *v.* Bank, 64 Tenn. (5 Baxt.) 1.

36. Right of state to notice of nonpayment of notes.—Clark *v.* Keith, 76 Tenn. (8 Lea) 703.

37. Right to repeal charter provision.—Furman, etc., Co. *v.* Nichol, 43 Tenn. (3 Coldw.) 432.

38. Termination of obligation by state must be unequivocal.—State *v.* Stoll (U. S.), 17 Wall. 425, 21 L. Ed. 650.

The court construes different sec-

Charter as a Contract.—Where the charter of a state bank provided that the notes thereof should be receivable for all debts due the state, and this provision was afterwards repealed, the undertaking of the state to receive the notes of the bank constituted a contract between the state and the holders of these notes, which the state was not at liberty to break, although notes issued by the bank after the repeal were not within the contract, and might be refused by the state.[39]

tions of the statutes of the state of South Carolina relating to the banks of that state, and holds—under the sixteenth section of the charter of the bank known as "the President and Directors of the Bank of the State of South Carolina," or more briefly "the Bank of the State" (which enacted "that the bills or notes of the said corporation originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable in all payments for taxes or other moneys due the state") —that the bills of the bank, although issued after December 20th, 1860, were a legal tender for the payment of taxes due the state in 1870, notwithstanding the fact that the bank at the time of their presentation did not redeem its notes in specie, and notwithstanding that in 1843 the legislature had enacted that "all taxes for the service of the state shall be paid in specie * * * or the notes of specie-paying banks." State *v.* Stoll (U. S.), 17 Wall. 425, 21 L. Ed. 650.

39. Charter provision as contract.—Woodruff *v.* Trapnall (U. S.), 10 How. 190, 13 L. Ed. 383, followed in Hathorn *v.* Calef (U. S.), 2 Wall. 10, 17 L. Ed. 776; Furman *v.* Nichol (U. S.), 8 Wall. 44, 19 L. Ed. 370; Hartman *v.* Greenhow, 102 U. S. 672, 26 L. Ed. 271, reaffirmed Paup *v.* Drew (U. S.), 10 How. 218, 13 L. Ed. 394; Trigg *v.* Drew (U. S.), 10 How. 224, 13 L. Ed. 397. See Keith *v.* Clark, 97 U. S. 454, 24 L. Ed. 1071.

In 1836, the legislature of Arkansas chartered a bank, the whole of the capital of which belonged to the state, and the president and directors of which were appointed by the general assembly. The twenty-eighth section provided, "that the bills and notes of said institution shall be received in all payments of debts due to the state of Arkansas." In January, 1845, this twenty-eighth section was repealed. The notes of the bank which were in circulation at the time of this repeal, were not affected by it. Woodruff *v.* Trapnall (U. S.), 10 How. 190, 13 L. Ed. 383. See Davis *v.* Gray (U. S.), 16 Wall. 203, 21 L. Ed. 447; Sherman *v.* Smith (U. S.), 1 Black 587, 17 L. Ed. 163.

Therefore, a tender, made in 1847, of notes issued by the bank prior to the repealing law of 1845, was good to satisfy a judgment obtained against the debtor by the state; and it makes no difference whether or not the debtor had the notes in his possession at the time when the repealing act was passed, or that the debtor was a defaulter for the money sued for. Woodruff *v.* Trapnall (U. S.), 10 How. 190, 13 L. Ed. 383.

Compared to general provision of law.—There is no analogy between this provision and a general provision to receive, for public dues, the paper of banks generally, unconnected with the state. One is a question of public policy, influenced by considerations of general convenience, which may be changed at the discretion of the legislature, but the other arises out of a contract incorporated into the charter, imposing an obligation on the state to receive, in payment of all debts due to it, the paper of a bank owned by the state, and whose notes are circulated for its benefit. The power of the legislature to repeal the section, the stock of the bank being owned by the state, is not controverted; but that act can not affect the notes in circulation at the time of the repeal. Woodruff *v.* Trapnall (U. S.), 10 How. 190, 13 L. Ed. 383.

Rule reaffirmed and limited.—The decision of the court in the preceding case of Woodruff *v.* Trapnall again affirmed. But although the pledge of the state to receive the notes of the bank in payment of all debts due to it in its own right was a contract which it could not violate, yet where the state sold lands which were held by it in trust for the benefit of a seminary, and the terms of sale were that the debtor should pay in specie or its equivalent, such debtor was not at liberty to tender the notes of the bank in payment. Paup *v.* Drew (U. S.),

Waiver.—If by a contract the state was bound to receive the notes of the bank in payment of its debts, by a contract this obligation might be waived. And no waiver could be more express than an obligation by the debtor to pay in specie or its equivalent.[40]

Accounted for as Money.—And it has been said that Tennessee banknotes receivable by the state in payment of taxes, if received by the collector and not paid over, must be accounted for as money, at their face value.[41]

§ 196 (2bd) Offer to Pay—Tender.—An offer to pay in banknotes, and a declaration of the party to receive payment that he would as soon take banknotes as specie, but that he would take neither, and would not ratify the contract, was a sufficient tender of payment.[42] Though, for many purposes, banknotes are regarded as money, yet they are not a legal tender, and can not be brought into court as cash.[43]

§ 196 (2c) As a Bill of Credit.—A bank bill issued by an institution taking its franchise from state authority for the mere legal convenience of a corporate body, is not a bill of credit, within the inhibition of the federal constitution.[44] To constitute a bill of credit within the constitution,

10 How. 218, 13 L. Ed. 394; Trigg *v.* Drew (U. S.), 10 How. 224, 13 L. Ed. 397.

And this was true, although the money to be received from the debtor was intended by the legislature to be put into the bank, and to constitute a part of its capital. The fund belonged to the state only as a trustee, and therefore was not, within the meaning of the charter, a debt due to the state. By the terms of sale, also, to pay "in specie or its equivalent," the notes of the bank were excluded. Paup *v.* Drew (U. S.), 10 How. 218, 13 L. Ed. 394; Trigg *v.* Drew (U. S.), 10 How. 224, 13 L. Ed. 397.

40. Waiver of right.—Paup *v.* Drew (U. S.), 10 How. 218, 13 L. Ed. 394, reaffirmed in Trigg *v.* Drew (U. S.), 10 How. 224, 13 L. Ed. 397.

41. Accounted for as money.—McLean *v.* State, 55 Tenn. (8 Heisk.) 22.

42. Tender—Offer to pay in banknotes.—Wheeler *v.* Knaggs, 8 O. 169.

43. Can not be brought into court.—Hevener *v.* Kerr, 4 N. J. L. 58.

44. Bank bill not bill of credit.—State *v.* Calvin, R. M. Charl. 151.

Banknotes issued by a state bank are not bills of credit, within the meaning of Const. U. S., art. 1, § 10, prohibiting any state from emitting such bills. Owen *v.* Branch Bank, 3 Ala. 258; McFarland *v.* State Bank, 4 Ark. 44, 37 Am. Dec. 761; Jones *v.* Bank (Ky.), 8 B. Mon. 122, 46 Am. Dec. 540.

The Bank of the Commonwealth of Kentucky was "established in the name and behalf of the commonwealth," was declared to be exclusively the property of the commonwealth, and authorized to issue notes. The notes (which were in the common form of banknotes) were, by statute, made receivable on all executions, and if a plaintiff should not indorse on his execution that he would receive them, proceedings on his judgment were to be suspended for two years. In a suit by the bank on a promissory note for which the banknotes had been given, as a loan, it was held that such notes were not "bills of credit" within the meaning of the constitution. Briscoe *v.* Bank (U. S.), 11 Pet. 257, 9 L. Ed. 709, 928; Lampton *v.* Commonwealth's Bank (Ky.), 2 Litt. 300; Bank *v.* Spilman (Ky.), 3 Dana 150; Briscoe *v.* Bank (Ky.), 7 J. J. Marsh. 349.

State banknotes issued and circulated upon the faith and credit of an actual available fund created and pledged as the capital stock of a bank, and not upon the credit of the state, are not "bills of credit" issued by the state, within Const. U. S., which prohibits the states from issuing bills of credit. Bank *v.* Spilman (Ky.), 3 Dana 150.

"The last ground which the prosecutor assumes is, that all banks constituted by states are unlawful institutions, because the constitution of the United States declares no state shall issue bills of credit. After the exist-

it must be issued by a state, on the faith of the state, and be designed to circulate as money. They who issue it must have authority to bind the state, and must act as agents, and incur no personal responsibility, nor impart as individuals, any credit to the paper.[45] A promissory note, the consideration of which was a note of the Bank of the Commonwealth of Kentucky, is void, such note of the bank being held to be a bill of credit within the prohibition of the federal constitution.[46]

§ 196 (3) Requisites—§ 196 (3a) Signing and Countersigning. —By Whom Signed.—In some cases it is provided that a bank bill in order to be binding must be signed by the president of the bank.[47]

Countersigning.—Notes of a bank which are issued without being countersigned by the comptroller in accordance with the legal requirement of the statute are illegal and void, under the state laws.[48] Where

ence of such corporations, ever since the existence of the constitution, and the actual circulating medium which our country has lived by, ever since my earliest recollection, I can not regard this as now a judicial question." State *v.* Commercial Bank, 10 O. 535.

Notes issued by the Bank of Kentucky, all the stock of which was owned and the officers of which were appointed by the state, are not bills of credit, within the meaning of Const. U. S., prohibiting states from emitting such bills. Briscoe *v.* Bank (U. S.), 11 Pet. 257, 9 L. Ed. 709, 928.

Notes issued by a bank, whose capital stock is owned entirely by the state, and whose governing officers are appointed by the state legislature, and which notes are made receivable by the state in payment of debts, are not bills of credit, within the meaning of the prohibition of the federal constitution. Woodruff *v.* Trapnall (U. S.), 10 How. 190, 13 L. Ed. 383.

The bills of a banking corporation which has corporate property, and is established in the name and on behalf of a state, under the direction of a board chosen by the legislature thereof, the state being the only stockholder, and pledging its faith for the ultimate redemption of the bills, are not bills of credit, such as the constitution of the United States prohibits to be issued by a state. Darrington *v.* Bank (U. S.), 13 How. 12, 14 L. Ed. 30.

45. What constitutes a bill of credit. —Bank *v.* Wister (U. S.), 2 Pet. 318, 7 L. Ed. 437; Craig *v.* State (U. S.), 4 Pet. 410, 7 L. Ed. 903; State *v.* Billis, 2 McCord, 12.

The bills issued by the old Bank of Illinois were bills of credit, within the meaning of the constitution of the United States prohibiting a state from emitting bills of credit, and a note given in consideration of such bill is void. Linn *v.* State Bank (Ill.), 1 Scam. 87, 25 Am. Dec. 71.

Notes issued by a bank whose sole capital is the property of a state are bills of credit. Bank *v.* Clark, 4 Mo. 59, 28 Am. Dec. 345.

46. Bank *v.* Clark, 4 Mo. 59, 28 Am. Dec. 345; Griffith *v.* Commonwealth Bank, 4 Mo. 255.

47. By whom signed.—By § 9 of the charter of the Planters' & Mechanics' Bank of Dalton, it is declared that "the bills obligatory and of credit, notes and other contracts whatever, in behalf of said corporation, shall be binding upon the said company: Provided, the same be signed by the president and countersigned by the cashier of said corporation; and the funds of said corporation shall, in no case, be liable for any contract or engagement whatever, unless the same be signed and countersigned as aforesaid." Held, that bank bills, signed by a vice president, and countersigned by an assistant cashier, there being a regular president and cashier in office at the time, discharging their respective duties, are not binding on the corporation. Planters', etc., Bank *v.* Erwin, 31 Ga. 371.

Unless a banknote is signed by the president, it furnishes no evidence of a promise by the bank. Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111.

48. Countersigning—Necessity for.— A bank under the general banking law of New York made an assignment of assets to certain trustees to secure the

a banknote is countersigned, the presumption is that the countersigning is sufficient.[49]

§ 196 (3b) Date.—A date is not essential to a bank bill, and an undated bill will be good if proved to be genuine, and to have been actually issued.[50] The note on which the year alone is stated would be good, the note being payable on demand after date.[51]

§ 196 (3c) Number.—The figures denoting the number of a banknote, in a particular series to which the note belongs, is no part of the contract or obligation, and the fact that the same number has been put upon two or three bills, or that the number has been altered, will not affect the rights of the note holder, if the proof shows the note to be genuine, and that it was actually issued by the bank.[52]

§ 196 (3d) Time of Taking Effect.—Banknotes take effect from their issuance or reissuance, and not from their date.[53]

§ 196 (3e) Transferability and Circulation of Notes.—In General.—They are transferable by delivery, and are issued and put in circulation

payment of 800 negotiable notes of the bank, which were issued to raise money to keep up the credit of the bank. The objects for which the money was raised were to purchase state stocks—not to deposit with the comptroller of the state, but to speculate with—to buy up bills of other banks for purposes of speculation, and to do many other things not within the business of banking. The notes issued were not countersigned by the comptroller. Held, that the assignment must be set aside, as the notes issued thereon were illegal and void under the laws of New York. Leavitt *v.* Yates (N. Y.), 4 Edw. Ch. 134.

"No note of this bank could be lawfully issued and put in circulation until countersigned by the comptroller. The notes that might thus be issued were limited and made dependent upon the amount of bonds in the hands of the comptroller, and beyond this amount the comptroller was not authorized to sign the notes of the banks. The law provides a mode by which these bonds and other assets were to be made available to the note holders." Bank *v.* Bank, 56 Tenn. (9 Heisk.) 408. See post, "Deposit of Security," § 199.

49. Countersigning presumed official.—A note of the Utica Bank, on which is written, "Countersigned, O. Seymour," is countersigned within the meaning of the act; for it is not necessary, to give the note validity, that he should add to his name his official character of cashier at C. The presumption in such a case is that the countersigning is official; and, if there be any ambiguity on the face of the note, it may be explained by parol. Bank *v.* Magher (N. Y.), 18 Johns. 341.

50. Date.—Note Holders *v.* Funding Board, 84 Tenn. (16 Lea) 46, 57 Am. Rep. 211.

51. Year alone sufficient.—Note Holders *v.* Funding Board, 84 Tenn. (16 Lea) 46, 57 Am. Rep. 211.

52. Number of banknote.—Note Holders *v.* Funding Board, 84 Tenn. (16 Lea) 46, 57 Am. Rep. 211.

Registration of number denomination, etc.—"Our banking Act of 1860 did require banks to keep a book for the registry of the number, denomination and amount of notes intended to be circulated, a violation of which by the officers of the bank was visited with a penalty. But a clerical misprision as to the number of the notes would scarcely be treated as a penal offense, and a person into whose hands a wrongly numbered note, genuine and regularly issued, might come, would not be made to suffer for even a willful violation of duty by the officers of the bank." Note Holders *v.* Funding Board, 84 Tenn. (16 Lea) 46, 57 Am. Rep. 211.

53. Time of taking effect.—Note Holders *v.* Funding Board, 84 Tenn. (16 Lea) 46, 57 Am. Rep. 211.

with the avowed intention that they shall pass from hand to hand and circulate as money; and with the further intention that they shall continue in circulation, as money, during the continuance of the banking corporation; or, at least, that they shall be returned as seldom as possible, and that, when returned, they shall be again reissued, and thus remain in circulation indefinitely.[54] Indorsement of such notes, being unnecessary, possession is evidence of ownership unless it be shown that the holder obtained such possession male fide.[55]

Object of Circulation and Maintenance Thereof.—The profits of a bank of issue depend in a great measure on the ability of the bank to keep its currency afloat. The longer the bills are withheld from redemption, the greater the remuneration to the corporation. Every additional guaranty thrown around the bills, affecting their security and increasing the uses to which they can be put, affords necessarily additional inducements for the people in whose hands they fall to keep them, and not return them to the counter of the bank for redemption in specie.[56]

Contract Arising from Circulation.—The issuing of a note by a bank organized under the general banking law of 1852, and the receiving of it by the holder as money, is, in effect, a contract between the holder and the bank that the latter will pay it on demand; and, upon the refusal of the bank to do so, it may be sued by the holder.[57]

§ 196 (3f) Warranty.—Warranty of Genuineness.—It seems that there is a warranty of the genuineness of a banknote, which is paid away

54. Transferability.—F. & M. Bank *v.* White, 34 Tenn. (2 Sneed) 481.

55. Indorsement unnecessary.—New Hope Delaware Bridge Co. *v.* Perry, 11 Ill. 467, 52 Am. Dec. 443.

"Banknotes were negotiable at common law, without reference to any British statute. They were regarded as cash, and passed from hand to hand, without any other evidence of title in the holder than what arose from the possession." New Hope Delaware Bridge Co. *v.* Perry, 11 Ill. 467, 52 Am. Dec. 443.

"In the leading case of Miller *v.* Race, 1 Burrow 452, it was decided that a banknote, though stolen from the owner, became absolutely the property of the party who had received it for value, without notice of the robbery. Lord Mansfield, in delivering the judgment of the court, said: 'It has been very ingeniously argued by Sir Richard Lloyd, for the defendant. But the wholly fallacy of the argument turns upon comparing banknotes to what they do not resemble, and what they ought not to be compared to, viz; to goods, or to securities, or documents for debts. Now they are not goods, not securities, nor documents for debts; nor are so esteemed, but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are, or any other current coin, that is used in common payments, as money or cash. They pass by a will, which bequeaths all the testator's money or cash, and are never considered as securities for money, but as money itself.'" New Hope Delaware Bridge Co. *v.* Perry, 11 Ill. 467, 52 Am. Dec. 443.

Notes indorsed to circulate as currency.—Proof by the plaintiff of the indorsement of the notes was not necessary. The plaintiffs were holders of the notes, and if the jury found they were intended to circulate as currency they were prima facie the owners thereof. Lawler *v.* Walker, 18 O. 151.

56. Maintenance of circulation.—Furman *v.* Nichol (U. S.), 8 Wall. 44, 19 L. Ed. 370.

57. Contract arising from circulation.—Conwell *v.* Hill, 14 Ind. 131.

or exchanged.[58]

Warranty of Value.—But there is no warranty of value on the sale or exchange, or the paying away genuine banknotes.[59]

§ 196 (3g) Value of Banknotes.—It has been held that if at the time and place of maturity of banknotes, "greenbacks," or United States currency, is not in circulation, then the value of the banknotes must be estimated according to the gold standard.[60] But as to notes executed after the act of congress for the issue of legal tender notes, the standard of comparison by which banknotes are to be estimated is legal tender notes, not gold and silver.[61]

§ 196 (3h) Right of Lender to Bank to Lien on Notes.—Where a bank, as security for a person who lends his name as maker of an accommodation note, deposits a sealed package of the bills of the bank in its vaults, with a memorandum thereon that the package is to secure the drawer of the note, the drawer of the note acquires no lien upon the bills.[62]

§ 197. Power to Issue or Circulate—§ 197 (1) Power to Regulate and Control.—The issue of notes to circulate as currency concerns a valuable prerogative of government, and is a proper subject of regulation

58. Warranty of genuineness.—Edmunds *v.* Digges, 42 Va. (1 Gratt.) 359, 549, 42 Am. Dec. 561.

59. Warranty of value.—Edmunds *v.* Digges, 42 Va. (1 Gratt.) 359, 549, 42 Am. Dec. 561. The court said: "The court is of opinion that there is no implied warranty of the value of current money of the country, passing from hand to hand, in the course of trade, commerce and other business. This is true, not only of the money made by law a good tender in the payment of debts and performance of contracts, but is equally so in regard to the notes of banks and bankers, payable to bearer, and circulated by delivery. These are not merely the representative of money, but in the course of business, and by common usage, are substantially employed and treated, for most purposes, as actual money or cash. The circulation of them depends, not upon the responsibility of those who pass them, but upon the opinion and estimate of those who receive them. Those who circulate them are not understood as thereby giving any assurance of the credit, punctuality or solvency of the makers; in regard to all which the receiver exercises his own judgment. * * * There is no implied warranty, whether of title or value, in the circulation of banknotes, any more than of other money. The title to them can never be questioned in the hands of a bona fide holder; and on his part he takes them as money, for whatever they may be worth. Both parties are equally innocent, and there is no reason or justice in throwing the loss sustained by one upon the shoulders of the other, and sending him against a third in the like predicament, and so continuing the pursuit through various stages of transitory ownership, to fix the burthen at last upon some innocent person." Edmunds *v.* Digges, 42 Va. (1 Gratt.) 359, 549, 42 Am. Dec. 561.

60. Estimating value of banknotes.—Moore *v.* Gooch, 53 Tenn. (6 Heisk.) 104; Jones *v.* Kincaid, 73 Tenn. (5 Lea) 677; Laird *v.* Folwell, 57 Tenn. (10 Heisk.) 92.

The value of current banknotes, at a time and place during the war, when United States treasury notes were unknown, was to be estimated by the gold standard. Jones *v.* Kincaid, 73 Tenn. (5 Lea) 677, citing English *v.* Turney, 49 Tenn. (2 Heisk.) 617.

61. Legal tender notes standard of comparison.—English *v.* Turney, 49 Tenn. (2 Heisk.) 617. See ante, "Banknotes as Money," § 196 (2).

62. Right of lender to bank to lien on notes.—Davenport *v.* City Bank (N. Y.), 9 Paige 12. See ante, "Borrowing Money," § 97.

by law.[63] It has been judicially suggested that every organization clothed with authority to make currency is a public institution, performing a public function, exercising a public power, and therefore always subject to public control.[64] And congress having undertaken, in the exercise of undisputed constitutional power, to provide a currency for the whole country, it may constitutionally secure the benefit of it to the people by appropriate legislation, and to that end may restrain, by suitable enactment, as by taxation, the circulation of any notes, not issued under its own authority.[65] Though a state cannot engage in the business by reason of the provision of the constitution of the United States, which prohibited states, as such, from emitting bills of credit, it has the right to assume the exclusive right, in the state, of granting the franchise to make paper money to others.[66] The state legislature has power to allow all persons to exercise the function

63. Prerogative of government.—"The issue of notes as a common currency, or circulating medium, is guarded with much jealousy by all governments as touching one of its most valuable prerogatives, and as deeply affecting the common good of the people." Thomas *v.* Richmond (U. S.), 12 Wall. 349, 20 L. Ed. 453.

"The monetary system of every community, is one of the most important parts of its civil policy, and the franchise of banking, is, perhaps, a trust more confidential, more liable to abuse, and if abused, followed by more consequences, than any committed by government to its citizens. It ought, therefore, to be restrained by such bounds as tend to prevent its abuse. The power which flows from the management of a bank may be injuriously exercised, either to the undue advantage of its managers or to the prejudice of those who depend upon them for accommodation." State *v.* Buchanan (O.), Wright 233.

Power of state.—A state has no power over the currency farther than the right to establish banks, to regulate or prohibit the circulation, within the state, of foreign notes, and to determine in what the public dues shall be paid. Woodruff *v.* Trapnall (U. S.), 10 How. 190, 13 L. Ed. 383.

Regulating denominations of notes.—A grant to a banking corporation, in general terms, of the power to issue notes and bills for circulation for a specified period of years, is not a surrender of the right of the state to prescribe by law, the lowest denomination for which notes or bills shall be allowed to circulate. Such a grant does not prevent the state from absolutely prohibiting, or taxing out of existence, the circulation of small notes. (Opinion of Taney, C. J.) Ohio, etc., Co. *v.* Debolt (N. Y.), 18 How. 415, 437.

64. Public function subject to public control.—Knoup *v.* Piqua Branch, 1 O. St. 603.

65. Regulation by congress.—Veazie Bank *v.* Fenno (U. S.), 8 Wall. 533, 19 L. Ed. 482, 38 How. Prac. 147. See Briscoe *v.* Bank (U. S.), 11 Pet. 257, 9 L. Ed. 709, where Story, J., dissenting, says that a state may rightfully authorize a bank created by it to issue bank bills or notes as currency, subject always to the control of congress, whose powers extend to the entire regulation of the currency. See post, "Taxations," XIX.

And the tax of ten per centum imposed by the Act of July 13th, 1866, on the notes of state banks paid out after the 1st of August, 1866, is warranted by the constitution. Veazie Bank *v.* Fenno (U. S.), 8 Wall. 533, 19 L. Ed. 482, 38 How. Prac. 147.

"Chancellor Kent observes, that Mr. Justice Story, in his Commentaries on the Constitution (vol. 3, p. 19), seems to be of opinion that independent of the long continued practice, from the time of the adoption of the constitution, the states would not, upon a sound construction of the constitution, if the question was res integra, be authorized to incorporate banks with a power to circulate bank paper as currency, inasmuch as they are expressly prohibited from coining money." Veazie Bank *v.* Fenno (U. S.), 8 Wall. 533, 553, 19 L. Ed. 482, 38 How. Prac. 147.

66. Exercise of function.—Dearborn *v.* Northwestern Sav. Bank, 42 O. St. 617, 51 Am. Rep. 851.

of issuing and circulating paper money, or to prohibit all, or, to require special authority, by incorporation or otherwise, as a condition precedent to the right.[67]

The power to create bank to issue depends upon the wording and construction of the constitution and laws of the particular state.[68]

§ 197 (2) Right to Exercise Function—§ 197 (2a) In General.—Banks.—By special authority banks may be permitted to use their own notes or bills as money, and to pay them out and derive the same benefit from their issue which it would from an equal amount of gold or silver coin.[69] A state may confer on a state bank the ordinary banking powers

67. **Permission of exercise of function.**—Myers *v.* Manhattan Bank, 20 O. 283.

Individuals forbidden to issue money.—"The thirty-second section of the general provisions of the constitution of the state, is to the effect that 'the legislature shall prohibit by law, individuals from issuing bills, checks, promissory notes, or other paper, to circulate as money.'" Mills *v.* State, 23 Tex. 295; Williams *v.* State, 23 Tex. 264.

Section 1, of the statute of the 7th of April, 1846, provides, "That from and after the passage of this act, no person, or persons within this state, shall issue any bill, promissory note, check or other paper, to circulate as money in the same." Mills *v.* State, 23 Tex. 295.

Ohio constitution and statutes construed and applied.—The purpose and policy of the Ohio statutes restricting the right to issue paper money was to guard the community against fraud and imposition, by exacting of persons engaging in this business the proper security before they were suffered to enter upon it, and to make them directly amendable for abuses to the laws of Ohio. Myers *v.* Manhattan Bank, 20 O. 283; Bonsal *v.* State, 11 O. 72.

The Act of February 8, 1815.—State *v.* Granville Alexandrian Soc., 11 O. 1; Bonsal *v.* State, 11 O. 72; Miami Exporting Co. *v.* Clark, 13 O. 1; Dearborn *v.* Northwestern Sav. Bank, 42 O. St. 617, 51 Am. Rep. 851.

The Act of February 27, 1816.—Johnson *v.* Bentley, 16 O. 97; Lewis *v.* McElvain, 16 O. 347; Dearborn *v.* Northwestern Sav. Bank, 42 O. St. 617, 51 Am. Rep. 851; Porter *v.* Kepler, 14 O. 127; Lawler *v.* Burt, 7 O. St. 340; Kearny *v.* Buttles, 1 O. St. 362; Myers *v.* Manhattan Bank, 20 O. 283; Lawler *v.* Walker, 18 O. 151; Porter *v.* Porter, 14 O. 220; Watson *v.* Brown, 14 O. 473; Steedman *v.* State, 11 O. 82; Brown *v.* State, 11 O. 276; Bonsal *v.* State, 11 O. 72; State *v.* Granville Alexandrian Soc., 11 O. 1.

The Act of February 16, 1838.—Steedman *v.* State, 11 O. 82.

The Act of March 18, 1839.—Bonsal *v.* State, 11 O. 72. See also, Lawler *v.* Walker, 18 O. 151; Lawler *v.* Burt, 7 O. St. 340; Lewis *v.* McElvain, 16 O. 347.

The Act of March 12, 1845.—Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371.

Ohio Constitution, 1851.—Bates *v.* Peoples' Sav., etc., Ass'n, 42 O. St. 655; Dearborn *v.* Northwestern Sav. Bank, 42 O. St. 617, 51 Am. Rep. 851; Forrest City, etc., Bldg. Ass'n *v.* Gallagher, 25 O. St. 208; Exchange Bank *v.* Hines, 3 O. St. 1; State *v.* Granville Alexandrian Soc., 11 O. 1.

Free Banking Act of 1851.—Citizens' Bank *v.* Wright, 6 O. St. 318; State *v.* Governor, 5 O. St. 528.

Amendment of April 24, 1879.—Bates' Anno. Stat. (3821-75), § 17.

68. **Power of legislature to establish banks of issue.**—Const., art. 9, provides that the legislature may create a state bank by charter of incorporation, with power to issue bills; and also that no banks shall be established otherwise than under a general banking law, which law shall provide for the registry and countersigning, by an officer of state, of all paper credit designed to be circulated as money, etc. Held, that no bank of issue can be established in the state under the constitution except a state bank and free or private banks pursuant to the general banking law. Brown *v.* Killian, 11 Ind. 449.

69. **Right to exercise function.**—Exchange Bank *v.* Hines, 3 O. St. 1.

and privileges, including the power to issue bills and notes, designed to pass as currency.[70] The power of existing banks, under the general laws as to issuing circulating bills and notes, may be abridged or modified by a subsequent general banking act.[71] There have been state banks, the notes of which did not circulate as currency, though their charters had not expired, and all their powers, privileges, and immunities were wholly unimpaired.[72]

Bank Organized Under Unconstitutional Law.—The notes issued by a bank organized under an unconstitutional law are void.[73]

Private Persons and Corporations Other Than Banks.—In some cases private persons and corporation are prohibited from issuing obligations intended to circulate as money.[74] But such a law does not prohibit the issuance by bridge, railroad, and passenger railway companies of tickets good for one trip.[75] A statute forbidding the creation or circulation of any note, bill, bond, check, or ticket purporting that any money or banknotes will be paid to the holder, or that it will be received in payment of debts, or to be used as a medium of currency in lieu of money, is intended

70 **Issuance of bills to pass as currency.**—Furman, etc., Co. *v.* Nichol, 43 Tenn. (3 Coldw.) 432.

The issuance of notes by the Bank of Tennessee in compliance with the terms of its charter was a legitimate part of its banking business. State *v.* Bank, 64 Tenn. (5 Baxt.) 1.

71. **Subsequent General Banking Act.**—Under General Banking Act 1895 (Gen. Laws 1895, c. 145, § 1), providing that banks thereunder shall be banks of discount and deposit, and § 29, providing that powers of banks already existing shall be abridged or modified to conform to the act, the right of banks to issue bills, under articles of incorporation based on the general laws of the state previous to that act, was revoked and withdrawn. Seymour *v.* Greve, 79 Minn. 211, 81 N. W. 1059.

72. **Bank not issuing circulating notes.**—State *v.* Shelton, 26 Tenn. (7 Humph.) 31.

Banks organized under Gen. St. 1878, c. 33, until the passage of Laws 1895, c. 145, had the charter powers of banks of issue, whether they issued any circulating notes or not. Palmer *v.* Bank, 72 Minn. 266, 75 N. W. 380.

73. **Bank organized under unconstitutional law.**—Skinner *v.* Deming, 2 Ind. 558, 54 Am. Dec. 463.

74. **Private persons and corporations prohibited.**—United States *v.* Monongahela Bridge Co., Fed. Cas. No. 15,796, 2 Pittsb. Rep. 476.

Texas Act of 1846.—The Act of 1846 prohibited individuals from issuing paper to circulate as money. Mills *v.* State, 23 Tex. 295.

A mercantile firm composed of three partners, doing a general commission business, receiving money on deposit, and selling in exchange, would, by issuing paper money, incur the penalties attached to a violation of the Act of 1846. Mills *v.* State, 23 Tex. 295.

Circulation of notes emitted by unchartered banks.—The first section of the Act of 1816, relating to unauthorized circulation provides "that it shall not be lawful for any association or company, not having a charter incorporating such association or company, with authority to deal or trade as a bank, now formed or in being, or which hereafter may be formed, within the limits of this commonwealth, for the purpose of discounting notes, bills, etc., and issuing notes, bills, etc., for the purpose of dealing, trading or carrying on business as a bank, to commence or continue the discounting of any notes or bills, etc., or the issuing of any notes, drafts or bills, etc." Commonwealth *v.* Scott, 25 Va. (4 Rand.) 143.

75. **Tickets for one round trip.**—United States *v.* Monongahela Bridge Co., Fed. Cas. No. 15,796, 2 Pittsb. Rep. 476.

Checks redeemable in merchandise.—Martin-Alexander Lumber Co. *v.* Johnson, 70 Ark. 215, 66 S. W. 924.

to prevent creation of private circulation medium.[76] But checks issued by a company to its employees redeemable in merchandise at the company's store are not within the prohibition.[77]

Corporate Power.—The power of a corporation to issue bills or notes as a circulating medium may be expressly excluded by the general laws. In such cases the right to issue them for all proper purposes is incident to the expressed powers or objects of the corporation.[78] And sometimes the charter of a corporation prohibits the corporation from issuing bills, etc., to circulate as money.[79]

Insurance Company.—An insurance company is not authorized to issue certificates of deposit designed to circulate as money, by a provision in its charter authorizing it to receive money on deposit, "and to give acknowledgments for deposit in such manner and form as they may deem convenient and necessary to transact such business."[80] And the conferred power "to buy and sell drafts and bills of exchange," confers no power to issue evidences of debt designed to circulate as money.[81] However, it may be well to state that the right of a corporation, authorized by its charter "to receive deposits on trust," receive money on deposit and gives certificates therefor, is not affected by a proviso prohibiting the corporation from issuing bills, bonds, notes, or other securities to circulate in the community as money.[82] Where the issue of bills as a currency, except by banking institutions, is prohibited, a municipal corporation has no power, without express authority, to issue such bills.[83]

Issuance of Paper by Municipal Corporation.—A law making it unlawful for any person "or body corporate" to create or put in circulation any bills, notes, checks, etc., for less than five dollars with intent to create a circulating medium, and which imposes a penalty for violation therefor, embraces municipal as well as private corporations.[84] The fact that mem-

76. **Preventing private circulating medium.**—Martin-Alexander Lumber Co. *v.* Johnson, 70 Ark. 215, 66 S. W. 924.

77. **Checks issued to employees—Payment in goods.**—Martin-Alexander Lumber Co. *v.* Johnson, 70 Ark. 215, 66 S. W. 924.

78. **Power excluded by general law.**—Smith *v.* Eureka Flour Mills Co., 6 Cal. 1.

79. **Charter prohibition.**—New York Life Ins., etc., Co. *v.* Beebe, 7 N. Y. 364.

The charter of the New York Life Insurance Trust Company forbids the company from issuing its "own bills, notes, or other evidences of debt for loan," etc. Held, that the issuing, by said company, of its certificates of deposit, payable at a future day, with interest semiannually, was a violation of its charter, and was also in violation of a provision in the Revised Statutes. New York Life Ins., etc., Co. *v.* Beebe, 7 N. Y. 364.

80. **Insurance company—Charter provision construed.**—Bliss *v.* Anderson, 31 Ala. 612, 70 Am. Dec. 511.

81. **Power to buy and sell drafts and bills of exchange.**—In re Ohio Life Ins., etc., Co., 9 O. 291.

82. **Right to receive deposits and give certificates.**—Talladega Ins. Co. *v.* Landers, 43 Ala. 115.

83. **Issuance by municipal corporations.**—Thomas *v.* Richmond (U. S.), 12 Wall. 349, 20 L. Ed. 453.

84. **Pennsylvania Act of April 12, 1828.**—McCormick *v.* Allegheny City, Fed. Cas. No. 8,717.

Where a municipal corporation, by its corporate officers, issues scrip under the denomination of five dollars, it is liable therefor, with twenty per cent interest thereon, as provided by

bers of a city council, in voting to issue the city script to aid in building a bridge, may have contemplated that such script might or would become a convenient circulating medium, does not make such script money, or the issue thereof unlawful.[85]

Effect of Power to Issue Notes in Payment.—The right of a company to issue promissory notes, in the form of banknotes, in payment, gives it no right to issue them for the purpose of putting them in circulation as a current circulating medium.[86]

§ 197 (2b) Prohibiting Particular Circulating Mediums.—Some statutes prohibit the emission of any paper, etc., without authority of law, to answer the purpose of money, or for general circulation.[87] Such a statute does not apply to a paper of the form: "Let A. have ——— dollars trade at store," dated, signed and the words "not transferable" written across its face.[88] Other statutes prohibit the issuing or putting in circulation of "any bills," designed to substitute banknotes.[89] Change bills or tickets are also prohibited.[90] But the issuance of a dray ticket bearing these words: "Dray tickets for fifty cents. Knoxville Iron Co.,"—is merely a method of keeping accounts with the draymen and is not prohibited by the statute.[91]

With Reference to Denomination—Act of July 7, 1838.—The Act of Congress of July 7, 1838, provides that it shall be unlawful to pass or procure to be issued with the District of Columbia any note, check, bank bill or other paper medium of a less denomination than five dollars.[92]

§ 197 (2c) With Reference to Paper Issued in General.—A certificate of deposit, payable in current bank bills, is within the law forbidding the issue of bills, etc., designed for circulation, not payable in gold or silver coin.[93] The issue of small bills and notes other than bank bills, intended to be used as a circulating medium, is, under some statutes, illegal.[94]

the Act of April 12, 1828, forbidding the circulation of small notes by corporations. Allegheny City *v.* McClurkan & Co., 14 Pa. 81.

85. What constitutes city script—Money.—Dively *v.* Cedar Falls, 27 Iowa 227.

86. Effect of right to issue notes in payment.—United States *v.* Ray, Fed. Cas. No. 16,124, 2 Cranch C. C. 141.

87. Paper prohibited.—Durr *v.* State, 59 Ala. 24.

Rev. Code 1845, p. 167, provides that no person unauthorized by law shall create or put in circulation, as a circulating medium, any note, bill, or ticket purporting that any money will be paid to the receiver or holder thereof, or that it will be received in payment of debts, or as a currency or medium of trade in lieu of money. Held, that the word "purporting," as used in such act, does not refer to the last clause of the section relating to notes, bills, etc., put in circulation to be used as a currency or medium of trade in lieu of money. State *v.* Page, 19 Mo. 213.

88. Durr *v.* State, 59 Ala. 24.

89. Designed to substitute bank notes.—State *v.* Watson, 4 Ind. 195.

90. Change bills or tickets.—State *v.* Fisk, 35 Tenn. (3 Sneed) 695.

91. Mere method of keeping account.—State *v.* Fisk, 35 Tenn. (3 Sneed) 695.

92. Act of congress of July 7, 1838.—Stettinius *v.* United States, Fed. Cas. No. 13,387, 15 Cranch Cl. 573.

93. Certificate of deposit.—Darden *v.* Banks, 21 Ga. 297.

94. Small bills other than bank bills.—Madison Ins. Co. *v.* Forsythe, 2 Ind. 483.

Drafts on Foreign Banks.—Prior to the Massachusetts Stat. 1816, c. 91 there was nothing in the charters of the banks of that state which prohibited them from issuing drafts on a bank in another state, where they had funds deposited, for small sums, with the intention of their being circulated as bank bills.[95]

Bank Bills below Par.—That bank bills are below par does not render their circulation illegal.[96]

§ 197 (2d) Issuing Paper in Similitude of Banknotes.—The right to issue change bills or promises in the similitude of currency is sometimes prohibited to persons or corporations, and no recovery can be had on such change bills issued by a city.[97] The law sometimes provides that all notes are void which are given to any company which, without authority, shall issue notes or do other banking business.[98] Notes in the semblance of a bank bill, issued by a corporation payable to its clerks, and indorsed by them in blank, are void, where the corporation is by its charter prohibited from carrying on any banking operations.[99] And it seems that the form of such notes is sufficient to put those who receive them upon inquiry as to whether they are given for the legitimate purpose of the company.[1] Where an insurance company draws checks on a bank, which have the similitude of banknotes, and are intended to circulate as such, but are given as a loan on deposit of a note as collateral security, which checks were not paid by the bank, but by the drawer, such transaction is not the exercise of a banking privilege, contrary to such restraining act.[2] But if such company call in a part of their capital for the purpose of making loans by issuing checks in the shape of banknotes, such loans are a violation of the restraining act.[3] A certificate of deposit payable to bearer, but not adapted or intended for circulation as money, is not, it seems, within the charter of an insurance company prohibiting "the issue for circulation as money" of any of its own

95. **Drafts on foreign banks.**—King *v.* Dedham Bank, 15 Mass. 447, 8 Am. Dec. 112.

96. Robinson *v.* Beall, 26 Ga. 17.

97. **Right prohibited to persons or corporations.**—Cothran *v.* Rome, 77 Ga. 582, construing Act of Dec. 10, 1841, Cobbs Dig., p. 847.

98. **Issuing in similitude of banknotes renders obligation void.**—Utica Ins. Co. *v.* Pardow, 2 N. Y. Super. Ct. 552.

99. **Notes in semblance of banknotes issued to clerks.**—Attorney General *v.* Life, etc., Ins. Co. (N. Y.), 9 Paige 470.

1. **Notice to party receiving.**—An incorporated company, which was by its charter expressly prohibited from carrying on any banking operations, issued notes printed on engraved plates, in the semblance of bank bills, which were made payable to clerks, etc., of the company, and by them indorsed in blank, which notes were exchanged for securities of other companies, paid out upon the discount of bonds and mortgages, and sold in the market for cash, in the same manner as the post notes of banks are issued and circulated. Held, that the form of these notes was sufficient to put those who received them upon inquiry as to whether they were given for the legitimate purposes of the company. Attorney General *v.* Life, etc., Ins. Co. (N. Y.), 9 Paige 470.

2. **Checks given as a loan on deposit of note.**—Utica Ins. Co. *v.* Pardow, 2 N. Y. Super. Ct. 552.

3. **Calling in part of capital stock.**—Utica Ins. Co. *v.* Cadwell (N. Y.), 3 Wend. 296.

notes in the nature of banknotes or certificates of deposit payable to bearer.[4]

Loan companies are sometimes prohibited from issuing notes or bills of credit or promissory notes in the nature of banknotes, and this prohibition covers all instruments in the similitude of a banknote.[5]

Individual Liability of Stockholders.—And it is sometimes provided that the issuance of a bill, etc., in the similitude of banknotes shall be considered unauthorized banking within the meaning of a statute making the stockholders, etc., individually liable to the holders of such bills.[6]

§ 197 (2e) Post Notes and Paper Not Payable on Demand.—If a bank have power to issue paper for circulation, and there is no limitation in the charter as to the kind of paper to be issued, it may issue post notes to circulate as currency.[7] And in some cases the right to issue post notes is secured by charter.[8] The law, probably in most cases, provides that cir-

4. **Certificate of deposit.**—Mumford *v.* American, etc., Ins. Co., 4 N. Y. 463.

5. **Restriction on loan companies.**—Where a loan company was authorized to loan money on pledges of personal property, but was prohibited from issuing "notes, or bills of credit, or promissory notes in the nature of bank notes," it was not authorized to issue an instrument by which it promised "to pay M. or order $1,000, three months after date, being a deposit made by him with the company," with interest, at the company's office, and signed by his president; since such instrument is a "note in the nature and similitude of a banknote," and therefore ultra vires and void. Southern Loan Co. *v.* Morris, 2 Pa. 175, 44 Am. Dec. 188.

6. **Individual liability of stockholders, etc.**—Act Jan. 27, 1816, prohibits the issue of unauthorized bank paper, and makes the stockholders of a bank issuing such paper individually liable to the holders. Act March 19, 1839, provides that every corporation, not a bank, which shall issue, put in circulation, or pay out for debts any notes calculated to circulate as money, shall be deemed an unauthorized bank, within the meaning of the former act. Held, that a canal company, issuing paper in the form of banknotes in payment of contractors, comes within the meaning of the statute. Lawler *v.* Walker, 18 O. 151.

The charter of the Erie Canal Company authorized it to make certain dispositions of its property, and to do all other things "necessary for the proper business of the company." For the completion of the canal the corporation gave to the contractors bonds payable to bearer, at a future day, with interest. The bonds were not paid at maturity, and the holder of one of them sued the president and secretary, who had signed the bond, on the ground that the corporation had no power to issue the bonds, because such issue was an exercise of a banking privilege, and that, therefore, defendants were personally liable. It appeared that the bonds were issued under the corporate seal, and by authority of the board of directors. Held, that the bonds were simple obligations given for the payment of lawful debts, and were not within the prohibition respecting the exercise of banking privileges, so as to charge defendants personally. McMasters *v.* Reed (Pa.), 1 Grant Cas. 36.

7. **Post notes.**—Campbell *v.* Mississippi Union Bank (Miss.), 6 How. 625.

8. **Right secured by charter.**—State *v.* Commercial Bank, 10 O. 535.

"The charter of this institution was passed on February 11, 1829. It made it lawful for the company, among other things, to discount upon banking principles and usages bill of exchange and post notes, and to issue notes payable to bearer on demand and at its own office, and to draw and issue post notes and bills of exchange, payable to order at such place and at such time or day as the directors may deem expedient. 3 Chase's L. 2059. The bill whose issue is complained of, is a post note, the right to issue which is among the enumerated power conferred by the charter upon the company. The statute of 1824 (Chase's L. 1420) did not render such notes void, but rendered them payable on demand; and it is not to be construed so as to take away a power expressly

culating banknotes must be payable on demand.[9] This is sometimes provided by charter.[11] Thus, § 23 of the act incorporating the Ohio Life Insurance & Trust Company does not authorize the issue of bills or notes for circulation payable otherwise than on demand.[12] In some cases the general banking law provides that negotiable bills of exchange, payable at a future day, can not be issued by banking associations.[13] Where an act prohibits a banking association from issuing or putting in circulation any bill or note,

and specially given by a subsequent act of the legislature." State *v.* Commercial Bank, 10 O. 535.

9. Paper not payable on demand.—Act Mich. March 28, 1836, was made applicable to banking corporations thereafter to be created and provided (§ 31) that "no moneyed corporation subject to the act shall issue any bill or note of said corporation unless the same be made payable on demand and without interest." Held, that a bank created on the same day the act took effect was subject thereto, and that checks drawn on and accepted by it payable, one thirty days and the other six months, after date, and negotiated after such acceptance, were within the prohibition of the act, and void. Weed *v.* Snow, Fed. Cas. No. 17,347, 3 McLean 265.

Banknotes are void which were issued in violation of the safety fund law of Michigan (Act March 28, 1836), prohibiting all banks, etc., from issuing notes which are not payable on demand, and without interest. Weed *v.* Snow, Fed. Cas. No. 17,347, 3 McLean 265.

Banking Act, § 20 (Scates' Comp. 115), provides that "no banking association or individual banker shall issue or put in circulation any bills or notes of such association or banker, unless the same shall be payable on demand." The act requires bankers to certify to the secretary of state the name to be used in business, place of business, capital stock, names of stockholders, and term of association. Held, that by "individual banker" was meant a bank composed of one individual only, and incorporated under the act; and hence § 20 did not apply to a private banker's issue of a certificate of deposit payable three months after date. Hunt *v.* Divine, 37 Ill. 137.

Iowa.—Post notes, issued, by an incorporated company, were invalid under the constitution of 1846, and the act of 1851 (chapter 147), and such notes made prior to the constitution of 1857 and to the Acts of 1858, relating to banking, are not rendered valid thereby. Reynolds *v.* Nichols & Co., 12 Iowa 398.

Massachusetts statute.—"Rev. St., c. 36, § 57, is in the following words: 'No bank shall make or issue any note, bill, check, draft, acceptance, certificate, or contract, in any form whatever, for the payment of money, at any future day certain, or with interest, excepting for money that may be borrowed of the commonwealth, or of any institution for savings incorporated under the authority of the commonwealth, and excepting also, that all debts due to any bank from any other bank, including bills of the bank so indebted, may lawfully draw interest.'" Faneuil Hall Bank *v.* Bank (Miss.), 16 Gray 534.

A holder of a draft made by a bank within the state on a bank without the state is not void as in violation of Rev. St., c. 36, § 57, and the holder may recover the amount thereof on failure to pay the same, with interest at 2 per cent per month, under § 60-63. Faneuil Hall Bank *v.* Bank (Mass.), 16 Gray 534.

New York statute.—A draft issued by a banking institution, payable at a future time, is prohibited by statute; and no person, by any act, can give validity to it as commercial paper anywhere. Bank *v.* Dodge (N. Y.), 8 Barb. 233.

Promissory notes, given by a bank, and payable at a future day, with interest, are void. Bank Commissioners *v.* St. Lawrence Bank, 7 N. Y. 513.

Under the Act of 1840, all promissory notes made by a banking association unless made payable on demand, and without interest, though not intended to circulate as money, are illegal and void. Swift *v.* Beers (N. Y.), 3 Denio 70.

11. Charter provision.—Cannon *v.* McNab, 48 Ala. 99.

12. Act incorporating Ohio Life Insurance Company.—In re Ohio Life Ins., etc., Co., 9 O. 291.

13. Negotiable bill of exchange.—Smith *v.* Strong (N. Y.), 2 Hill 241.

unless payable on demand and without interest, promissory notes given by such association for its prior indebtedness, payable on time, are illegal and void, though not intended to circulate as money, and incapable of so circulating.[14] So post notes, given by a banking institution to secure a bona fide cash loan made to it after the passage of the statute, are within the prohibition.[15] A postdated draft, issued by a banking association, taking effect upon delivery, is a time bill, and prohibited.[16] And so is a certificate of deposit issued by a banking association; it being a promissory note, and void, if payable six months after date, with interest to the order of a particular person.[17] But it is held that certificates of deposit given by a bank in New York, and payable in Philadelphia, are not "bills or notes issued or put into circulation," within the meaning of the act.[18] Nor is a note or draft not negotiable within the statute prohibiting moneyed corporations from issuing any bill or note that is not payable on demand without interest.[19] The statute does not prohibit the issue by such corporations of instruments in the form of bonds for the payment of the principal at a future day, with coupons for semi-annual interest, convertible into stock at the holder's option, such bonds not being sealed instruments under the laws.[20] And where a banking association places its negotiable interest-bearing bonds in the hands of a creditor to secure a past indebtedness and future advances before the act takes effect, neither the bonds held by the pledgee, nor those sold by him after that act took effect, are within the prohibition of that statute.[21]

Bank Not a Corporation.—It has been held that a banking institution organized under the general banking law is not a corporation, and that a statute which prohibits moneyed corporations from issuing their bills or notes unless the same be made payable on demand, without interest, does not apply to such bank.[22]

Contract Made by a Bank Valid.—The violation of its charter by an incorporated bank, in circulating as currency notes or bills not payable on

14. **Promissory note given for prior indebtedness.**—Leavitt *v.* Blatchford (N. Y.), 5 Barb. 9.

Under the New York statute of 1840, providing "that no banking association" "shall issue or put in circulation any bill or note of said association" unless the same shall be made payable on demand, and without interest, it was held that negotiable promissory notes issued by a bank, payable in twelve months, with interest, and delivered to a mercantile house in London on account of a previous liability of the bank, were void, and that the prohibition was not confined to notes capable of circulating as money. Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333.

15. **To bona fide cash loan.**—Platt *v.* Littell (N. Y.), Anth. N. P. 358.

16. **Postdated note—Effect on delivery.**—Orneida Bank *v.* Ontario Bank, 21 N. Y. 490.

17. **Certificate of deposit.**—Bank *v.* Merrill (N. Y.), 2 Hill 295.

18. **Certificate payable in Philadelphia.**—Curtis *v.* Leavitt (N. Y.), 17 Barb. 309.

19. **Note or draft nonnegotiable.**—Ontario Bank *v.* Schermerhorn (N. Y.), 10 Paige 109.

20. **Bonds for payment of principal at future date.**—Leavitt *v.* Blatchford, 17 N. Y. 521.

21. **Negotiable interest-bearing bonds prior to taking effect of act.**—Curtis *v.* Leavitt, 15 N. Y. 9.

22. **Bank not a corporation.**—Farmers', etc., Bank *v.* Troy City Bank (Mich.), 1 Doug. 457.

demand, does not vitiate a contract made by the bank with other parties, involving the circulation of such notes or bills.[23]

Penal Statutes.—The act of the Georgia legislature of 1837, making it penal in a bank to put any instrument in circulation payable at a longer date than three days, applies to post notes only.[24]

§ 197 (2f) Immediate Unrestricted Circulation.—The act of a bank in buying specie or exchange of another bank, and paying therefor in its own bills, with an agreement that the bills shall not be returned for redemption for a specified time, is in contravention of a law imposing a penalty on a bank which loans or issues any of its bills with an understanding that they shall not be put into immediate unrestricted circulation.[25]

§ 197 (2g) Instrument in Form of Due Bills.—Instruments in the form of due bills not intended as a general circulating medium to mingle with the currency of the country are not within the meaning of a statute prohibiting the issue or drawing of any bill of credit, etc., to be used as a general circulating medium, or in lieu of money.[26]

§ 197 (3) What Constitutes Issuance as Circulating Currency.—The setting apart of bank bills, by a banking company, as a pledge or security, is not an issuing of such bills as a circulating currency.[28]

§ 197 (4) Presumption of Legality.—As the law will not presume the illegality of a transaction, the presumption is that bills put in circulation by a bank were in the ordinary course of its business and for a lawful purpose.[29]

23. Contract valid.—Cannon *v.* McNab, 48 Ala. 99.

24. Penal statutes.—Carey *v.* McDougald, 7 Ga. 84.

Act Dec. 26, 1837, made penal the paying away of any bank bill intended for circulation as paper money having longer time than three days to run, or payable otherwise than in gold or silver. Held, that certificates of deposit payable to order with interest from date are not void within such act. Hargroves *v.* Chambers, 30 Ga. 580.

25. Immediate uninterested circulation.—Commonwealth *v.* Bank (Mass.), 4 Allen 1, construing Gen. St., c. 57, § 67.

26. Bill, etc., in form of due bills.—In an action to recover money upon a number of printed tickets issued by a sutler in the army in this form: "Good for 50 cents. H. C. Myers, Sut.," and indorsed by him, "H. C. M.," which were paid out for value to persons receiving them in course of business—it was held that these instruments were not intended as a general circulating medium to mingle with the currency of the country, and therefore they were not within Scates' Comp. 120, prohibiting the issue or drawing of any bill of credit or promissory note (other than bills or notes of the bank of the state) to be used as a general circulating medium, or in lieu of money. Weston *v.* Myers, 33 Ill. 424.

28. What constitutes issuance as circulating currency.—Collins *v.* Central Bank, 1 Ga. 435.

29. Issuance presumed legal.—"The law presumes (after proof that the bills in controversy are genuine), that the Bank of Tennessee put into circulation the Torbett issue in the ordinary course of its business for lawful purposes. The law will not presume the illegality of a transaction, but the illegality must be made to appear by proof." Clark *v.* Keith, 76 Tenn. (8 Lea) 703.

§ 197 (5) Statutory Invalidation of Issue.—The contracts made by a bank with the citizens dealing with it are protected from impairment by the federal constitution as effectually, during the existence of a usurped government, as before. Hence, it is held, that the act of the restored state government, by which it is sought to repudiate the issues of the bank, are null and void, because they impair the obligation of contracts between the bank and holders of its notes.[30]

§ 198. Restrictions upon Issue or Circulation.—With Reference to Denomination.—In some cases the bank charter restricts the issuance of notes to certain denominations,[31] while in other cases the general law provides such restrictions.[32] It has been decided that the omission from a bank charter, a provision against issuing bills below a certain denomination, could not be supplied by inference from the policy to the state with reference to other banks and could not be cured by the court as an inadvertence of the legislation.[33]

What Constitutes Violation of Restriction.—Issuing promises "to pay bearer on demand fifty cents in goods" is not a violation of a law which forbids issuing notes for a less sum than one dollar, intended to circulate as money.[34]

Place of Payment.—The charter may contain a restriction on the issue of notes payable to bearer at any other office than their own. Such provision does not prohibit the issue of such notes payable to order.[35] A law

30. **Statutory invalidation of issue.**—State *v.* Sneed, 68 Tenn. (9 Baxt.) 472, affirmed in 96 U. S. 69, 24 L. Ed. 610; State *v.* Bank, 64 Tenn. (5 Baxt.) 1.

31. **With reference to denomination—Charter restriction.**—State *v.* Franklin Bank, 10 O. 535.

32. **General-law restriction.**—State *v.* Franklin Bank, 10 O. 535.

The Franklin Bank of Cincinnati was prohibited by its charter from issuing any notes, payable to bearer and on demand, for less than five dollars, except ones, twos and threes. The law of 1838 permitted such issues and the law of 1848 forbade them. In a case involving such issues made prior to the enactment of the law of 1840, it was held that the court would not determine whether the general law or the charter would prevail as to issues after the enactment of such law. State *v.* Franklin Bank, 10 O. 535.

33. **Supplying restriction by inference.**—The charter of the bank of Fayetteville does not expressly authorize the bank to issue notes for circulation as money. But it confers banking powers in general terms, mentioning in one clause "bills or notes" issued by order of the corporation, and in another requiring the bank, once in six months, to furnish the public treasurer a statement of the "notes in circulation"—coinciding, in this respect, with other banks in the state. The power to issue notes for circulation is not restricted by the charter. The several acts incorporating other banks of the state all contain a provision against the issuing of small notes—in some under five, and in others under three dollars, in denomination. Held, that the omission from the charter of the bank of Fayetteville of a provision against issuing bills below a certain denomination could not be supplied by inference from the policy of the state with reference to other banks, and could not be cured by the court as an inadvertence of the legislature. Therefore its charter conferred on the bank authority to issue one dollar notes. State *v.* Matthews, 48 N. C. 451.

34. **What constitutes violation of restriction.**—United States *v.* Van Auken, 96 U. S. 366, 24 L. Ed. 852.

35. **Place of payment.**—State *v.* Franklin Bank, 10 O. 535.

providing that no bank shall issue any bill, etc., payable at any other place than the bank, etc., for any sum not exceeding $100, applies to banks previously incorporated.[36]

With Reference to Amount Issued.—The law may limit the amount of bills, etc., that may be issued by a bank. Thus, where a savings bank deposited a sealed package of its bills as security for an accommodation indorser, the bills, though the books of the bank do not show them as issued and in circulation, are issued and in circulation within the statute limiting the amount of bills to be issued by savings banks.[37]

§ 199. Deposit of Security—§ 199 (1) Deposit of Security in General.—Necessity for.—It may be stated generally that the circulation of a state bank is based upon and secured by bonds or securities deposited with the proper state officials.[38] The notes that may be thus issued are limited and made dependant upon the amount of securities in the hands of the state.[39]

Title, Rights and Possession.—The securities are devoted to the redemption of the notes, and are beyond the control of the institution. The legal title to the securities is vested in the auditor, and they are then deposited with the treasurer for safekeeping. If the bank fails to redeem its notes in specie, it is the duty of the auditor to sell the securities at public auction, and apply the proceeds to the payment of the notes. He may withdraw the securities for the purpose of having them disposed of for the same object, under the decree of a court. He may return them to the bank, on the surrender of a like amount of its circulating notes, or on the delivery of a full equivalent in other stocks.[40] Hence it has been held that stocks of the state deposited with the treasurer to secure the notes of a bank, in compliance with the banking law, are not entitled to share in the distribution ot a tax levied under the constitution for the purpose of liquidating the state debt.[41]

Held as Trust Fund.—The securities required by a statute to be deposited with the comptroller, for the security of the note holders of the bank, are denominated "trust funds," and such is their character. They are deposited for the benefit of the note holders, who are entitled, in case the bank is wound up, to share pro rata in the proceeds, and each of whom has an interest in the funds; and no one of those interested can be permitted to absorb and appropriate the entire fund to the exclusion of

36. Application to bank previously incorporated.—Dedham Bank *v.* Chickering (Mass.), 4 Pick. 314.

37. With reference to amount issued. —Davenport *v.* City Bank (N. Y.), 9 Paige 12.

38. Necessity for deposit of security. —Bank *v.* Bank, 56 Tenn. (9 Heisk.) 408.

39. Amount of notes limited by amount of security.—Bank *v.* Bank, 56 Tenn. (9 Heisk.) 408.

40. Title rights and possession.—Marine Bank *v.* Auditor, 14 Ill. 185.

41. Right to share in distribution of tax levied to liquidate state debt.—Marine Bank *v.* Auditor, 14 Ill. 185.

others of the same class whose equities and interests in the fund are equal to his.[42]

Liability of State as Holder of Security.—The state is not liable to its citizens, in the absence of an express guaranty or undertaking to that effect, for the loss of bonds deposited with the comptroller for the purpose of protecting the note holders of the free banks of this state, or to make a deficiency in their amount caused by the fraud or negligence of the officers or agents of the state.[43] The relation of the state is not that of agent, bailee, or trustee for the banks making the deposit.[44] Where a state pledges itself to see to the proper application of the securities deposited for the benefit of the note holders of free banks, an affirmative declaration that the state does pledge itself that the securities shall be properly applied, and will make the loss good if they are not, cannot be implied.[45]

Liability of State as Guarantor.—In establishing a system of free banks, the state assumes no liability as guarantor of the notes issued by the banks as circulation, especially where such liability is expressly negatived by the terms of the act.[46]

Withdrawal of Securities.—Where stocks of the state are deposited with the treasurer to secure the circulating notes of a bank, the auditor has authority to allow the bank to withdraw such stocks upon receiving an ample equivalent in other securities of this kind designated by the banking law.[47]

Transfer of Securities to Holders of Notes.—Under a general banking law authorizing the state comptroller to retransfer mortgages transferred to him by a bank as security for the redemption of its circulating notes to such bank, on receiving an equal amount of the notes or other mortgages, or to sell such mortgages, the comptroller cannot transfer a mortgage to a

42. Held as trust fund.—Clark *v.* State, 47 Tenn. (7 Coldw.) 306.

"No one of those interested can be permitted to absorb and appropriate the entire trust fund to the exclusion of others of the same class, whose equities and interest in the fund are equal to his. Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471, 476." Clark *v.* State, 47 Tenn. (7 Coldw.) 306.

The Bank of Tennessee received the bonds deposited by the Exchange Bank for the security of its note holders from Spence, the president of the bank, and Carney, with notice of the trust impressed upon them, and of the illegality of their withdrawal from the comptroller. The bank took them, charged with the trust, and became trustee with regard to these bonds, for the benefit of all persons entitled to share in the proceeds thereof, and this purpose, the broad principle of equity, that one cestui que trust shall not be permitted knowingly to appropriate to his own benefit the entire fund which was provided equally for him and for others. Clark *v.* State, 47 Tenn. (7 Coldw.) 306.

43. Liability of state as holder of security.—Clark *v.* State, 47 Tenn. (7 Coldw.) 306.

44. State not the agent, bailee or trustee for the banks.—If an officer or agent of the state, in violation of law, commits an act to the injury to the citizen, it is an act beyond the scope of his agency, unauthorized by his principal, and the state is not liable therefor to the party injured; for the state, in this instance, did not assume, in regard to the securities deposited with the comptroller, the relation of agent, bailee or trustee for the banks depositing them. Clark *v.* State, 47 Tenn. (7 Coldw.) 306.

45. Liability of state on pledge.—Clark *v.* State, 47 Tenn. (7 Coldw.) 306.

46. Liability of state as guarantor.—Clark *v.* State, 47 Tenn. (7 Coldw.) 306.

47. Withdrawal of security.—Marine Bank *v.* Auditor, 14 Ill. 185.

holder of circulating notes on surrender of such notes, or transfer the mortgages to the bank on surrender by it of the notes by it transferred to the holder of the notes, such transfer giving no title to the transferee.[48]

Conversion of Security.—A bank which has, pursuant to the general banking law, deposited stocks with the state auditor as security for the redemption of its notes, cannot sue him on his official bond for conversion, without showing that the object for which the stocks were deposited is accompanied; since the remedy on the bond is for the benefit of the bank's creditors.[49]

§ 199 (2) Interest on Deposited Securities.—Disposition of Accrued Interest.—A law which provides in certain contingencies, for the application of interest accruing on bonds of the bank deposited with the auditor of state to the redemption of the notes of the bank, when construed in connection with a law authorizing the auditor, in certain cases, to retain the interest accruing on the bonds for the payment of taxes due from the bank, requires that the interest, if needed, should first go to the redemption of the notes of the bank; and, if not so needed, it may then be retained by the auditor for the payment of taxes.[50]

State's Lien on Interest.—Where the state has a lien on the interest falling due on securities deposited with it to secure the bank's circulation, its lien attaches to the interest falling due on securities substituted in place of the original deposit.[51]

§ 200. Unauthorized Issue—§ 201. —— In General—§ 201 (1) Issuing, Passing and Receiving as Constituting Crime.—The issuing or passing paper bills, etc., of certain kinds, designed to circulate as money is, in a great many cases, rendered criminal.[52] The issuing or putting in

48. **Transfer of securities to holder of notes.**—Mitchell *v.* Cook, 7 N. Y. 538, Seld. Notes 16.

49. **Suit for conversion of security.**—State *v.* Dunn, 10 Ind. 269.

50. **Disposition of accrued interest.**—Ewing *v.* Robeson, 15 Ind. 26.

51. **Lien of state on interest falling due.**—A bank purchased state bonds, and deposited the same with the comptroller under an agreement that they should be security for the circulation of the bank, and that state treasurer, on default in the payment of any of the installments due for the purchase price of the bonds, might retain for the use of the state the amount thereof out of the interest falling due on the bonds so deposited. The bonds were afterwards withdrawn by the bank, and in lieu thereof other securities were received. Held, that the lien of the state upon the interest on the bonds deposited by the bank with the comptroller attached to the substituted securities. State *v.* Rusk, 23 Wis. 636.

52. **As constituting crime—Act of congress July 7, 1838.**—Stettinius *v.* United States, Fed. Cas. No. 13,387, 15 Cranch Cl. 573.

A printed instrument, accepted by the drawee, ordering him to "pay to bearer one dollar in currency when twenty dollars are presented," is a "bill" for circulation within the meaning of Pen. Code, § 400, forbidding the issuing of bills intended to circulate as money, although payable in Confederate currency, and not regarded by the community as of equal value as a circulating medium with gold and silver. Luckey *v.* State, 26 Tex. 362.

Act Feb. 24, 1816, provides that it shall not be lawful for any association not having a charter authorizing it to deal as a bank to commence or continue the discounting of any notes or bills, or the issuing of any notes or

circulation of "any bills" designed to be used as a substitute for banknotes,[53] or in the nature of banknotes,[54] has been rendered penal. Some statutes make it a misdemeanor and prescribe a fine in the nature of a penalty.[55] And the fact that such bills were redeemable in Confederate notes does not repel the intention manifested in issuing them that they should circulate as money.[56] In some cases the law makes penal the passing or procuring to be issued any note, etc., of less denomination than five dollars.[57] In other cases three-dollar bills are the smallest denomination permitted.[58]

other securities for the payment of money; and a violation thereof is declared to be a misdemeanor. By Act 1832, savings institutions are prohibited from issuing circulating notes. Held, that evidence that a savings institution had loaned money to borrowers, and that they had in turn deposited the money in the bank, accepting certificates of deposit payable on presentment, was sufficient to authorize the filing of an information against the officers and directors of the institution. Commonwealth *v.* Horner, 37 Va. (10 Leigh) 700.

53. Designed as substitute for banknotes.—A written promise to pay to a person named, or bearer, on demand, a specified sum "in Indiana, Illinois, or Ohio banknotes," is not within Rev. St. 1843, c. 71, § 3, making it penal to issue or put in circulation "any bills" designed to be used as a substitute for banknotes. State *v.* Watson, 4 Ind. 595.

Bill payable in banknotes.—Rev. St. 1843, c. 71, § 3, does not make it penal to issue or put in circulation as a circulating medium, or substitute for banknotes, bills containing a promise to pay a sum of money in banknotes. State *v.* Watson, 4 Ind. 595.

54. Paper in nature of banknotes.—A certificate that "there is due from the Hazelton Coal Company to A., or bearer, five dollars, value received, payable one year after date, at the office of the company, Philadelphia, with interest at six per cent per annum, being part of a loan authorized by an act of the legislature of Pennsylvania, of the 8th of March, 1839," signed by the president, and by B. for the treasurer, and printed on banknote paper, is within Act March 22, 1817, § 2, inflicting a penalty on the issue of promissory notes, tickets, or engagements of credit in the nature of banknotes. Hazelton Coal Co. *v.* Megargel, 4 Pa. 324.

55. Misdemeanor—Punishment.—The first section of the Act of 1816 provides that "every member, officer or agent, or any such company or association, that may so commence or continue such discounting issuing, etc., shall be held and taken to be guilty of a misdemeanor, and upon conviction thereof, on indictment, information or presentment, shall be liable to be fined at the discretion of a jury, in a sum not less than $100, nor more than $500; and if any such company or association, or any president, manager, cashier or other officer, or agent, etc., shall pay out, deliver, put in circulation, or issue, any note, draft, bill, etc., each member, officer, or agent thereof, shall be, in like manner, liable to the same penalty." Commonwealth *v.* Scott, 25 Va. (4 Rand.) 143.

56. Bills redeemable in Confederate notes.—Luckey *v.* State, 26 Tex. 362.

57. Note, etc., less than five dollars.—Stettinius *v.* United States, Fed. Cas. No. 13,387, 15 Cranch Cl. 573.

58. Notes less than three dollars.—The charter of the Bank of Fayetteville does not expressly authorize the bank to issue notes for circulation as money; but it confers banking powers in general terms, mentioning in one clause "bills or notes" issued by order of the corporation, and in another requiring the bank once in six months to furnish the public treasurer a statement of the "notes in circulation"—coinciding, in this respect, with other banks in the state. Act 1854, to go into effect January 1, 1856 (Rev. Code, c. 36), prohibits the issue of notes under three dollars by any bank, "unless plainly and expressly allowed by its charter," and makes it a misdemeanor to circulate such notes. Held, that the Bank of Fayetteville was within the statute of 1854, and hence a person was indictable for passing, since January 1, 1856, a dollar banknote issued by said bank. State *v.* Matthews, 48 N. C. 451.

What Constitutes Statutory Crime.—To constitute the statutory offense of making, emitting, or circulating change bills to be used as money it is immaterial what name was given to the paper, to what extent it was circulated, what considerations of convenience prompted it, or what benefit accrued from it to the accused or any one else.[59] Under such a law the criminal intent necessary to be proved, can not be avoided by showing that the act was done through indifference, thoughtlessness, or mechanical compliance with the orders of some other person.[60] Where the law makes it an indictable offense to issue, pass or receive small notes, checks, or duebills as a substitute for money from another, the intent that the note issue shall pass current as a substitute for money, or that it is in fact so issued and passed, is an essential ingredient of the offense.[61]

The Act of Congress of July 7, 1838, provides that it shall be unlawful to pass or procure to be issued within the District of Columbia any note, check, bank bill, or other paper medium below a certain denomination evidently intended for common circulation. The offense does not consist in circulating paper as currency, but in passing paper currency, that which is already currency, or evidently intended for common circulation.[62] Where the law is intended to prohibit the circulation of small notes, it is no justification, for passing such paper that it was passed in payment of a bona fide debt, nor that it was passed with intent that it should be carried out beyond the territorial jurisdiction of the law prohibiting it, nor that the defendant was agent of the railroad company.[63]

Bank Receiving Notes of Prohibited Issue.—A law making it a misdemeanor to "pass or receive" bank notes under the denomination of three dollars, does not apply to the bank itself. The statutes provide a punishment intended for the bank for making and issuing such notes.[64]

§ 201 (2) Issuing, Passing or Receiving as Creating Obligations.—As to the obligations created and the rights arising out of the issuing, passing and receiving illegal and unauthorized banknotes, bills, etc., see post, "Operation and Effect of Banknotes," § 202.

§ 201 (3) Testing Right to Issue.—Under the Texas statute, Act of 1848, "to suppress illegal banking," the state had power to test the right of a corporation to issue notes as a circulating medium by the proceedings therein provided, and it was not necessary to bring a direct proceeding by quo warranto.[65]

59. **Making or emitting bills as money.**—Norvell *v.* State, 50 Ala. 174.

60. **Criminal intent.**—Norvell *v.* State, 50 Ala. 174.

61. **Intent to pass paper as currency.**—State *v.* Humphreys, 19 N. C. 555.

62. **Passing or procuring issued bill, etc., less than five dollars.**—Stettinius *v.* United States, Fed. Cas. No. 13,387, 15 Cranch Cl. 573.

63. **Justification or defense.**—Stettinius *v.* United States, Fed. Cas. No. 13,387, 15 Cranch Cl. 573.

64. **Bank receiving prohibited notes.**—State *v.* Bank, 48 N. C. 450.

65. **Test of right to issue.**—Williams *v.* State, 23 Tex. 264.

§ 202. —— Operation and Effect of Banknotes—§ 202 (1) Rights of Holders.—Where holder of bills issued to pass as currency are charged with knowledge that their issuance was illegal and in excess of the authority of those issuing them, they are in pari delicto and can not recover the money paid either in an action on the bills or for money had and received.[66] Where no bank of issue can be established except a state bank, and free or private banks pursuant to the provisions of the general banking law, notes purporting to be banknotes issued by banks other than those above mentioned are illegal, and no action can be maintained on them.[67] One who has taken a time draft which has been issued in violation of a law which prohibits banks from issuing time drafts, and imposing a penalty only upon the party issuing them, may disaffirm the draft, and recover upon the original consideration.[68]

Recovery from Bank of Consideration Paid.—Though no action can be maintained on notes issued by banks other than state banks, and free or private banks pursuant to the general banking law, yet it seems that the consideration paid for such notes may be recovered back.[69]

Public Law as Notice.—Public state laws limiting powers of banks to issue notes is notice as well to persons out of the state as to those within it, and the holder of a note issued in violation of such law, being charged with notice, can not recover thereon.[70]

Right of Action against Drawer, etc.—Where the law prohibits the circulation of private notes, and provides that the holder of any bill or small note issued for the purpose of change or otherwise shall have the right to sue the drawer, issuer, or indorser thereof, it does not apply to municipal corporations; and therefore, where a city has illegally issued "city money," the holder thereof can not, under said acts, have a remedy against the city.[71]

As Evidence of Indebtedness.—Although a note given by a banking association is not such a one as could be lawfully issued for circulation as money, it will be prima facie evidence of an indebtedness lawfully incurred by the bank for some purpose incidental to its legitimate business.[72] A bank

66. **Holders in pari delicto.**—Thomas *v.* Richmond (U. S.), 12 Wall. 349, 20 L. Ed. 453.

Virginia Act 1854, prohibiting any association, company, or person other than a bank from issuing or receiving bills to be used as currency, and providing a penalty therefor, bills issued by the officials of the city of Richmond, to be used as currency on the breaking out of the Rebellion, were in violation of the statute, and void; and since holders of such bills are charged with knowledge that their issuance was illegal, and in excess of the powers of the city officials, they are in pari delicto, and therefore can not recover money paid therefor either in an action on the bills or for money had and received. Thomas *v.* Richmond (U. S.), 12 Wall. 349, 20 L. Ed. 453.

67. **Rights of holders.**—Brown *v.* Killian, 11 Ind. 449.

68. **Recovery upon original consideration.**—Buffalo City Bank *v.* Codd, 25 N. Y. 163.

69. **Recovery from bank of consideration paid.**—Brown *v.* Killian, 11 Ind. 449.

70. **Public law notice to persons out of state.**—Root *v.* Godard, Fed. Cas. No. 12,037, 3 McLean 102.

71. **Right of action against drawer, etc.**—Lindsey *v.* Rottaken, 32 Ark. 619.

72. **As evidence of indebtedness.**—Parmly *v.* Tenth Ward Bank (N. Y.), 3 Edw. Ch. 395.

or other private corporation issuing bills contrary to law, may be compelled to pay the holder in an action for money had and received, although the bills themselves were void, if the receiving of the bills were not expressly prohibited.[73] The fact that notes of a state bank in the South were issued after May 6, 1861, during the so-called insurrectionary period, did not in itself make them invalid, it not appearing that they were issued upon any unlawful consideration or for an unlawful purpose.[74]

73. Illegal issue of bills.—Thomas *v.* Richmond (U. S.), 12 Wall. 349, 20 L. Ed. 453.

"In cases of bills, or other obligations, illegally issued, by a banking or other private corporation, which has received the consideration therefor, it would enable them to commit a double wrong to hold that they might repudiate the illegal obligations, and also retain the proceeds. Hence, where the parties are not in pari delicto, actions are sustained to recover back the money or other consideration received, for such obligations, though the obligations themselves, being against law, can not be sued on. The corporation issuing the bills contrary to law, and against penal sanctions, is deemed more guilty than the members of the community who receive them, whenever the receiving of them is not expressly prohibited. The latter are regarded as the persons intended to be protected by the law, and if they have not themselves violated an express law in receiving the bills, the principles of justice require that they should be able to recover the money received by the bank for them. But if the parties are in pari delicto, as, if the consideration as well as the bills or other obligations is tainted with illegality or immorality, as it would be if loaned or advanced for the purpose of aiding in any illegal or immoral transaction, or if the receiving as well as passing or issuing the bills is forbidden by law, then the holder is without legal remedy, and the parties are left to themselves." Thomas *v.* Richmond (U. S.), 12 Wall. 349, 20 L. Ed. 453.

But if the receiving as well as issuing were prohibited, both parties would be in pari delicto, and no action could be sustained for the amount of the bills. Thomas *v.* Richmond (U. S.), 12 Wall. 349, 20 L. Ed. 453.

Counterfeit or raised notes.—Upon the doctrine of estoppel by conduct, substantially, rests the decision in Bank *v.* Bank (U. S.), 10 Wheat. 333, 6 L. Ed. 334, where the question was as to the right of the bank of Georgia to cancel a credit given to the Bank of the United States, in the general account the latter kept with the former, for the face value of certain banknotes purporting to be genuine notes of the Bank of Georgia, and which came to the hands of the other bank in the regular course of business and for value. The notes were received by the Bank of Georgia as genuine, but being discovered nineteen days thereafter to be counterfeits, they were tendered back to the Bank of the United States, which refused to receive them. This court held that the loss must fall upon the Bank of Georgia. Leather Mfg'rs. Nat. Bank *v.* Morgan, 117 U. S. 96, 26 L. Ed. 811, 6 S. Ct. 657.

"A bank which should refuse to receive its bills in payment of a note due from one of its customers, but should sue him on his note, and leave him to establish the genuineness of the bills by suit against the bank, would not be regarded with much favor in a business community. It is the duty of its cashier or receiving teller to judge of the genuineness of the bills offered, and to refuse them as spurious on his peril, or rather, on the peril of the bank itself." McGahey *v.* Virginia, 135 U. S. 662, 34 L. Ed. 304, 10 S. Ct. 972.

"It would excite surprise in any commercial community if a bank, whose bills purport on their face to be payable on demand, should declare that inasmuch as there were some forged notes upon it in circulation, therefore it would pay only such as the holder should judicially establish to be genuine. It has been decided that any unnecessary delay by a bank in examining its bills to determine their genuineness is equivalent to a refusal to redeem them. A bank resorting to such a flimsy pretext to evade payment would at once be pronounced insolvent, and be put into the hands of a receiver." Antoni *v.* Greenhow, 107 U. S. 769, 27 L. Ed. 468, 2 S. Ct. 91.

74. Validity of issue by southern

Notes, etc., Payable at Future Date.—Though the law prohibits banks from issuing bills with an agreement that they shall be kept free from circulation for a limited time, and provides that, in case a bank does so, it shall forfeit a certain amount, such an agreement does not vitiate the bills issued, the holders of which are entitled to payment out of the assets of the bank, which has become insolvent.[75] And where the law prohibits any bank from issuing any note, draft, or contract for the payment of money at any future day certain, and provides that on the failure to pay any draft other than in specie on demand, etc., a draft made by a bank within the state on a bank without the state is not void in the hands of an innocent holder.[76]

§ 202 (2) Right of Bank.—Right of Bank to Sue—Ohio Act of 1816.—Under the Ohio Banking Act of January 27, 1816, a bank engaged in violating the provisions of such act could not maintain an action against its debtors.[77]

Ohio Act of 1845.—The Act of March 8, 1845, authorized the trustee of an unauthorized banking company, whose notes, bills and contracts, negotiable and payable at such bank, were declared void, to prosecute suits against the debtors of such bank, and such act was constitutional.[78]

Passing Prohibited Bills as Defense.—If a corporation violate the act to prevent illegal banking by receiving and passing bank notes of certain denominations, this violation will take away the right of action in the par-

bank during "insurrectionary" period. Keith *v.* Clark, 97 U. S. 454, 24 L. Ed. 1071, reaffirmed in Clark *v.* Keith, 106 U. S. 464, 27 L. Ed. 302, 1 S. Ct. 568.

The state of Tennessee having, in 1838, organized the bank of Tennessee, agreed, by a clause in the charter, to receive all its issues of circulating notes in payment of taxes; but, by a constitutional amendment adopted in 1865, it declared the issues of the bank during the insurrectionary period void, and forbade their receipt for taxes. Held, that the amendment was in conflict with the provision of the constitution of the United States against impairing the obligation of contracts. Keith *v.* Clark, 97 U. S. 454, 24 L. Ed. 1071, reaffirmed in Clark *v.* Keith, 106 U. S. 464, 27 L. Ed. 302, 1 S. Ct. 568.

In this case there was no evidence in the record that the notes offered in payment of taxes by the plaintiff were issued in aid of the "rebellion," or on any consideration forbidden by the constitution or the laws of the United States; and no such presumption arose from anything of which the court could take judicial notice. Keith *v.* Clark, 97 U. S. 454, 24 L. Ed. 1071, reaffirmed in Clark *v.* Keith, 106 U. S. 464, 27 L. Ed. 302, 1 S. Ct. 568.

If the notes which were the foundation of this suit had been issued on a consideration which would make them void for any of the reasons mentioned, it is for the party asserting their invalidity to set up and prove the facts on which such a plea is founded. Keith *v.* Clark, 97 U. S. 454, 24 L. Ed. 1071, reaffirmed.

Furman *v.* Nichol (U. S.), 8 Wall. 44, 19 L. Ed. 370, however (which is the identical case before us, except that in the former case the notes were issued prior to May 6, 1861), the court, out of abundant caution, said, it did not consider or decide anything as to the effect of the Civil War on that contract, or as to notes issued subsequently to that date. Keith *v.* Clark, 97 U. S. 454, 24 L. Ed. 1071, reaffirmed.

75. Notes payable at future date.—Atlas Bank *v.* Nahant Bank (Mass.), 3 Metc. 581.

76. Draft on bank without state.—Faneuil Hall Bank *v.* Bank (Mass.), 16 Gray 534.

77. Right of bank to sue.—Johnson *v.* Bentley, 16 O. 97; Lewis *v.* McElvain, 16 O. 347. See Kearny *v.* Buttles, 1 O. St. 362. See post, "Capacity to Sue and Be Sued." § 213.

78. Ohio Act of 1845.—Lewis *v.* McElvain, 16 O. 347.

ticular case in which the violation is set up as a defense.[79]

"Suspended or Non Specie Paying Banknotes."—An act to prevent illegal banking, forbidding a corporation to pay or receive "any suspended or non specie paying banknote," and providing that any violation or evasion of the act may be pleaded in bar to any suit brought by such corporation, has no application to the receiving and paying out by a bank the bills of other banks of this state, although they have suspended specie payment.[80]

As Consideration for Contract, Notes, etc.—Where the law makes penal the receiving as a deposit, or in any other way negotiating, loaning, or passing in payment, by any banking corporation, of the bank bills or notes of any banking company not incorporated by the legislature of the state, except the bills of the United States Bank, it renders void any note made payable to a bank in such prohibited bills; and the subsequent repeal of the statute does not purge the illegality of the contract.[81] The notes issued by a bank organized under an unconstitutional law will be void, and will constitute no consideration for a promissory note.[82] Where a private bank is forbidden to issue bills it is a good defense to an action of debt on a note that the plaintiffs are an unchartered banking company, issuing and circulating their own paper notes as currency, and that they, as a banking company, discounted said note, contrary to law and public policy, and that the consideration for the note was bank paper so unlawfully issued.[83] Although a bank

79. **Receiving and passing prohibited bills.**—Christian University *v.* Jordan, 29 Mo. 68.

Act 1845 prohibits the issuing and receiving of bank bills of a less denomination than $10, and provides that a violation of the act may be pleaded in bar to any action brought by the corporation so violating it. Act 1855 is a mere revision of the Act of 1845, extending the prohibition to notes of a less denomination than $5. Held that, where a corporation organized between 1845 and 1855 has passed bills of a less denomination than $5, the violation may be pleaded in bar under either act. North Missouri R. Co. *v.* Winkler, 33 Mo. 354.

80. **Suspended or non specie paying banknotes.**—Farmers' Bank *v.* Garten, 34 Mo. 119.

81. **Law prohibiting receiving, etc., of such notes.**—Springfield Bank *v.* Merrick, 14 Mass. 322.

82. **Consideration for note—Law unconstitutional.**—Skinner *v.* Deming, 2 Ind. 558, 54 Am. Dec. 463.

83. **Private unchartered bank issuing bills.**—Hamtramck *v.* Selden, etc., Co., 53 Va. (12 Gratt.) 28.

Act Feb. 24, 1816, respecting unchartered banks, and imposing additional penalties and prohibitions with a view to forcing them out of existence, did not repeal Act 1805, forbidding a private bank to issue bills; and, though Act Feb. 24th was suspended by Acts Nov., 1816, yet Act 1805 remained in force; and no action can be maintained by an unchartered bank on a bond given for banknotes issued by such bank. Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491.

Where an action of debt was brought upon a single bill, and the defendant pleaded two pleas, stating in substance that such bill was given to the president of an unchartered bank, established contrary to the provisions of the statutes in such case made and provided, and that it was given in consideration of bank notes, emitted by such unchartered bank in violation of those statutes, it was held that a judgment for the plaintiff of the lower court on a demurrer to these pleas is erroneous, and will be reversed on appeal. Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491.

Might exist as bank of deposit or discount.—Under the Act of 1805 an unchartered bank might legally exist as a bank of deposit, and even of dis-

has no right to issue notes purporting that the faith of the state is pledged for the redemption of the same, it is not such a violation of the charter as will avoid a note given for a discount of such paper, as the party receiving the same must know that the bank has no right to make such contract.[84] And the fact that the consideration of a note given to the bank of the commonwealth was the loan of their notes issued as bills of credit in violation of the federal constitution is no defense to a suit by the bank on such note.[85]

Right to Enjoin Suit.—The person who merely takes the note of an unchartered bank in payment may not be as culpable as the institution which issues them. Such person is not therefore precluded by the doctrine of in pari delicto from appealing to a court of equity for an injunction against an action on a bond given to secure the repayment of notes issued by an unchartered bank and loaned by the officers of such bank to the party who executed such bond.[86]

§ 202 (3) Notes Issued without Authority of Bank.—Where the circulating notes of a bank have come into the hands of a bona fide holder, the bank is liable therefor, and it is immaterial how they came into circulation, or that they were issued through the fraudulent acts of the bank's agents.[87]

count, if it did not issue its bills or notes, or bills or notes of an unchartered banking company, and even a company formed with intent to issue such bills or notes would not be wholly outlawed. Kee *v.* Kee, 43 Va. (2 Gratt.) 127, distinguishing Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491, in the following language: "The case of Spencer *v.* Wilson, shows that the defense and the adjudication of its sufficiency, rested on the distinct averment and the admission or proof that the consideration of the security sued on, was the notes of an unchartered banking company. In this case there is no distinct allegation that the consideration of the specialties was the notes or bills of the unchartered company."

84. **Notes purporting to pledge faith of state.**—Campbell *v.* Mississippi Union Bank (Miss.), 6 How. 625.

85. **Notes issued as bills of credit.**—Lampton *v.* Commonwealth's Bank (Ky.), 2 Litt. 300.

86. **Right to enjoin suit—In pari delicto rule.**—Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491.

In such case the doctrine of in pari delicto will not preclude the plaintiff from appealing to a court of equity. Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491.

Injunction against suit on bond for unauthorized notes.—A court of equity as well as a court of law will interfere to prohibit the effect of contracts made in violation of laws enacted for the public good; and therefore an injunction will lie against a suit on a bond given for the notes of an unchartered bank, such notes being unlawful under the provisions of the Act of 1805 (2 Rev. Code, p. 111, § 2). Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491.

The case of McGuire *v.* Ashby, was a suit in chancery. Ashby and Stribling, merchants, being creditors of one Murray, took a deed of trust from the latter, on a tract of land, to secure themselves. Previous to this deed, Murray had conveyed to Powell as trustee for McGuire, the same land which was included in the deed to Ashby and Stribling. The land was advertised for sale under the deed to Powell. Ashby and Stribling applied to the chancellor of the Winchester district, for an injunction to stop the sale under the deed of trust to Powell, alleging that McGuire was not the real creditor in the deed from Murray to Powell, but that it was in fact for the benefit of the unchartered bank in Winchester. The chancellor awarded an injunction which decree was affirmed by the supreme court. Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491.

87. **Notes issued without authority of bank.**—White *v.* How, Fed. Cas. No. 17,549, 3 McLean 291.

§ 203. —— Penalties and Actions Therefor.—A great many statutes prescribe penalties for passing, offering or receiving banknotes, bills, bonds, etc., which violate the law regulating circulating currency.[88] And such fines and forfeitures have been held enforceable in an action of debt.[89]

§ 204. Criminal Prosecutions—§ 204 (1) Indictment.—Where the law provides that after a certain date it shall be unlawful to pass any note, check, draft, or any other paper currency, the indictment must allege that the note passed or offered to be passed was paper currency.[90] And the term "bank bill," as used in the act, does not, of itself, purport to be paper currency, without a special averment to that effect.[91]

Designation of Instruments.—Although the indictment improperly designates the instruments as "bills," it is immaterial error if the instruments are copied in the indictment.[91a]

Character and Capacity of Defendant.—An indictment under a statute alleging that defendants, being members or partners of a private company or corporation, emitted, without authority of law, a certain paper to answer the purposes of money, or for general circulation, is not bad, on demurrer, in not setting forth with sufficient certainty whether the defendants are charged as individuals or as a private corporation.[92] And an indictment for emitting bills to circulate as money is not bad, on demurrer,

88. **Penalty for paying or receiving unauthorized notes.**—The Act of January 27, 1816, relating to unauthorized circulation, prohibited persons from offering or receiving in payment any bond, bill or note of any bank violating the provisions of such act, with knowledge of such violation, under the penalty of three times the amount of such bond, bill or note so received or offered in payment; and also prohibited persons from receiving and actually passing or circulating any bond, bill or note, a contract of such a bank, by delivery, without indorsing the same, with knowledge of the unauthorized character of such bank, under the penalty of four times the amount of such bond, bill or note. Such fines and forfeitures were enforceable in an action of debt. Steedman v. State, 11 O. 82. See, also, Act Feb. 16, 1838.

Penalty for violation of statute by individuals.—Section 2, of the statute of the 7th of April, 1846, prohibiting individuals from issuing paper to circulate as money, provides, "That every person, who may violate this act, shall be subject to indictment therefor, by a grand jury, as for a misdemeanor, at any time within twelve calendar months after so offending; and shall be subject to a fine of not less than ten dollars nor more than fifty dollars, for each and every bill, promissory note, check or other paper by them issued, in violation of the first section of this act." Mills v. State, 23 Tex. 295.

89. **Enforceable in action of debt.**—Steedman v. State, 11 O. 82.

90. **Allegation as to paper passed.**—Stettinius v. United States, Fed. Cas. No. 13,387, 15 Cranch Cl. 573.

91. **Term "bank bill" alone insufficient.**—Stettinius v. United States, Fed. Cas. No. 13,387, 15 Cranch Cl. 573.

91a. **Improper designation of bills in indictment.**—Where an indictment charged that the defendant without authority of law did issue certain bills intended to circulate as money and set out copies thereof, from which it appeared that the bills were drawn for one dollar in currency, made payable to bearer when $20 was presented and accepted by the drawee, the instruments were properly termed bills, and if improperly designated as they were copied in the indictment, it was an immaterial error. Luckey v. State, 26 Tex. 362.

92. **Character as individuals or as a private corporation.**—Barnett v. State, 54 Ala. 579.

because it charges the defendants disjunctively as members of a corporation or of an association or partnership.[93]

Character as Officer of Bank.—In a prosecution under an act prohibiting the issuance and circulation of unauthorized bank paper, the indictment is sufficient if it charges in general terms that the defendant acted as an officer of a bank not incorporated by law.[94]

Intent.—Where the intent that the note, etc., should serve as a substitute for money, is necessary it must be averred.[95]

§ 204 (2) Evidence.—Every essential element in the offense of violating the law with reference to issuing and passing paper bills, etc., designed to substitute money must be proved.[96] Thus circulation of the notes by accused must be proved.[97]

Purpose of Emission.—Where the defendant is being prosecuted for emitting change bills to circulate as money, it is proper to refuse to permit a witness to state the purpose for which the paper was emitted, it being the province of the jury to determine from the evidence whether it was issued for general circulation or for the purposes of money.[98] But evidence that the paper emitted was circulated and used as money, it being given and accepted in exchange for merchandise or for marketable articles, is admissible as tending to show its adaptation to circulate and use as money.[99] And the fact that such bills were not regarded by the community as of equal value with gold and silver as a circulating medium tend to show that the party issuing them did not violate the law.[1]

Admission of Bills or Notes in Evidence.—Individual notes, intended to pass as currency or money, are not competent evidence against the person issuing them, on an indictment for acting as the officer of a bank wrongfully issuing circulating notes, without proving that there was a company or association of individuals formed for the purpose of putting in circulation such notes.[2] Where in an indictment for issuing without authority of law certain bills, the bills were alleged to have been engraved when in fact they were printed, it was not error to admit the bills in evidence, since the allega-

93. **Charging defendants disjunctively.**—Barnett *v.* State, 54 Ala. 579.

94. **Character as officer of bank.**—Bonsal *v.* State, 11 O. 72.

95. **Intent—Averment of essentials.**—State *v.* Humphreys, 19 N. C. 555.

96. **Proof—Every essential element.**—State *v.* Humphreys, 19 N. C. 555.

97. **Circulation.**—In a prosecution under the statute prohibiting the circulation of private banknotes, it appeared that accused was secretary or cashier of a private banking establishment, and resided in another state; that he signed the notes of the bank as cashier; that the president, whose signature was also attached, resided in the state; that certain of the banknotes had circulated in the state, and had been redeemed by the president; that accused had been in the state but once when he made inquiries as to his liability on the notes. Held, that there was no evidence of a circulation of the notes by accused. Downing *v.* State, 4 Mo. 572.

98. **Purpose of emission.**—Barnett *v.* State, 54 Ala. 579.

99. **Evidence of circulation and use as money.**—Barnett *v.* State, 54 Ala. 579.

1. **Bills not of equal value with gold.**—Luckey *v.* State, 26 Tex. 362.

2. **Admission of notes—Individual notes.**—Steedman *v.* State, 11 O. 82.

tion that they were engraved was unimportant, and might be stricken out as surplusage.[3]

Weight and Sufficiency.—Where it is shown that the bills were issued and were used, with the knowledge of the party issuing them, by the community as a circulating medium in place of money, such facts would authorize a verdict against the accused.[4] Possession by plaintiff, coupled with proof of the signatures made by the officers of the company, is not sufficient evidence of the making and issuing within the act.[5]

Countersigning Unauthorized Paper.—On a prosecution "for countersigning a paper," etc., "issued without authority of law for purposes of money, or for general circulation," to charge that the defendant can not be convicted "unless there is proof by an eyewitness to the signature, or proof that defendant admits the signature to be his, or that the signature is in his handwriting," is erroneous.[6]

Necessity for Production of Note.—An indictment, framed under an act to prevent illegal banking, charging defendant with making or putting in circulation a note, etc., purporting that money will be paid to the receiver or holder thereof, or that it will be received in payment of debts, can only be sustained by the production and giving in evidence of a note, etc., which, upon its own face, declares that money will be paid to the receiver or holder thereof, or that it will be received in payment of debts.[7]

§ 204 (3) Variance.—On a prosecution for emitting change bills to circulate as money, the difference between the word "cents," as written in the paper offered in evidence, and its abbreviation "cts.," as written in the indictment, is not a material variance.[8] An indictment describing a note as purporting to be payable to holder is not sustained by a note purporting to be payable to bearer.[9]

§ 205. Taxation.—As to taxation of circulating notes of banks and bills, notes or other paper designed to circulate as money, see post, "Taxation," XIX.

§ 206. Penalties for Failure to Keep Notes at Par.—The meaning of the word "par," is "ordinarily equal to gold and silver for financial and

3. **Bills alleged engraved—Printed bills admissible.**—Luckey *v.* State, 26 Tex. 362.

4. **Facts authorizing verdict.**—Luckey *v.* State, 26 Tex. 362.

5. **Possession coupled with proof of signatures.**—Hazelton Coal Co. *v.* Megargel, 4 Pa. 324.

6. **Countersigning unauthorized paper.**—Jordan *v.* State, 52 Ala. 188.

7. **Production and giving in evidence note.**—State *v.* Page, 19 Mo. 213.

8. **Variance—Immaterial.**—Barnett *v.* State, 54 Ala. 579.

9. **Note alleged payable to holder.**—Under the statute (Dig. 1835, p. 96) declaring that no person unauthorized by law shall intentionally create or put in circulation as a circulating medium a note, bill, or ticket purporting that any money will be paid to the receiver or holder thereof, an indictment describing a note as purporting to be payable to the holder is not sustained by a note purporting to be payable to bearer. Downing *v.* State, 4 Mo. 572.

commercial purposes."[10] A statutory forfeiture of a certain percentage on its circulation, imposed on a bank for failure to keep its notes at par, is a penalty, and not a tax.[11] Hence such bank can not set off the bonus paid for its charter against the two-mill forfeiture claimed by the commonwealth for the violation of the law requiring banks to keep their notes at par.[12] It is held that the Pennsylvania Act of April 16, 1850, § 47, requiring the banks to keep their notes at par in Philadelphia and Pittsburg, applies to all the banks of the commonwealth, and not to those merely that should be thereafter chartered or renewed.[13]

Limitation of Actions.—An act of limitations providing that actions by the state under any penal act of the assembly shall be instituted in two years, applies to an action against a bank, under an act requiring certain banks, on a specified penalty, to keep their notes at par; and the bank is not deprived of the limitation by failure to give notice that its notes were not kept at par.[14]

§ 207. Payment or Redemption—§ 208. —— In General—§ 208 (1) Obligation of Bank in General.—It may be stated as a general rule that the holder of a bank bill is entitled to be paid in specie upon demand made at the bank during its usual business hours.[15] A bank is liable to be sued by the holder of a banknote for its full amount, or for the balance due after the securities deposited with the state shall have been exhausted; the proceeding by the state auditor with reference to the securities not being exclusive of all private remedies.[16]

Liability on Notes of Other Banks.—Where the law provides that banks shall not issue or pay out notes not made payable at their counter, a bank paying out the note of another bank does not assume payment merely because the note is payable at its own counter.[17]

Effect of Nationalization of State Bank.—The nationalization of a state bank does not affect the liability of the old or the new bank to pay the bills of the state bank.[18]

10. **Meaning of word "par."**—Harrisburg Bank *v.* Commonwealth, 26 Pa. 451.

11. **Penalty and not tax.**—Harrisburg Bank *v.* Commonwealth, 26 Pa. 451.

12. **Right to set off bonus paid for charter.**—Bank *v.* Commonwealth (Pa.), 2 Grant. Cas. 384.

13. **Effect of act prescribing penalty.**—Bank *v.* Commonwealth (Pa.), 2 Grant. Cas. 384.

14. **Limitation of action for penalty.**—Harrisburg Bank *v.* Commonwealth, 26 Pa. 451.

15. **Obligation of bank in general.**—Suffolk Bank *v.* Lincoln Bank, Fed. Cas. No. 13,590, 2 Mason 1.

Notes issued by a bank are payable on demand on the last day of grace after the known and usual hour of opening of the bank for business. Staples *v.* Franklin Bank (Mass.), 1 Metc. 43, 35 Am. Dec. 345.

16. **Right to sue—Exhaustion of securities deposited with state.**—Conwell *v.* Hill, 14 Ind. 131

17. **Notes of other bank—Payable at bank's counter.**—Bank *v.* Bank, 56 Tenn. (9 Heisk.) 408.

18. **Nationalization does not affect liability.**—The change or conversion of a state bank into a national bank did not "close its business of banking" nor destroy its identity or its corporate existence, but simply resulted in a continuation of the same body with the same officers and stockholders, the same property, assets, and banking business under a changed jurisdiction; it remained one and the same bank, and went on doing busi-

Breach of Contract by Original Holder.—A plea that the original holder of certain banknotes has not complied with certain stipulations of the contract whereby he got the notes—stipulations to be performed after he acquired the title to the notes and upon which the title in no degree depends—will not bar an action against the bank by a subsequent holder taking title by delivery.[19]

§ 208 (2) Presentation and Demand.—As a general rule banks are under no obligation to seek out their creditors; they are bound to pay only on a demand for payment made at their offices of discount and deposit.[20] And where banknotes are, by the statute incorporating the bank, placed upon the same footing as foreign bills of exchange, with the same remedies for their collection and for fixing the liability of the parties thereto, presentation and demand for payment with protest for nonpayment are essential to charge the bank on its own notes, and a suit thereon against it can not be maintained without these prerequisites.[21]

Place of Demand.—When, for any purpose, demand of payment of banknotes is necessary, the demand must be made at the place where the notes are, upon their face, made payable.[22] Where banknotes are made payable, some at the principal banking house, and some at a branch banking house, it will be sufficient to present them for payment at the respective places specified, and if those places be closed, or no one can be found there, or the notary is answered that none of the several bills or notes would be paid, the protest may be made for nonpayment without further demand or inquiry.[23] But the rule is otherwise where bills at large have no place of

ness uninterruptedly; and, therefore, the statutory proceedings relied upon in the answer could not operate as a bar to the liability of either bank to pay the bills of the state bank. Metropolitan Nat. Bank *v.* Claggett, 141 U. S. 520, 35 L. Ed. 841, 12 S. Ct. 60.

The New York statute providing for a redemption of circulating notes of a state bank and for releasing the bank, if the notes were not presented in six years, applies alone to banks "closing the business of banking;" and not to state banks converted into national banks and continuing as such. Metropolitan Nat. Bank *v.* Claggett, 141 U. S. 520, 35 L. Ed. 841, 12 S. Ct. 60. See post, "Reorganization of State Banks as National Banks," § 237.

19. Breach of contract by original holder.—A bank, on the security of the assignment of $90,000 of its stock, loaned $60,000, in its notes, to A and B, who agreed so to dispose of them as to prevent their return to the bank for redemption, and provide funds to redeem in case any were presented for redemption, etc. Held, that the averment that the notes so received by A and B were fraudulently delivered to the plaintiffs for the purpose of being put in suit against the bank, in their name, but for the benefit of A and B, did not constitute a bar to a recovery on the notes; that, as notes of the bank, they were loaned to B as so much cash; that the delivery was absolute and the title complete, and carried with it a present legal right of action against the bank. New Hope Delaware Bridge Co. *v.* Perry, 11 Ill. 467, 52 Am. Dec. 443.

20. General rule.—Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186; Bank *v.* Ward, 20 Va. (6 Munf.) 166.

21. Bank notes placed on footing of foreign bills of exchange.—Ocoee Bank *v.* Hughes, 42 Tenn. (2 Coldw.) 52.

22. Place of demand.—Ware *v.* Street & Co., 39 Tenn. (2 Head) 609; Union Bank *v.* Warren, 36 Tenn. (4 Sneed) 167.

23. Place specified.—Ocoee Bank *v.* Hughes, 42 Tenn. (2 Coldw.) 52; Nashville Bank *v.* Henderson, 13 Tenn. (5 Yerg.) 104, 26 Am. Dec. 257; Bank *v.* Bank, 56 Tenn. (9 Heisk.) 408.

payment specified on their face.[24]

Circulating notes of a bank, made payable at its branches, may be presented for payment at the principal bank, so as to sustain an action; especially if the branches at which they were made payable have been discontinued by the parent bank.[25] Where one bank can pay out the notes of another, if made payable at its counter, the holder can demand the specie at the bank so paying them; but if payment is refused, it is the fault of the bank making the note.[26]

Sufficiency of Demand.—Each bank bill need not be presented separately; a demand for payment of a whole package is sufficient.[27]

§ 208 (3) Payment of Lost or Destroyed Notes.—The owner of banknotes which have been destroyed may recover the amount from the bank which issued them, on proof of their destruction,[28] by indemnifying the bank for any liability on the lost note.[29] The owner must give proper no-

24. No place specified.—Ocoee Bank *v.* Hughes, 42 Tenn. (2 Coldw.) 52; Nashville Bank *v.* Henderson, 13 Tenn. (5 Yerg.) 104, 26 Am. Dec. 257; Bank *v.* Bank, 56 Tenn. (9 Heisk.) 408.

25. Notes payable at branch bank.—Nashville Bank *v.* Henderson, 13 Tenn. (5 Yerg.) 104, 26 Am. Dec. 257.

26. Notes of other bank—Place of payment.—Bank *v.* Bank, 56 Tenn. (9 Heisk.) 408.

"Under the Code, §§ 1814, 1817, banks were forbidden to pay out the notes of other banks. This was modified by the Act of the 6th of February, 1860, which in substance provides that banks shall not issue or pay out notes not made payable at their counter. And this was probably the reason these notes were made payable at the Bank of Memphis, in order to enable that bank to pay them out. The object of the Act of the 6th of February, 1860, was probably to enable one bank to pay out the notes of another, provided they are made payable at the counter of the bank paying them out. This was intended to give the holders the right to demand the specie at the bank where they were paid out without the inconvenience of following up the original bank issuing the notes. If payment was refused, it would be the default of the bank making the note. Aside from the provision of the statute above referred to, there is nothing inconsistent in a bank issuing its notes upon its face payable at the counter of another bank, as well as at its own counter. And the provisions of the act referred to do not make the bank paying out the note of another assume its payment, because the note is payable at its own counter. In fact, this would be inconsistent with the powers of the corporation and the right of other creditors." Bank *v.* Bank, 56 Tenn. (9 Heisk.) 408.

The Bank of Memphis was not liable for the notes of the Bank of Chattanooga, made payable at its counter, which it paid out. They were in no sense its own notes; nor, under the charter and laws by which it was created, could it assume to pay them. The holders of these notes are presumed to have notice of all that appears on their face, and in the charters and laws under which the banks were organized. Bank *v.* Bank, 56 Tenn. (9 Heisk.) 408.

27. Sufficiency of demand—Separate demand.—Reapers' Bank *v.* Willard, 24 Ill. 439.

28. Lost or destroyed notes.—Robinson *v.* Bank, 18 Ga. 65; Bank *v.* Summers (Ky.), 14 B. Mon. 306; Wade *v.* New Orleans Canal, etc., Co. (La.), 8 Rob. 140, 41 Am. Dec. 296; Burridge *v.* Geauga Bank (O.), Wright 688; Hagerstown Bank *v.* Adams Exp. Co., 45 Pa. 419, 84 Am. Dec. 499; Little *v.* Consolidated Ass'n, 2 Va. Ann. 1112. See post, "Enforcing Payment of Lost or Destroyed Notes," § 212 (3).

29. Indemnifying bank.—In Georgia, banknotes may be shown to be lost, and the amount recovered of the bank, on the claimant's indemnifying the bank for any liability on the lost note. Waters *v.* Bank (Ga.). R. M. Charlt. 193.

A party who proves the loss of a banknote is entitled to require of the

tice and demand.[30] Where a banknote payable on demand at a particular place has been lost or destroyed, equity will furnish no remedy to the owner till a demand has been made for payment at the place designated.[31]

Waiver of Proof of Description.—Where an owner of bank bills notified a bank that they had been destroyed, and identified them as to amount and genuineness, but furnished no proof of their description, the bank making no objection to the want of proof, the notice and demand were sufficient to entitle the owner to recover the amount.[32]

Necessity of Affidavit of Loss.—A recovery may be had upon the common counts in assumpsit, against a bank, for the value of notes of the bank, proved to have been destroyed, without an affidavit of loss previous to the institution of the suit.[33]

Subrogation of Party Paying for Lost Notes.—Where notes issued by a bank are sent to it, through an express company, and, while in transit, a part is stolen by an agent, who destroys them after the amount has been paid to the bank by the company, the property in the notes is transferred by that payment to the company, who, on proving the destruction, are entitled to recover the amount from the bank.[34]

§ 208 (4) Payment of Stolen Bills.—The fact that a banknote has been stolen from the rightful owner constitutes no defense to an action on the note by a bona fide holder who has taken it in the ordinary course of business under circumstances which would not have excited the suspicion of a person of ordinary care and prudence in business that it had been lost or stolen.[35] If he obtained it in good faith, gross negligence in not ascertaining that it was fraudulently put in circulation will not defeat his recovery.[36] Good faith and not great vigilance is required.[37] A newspaper

bank payment of the same, provided suitable indemnity be tendered. Robinson *v.* Bank, 18 Ga. 65.

30. **Notice and demand.**—Bank bills having been destroyed, the owner, on giving proper notice and demand, may recover the amount thereof from the bank. Ross *v.* Bank (Vt.), 1 Aikens 43, 15 Am. Dec. 664.

31. **Where banknote is lost.**—Streater *v.* Cape Fear Bank, 55 N. C. 31.

32. **Proof of description waived.**—Ross *v.* Bank (Vt.), 1 Aikens 43, 15 Am. Dec. 664. See post, "Evidence," § 212 (11).

33. **Necessity for affidavit of loss.**—Bank *v.* Williams, 13 Ala. 544.

34. **Right of express company to pay for lost notes.**—Hagerstown Bank *v.* Adams Exp. Co., 45 Pa. 419, 84 Am. Dec. 499.

35. **Stolen bills.**—City Bank *v.* Farmers', etc., Bank, Fed. Cas. No. 2,738, Taney 119.

Any holder receiving in good faith, in the regular course of business and for valuable consideration, bank bills which have been stolen from the bank, can recover upon them against the bank. Olmstead *v.* Winsted Bank, 32 Conn. 278, 85 Am. Dec. 260.

Banknotes although fraudulently put into circulation, or even stolen, become the property of him who gives valuable consideration for them, having no knowledge of the fraud or robbery. Robinson *v.* Bank, 18 Ga. 65. But see Sylvester *v.* Girard (Pa.), 3 Clark 440.

36. **Gross negligence.**—A party receiving a bank bill in good faith may recover upon it as against the bank issuing it, although he was guilty of gross negligence in not ascertaining that the bill was fraudulently put in circulation. Worcester County Bank *v.* Dorchester, etc., Bank (Mass.), 10 Cush. 488, 57 Am. Dec. 120.

37. **Good faith, not great vigilance necessary.**—Worcester County Bank *v.* Dorchester, etc., Bank (Mass.), 10 Cush. 488, 57 Am. Dec. 120.

account read by him that the bank had been robbed is not notice which he is bound to regard.[38] An action upon bank bills which had been stolen from the bank can not be defeated by proof that the bills were protested before the plaintiff purchased them, and that he obtained them at a discount.[39] The holder need not prove how he came in possession of the bill.[40] The burden of proof is upon the defendant to show that the holder took it under such circumstances that he has no claim upon it.[41]

§ 208 (5) Payment of Mutilated Notes—§ 208 (5a) In General.—The mutilation of a bank bill by time or accident does not affect the holder's right to recover if the particular bill is shown to be genuine, and to have been actually issued by the bank, and enough thereof remains to identify the bill.[42] Where the lower part of a banknote is torn, or worn out, so that the signatures of the president and cashier are wanting, plaintiff may recover, on proving that the part left is genuine.[43]

Bank Bills Cut or Torn in Two.—Where a bank bill is cut or torn in two, and half of it is presented to the bank issuing it, the holder is entitled to the whole amount of the entire bill.[44] Where the owner of a banknote has one-half in his possession, the other half being lost in transmission, he is entitled to recover the full amount of the note from the bank,[45]

38. Newspaper account as notice.—Worcester County Bank *v.* Dorchester, etc., Bank (Mass.), 10 Cush. 488, 57 Am. Dec. 120.

39. Defense of prior protest—Purchase at discount.—Olmstead *v.* Winsted Bank, 32 Conn. 278, 85 Am. Dec. 260.

40. Proof of manner of obtaining possession.—A holder of a bank bill which was stolen need not prove how he came into possession of it in order to recover against the bank. Worcester County Bank *v.* Dorchester, etc., Bank (Mass.), 10 Cush. 488, 57 Am. Dec. 120; Wyer *v.* Dorchester, etc., Bank (Mass.), 11 Cush. 51, 59 Am. Dec. 137.

41. Burden on defendant.—Wyer *v.* Dorchester, etc., Bank (Mass.), 11 Cush. 51, 59 Am. Dec. 137.

42. Mutilation by time or accident.—Note Holders *v.* Funding Board, 84 Tenn. (16 Lea) 46.

The owner of a bank bill accidentally tore it into two nearly equal parts, one of which, containing no words giving it a negotiable character, was lost. The bank, on demand being made upon it for the amount of the mutilated bill, refused payment until indemnified by the owner against the loss which would ensue to it from the refusal of the bank department to issue a new bill, or to retransfer so much of its security as was pledged for the redemption of its circulation. Held, that the bank was liable for the amount of the note. Martin *v.* Blydenburgh (N. Y.), 1 Daly 314.

43. Part worn away.—Miner *v.* Bank (La.), 1 Mart.. O. S., 12.

44. Bill cut or torn in two.—Armat *v.* Union Bank, Fed. Cas. No. 535, 2 Cranch C. C. 180; Patton *v.* State Bank (S. C.), 2 Nott & McC. 464, following Armat *v.* Union Bank (S. C.), 2 Nott & McC. 471; Little *v.* Consolidated, Ass'n, 2 La. Ann. 1012.

Where a banknote is cut in two, and one-half, sent by mail, is lost, the owner is entitled to payment by the bank on presentation of the other half, proving ownership, and giving adequate security to the bank against the lost half. Allen *v.* State Bank, 21 N. C. 3; Bank *v.* Ward, 20 Va. (6 Munf.) 166; Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186.

45. Notes cut for transmission.—Armat *v.* Union Bank, Fed. Cas. No. 535, 2 Cranch, C. C. 180; State Bank *v.* Aersten (Ill.), 3 Scam. 135, 36 Am. Dec. 536; Patton *v.* State Bank (S. C.), 2 Nott & McC. 464, following Armat *v.* Union Bank (S. C.), 2 Nott & McC. 471, note.

Where a banknote was divided into two parts by the plaintiff's agent, and the parts were sent by different mails, and one-half only arrived, the plaintiff was held entitled to recover of the

on making demand for payment,[46] and proving the loss of the other part,[47] or accounting for the mutilation of the parts presented,[48] where he gives security to indemnify the bank against the claim of any other person holding the lost parts.[49] Thus it has been held that he can not demand payment from the bank of any part of its amount in consequence of holding the retained half merely; but he is entitled to demand the whole amount of the said note, on satisfying the bank of the above facts, or establishing them by the judgment of a court of equity, and giving, in either case, security to the bank against future loss from the appearance and setting up of the other half of such note.[50]

Evidence of Identity and Ownership.—Where a banknote is cut in two, and one-half sent by mail and lost, before the holder of the remaining half can recover, upon demand of payment at the bank, he must produce such evidence of the ownership of the note as will satisfy the bank; in other

bank the whole amount of the bill. Hinsdale *v.* Bank (N. Y.), 6 Wend. 378.

Plaintiff's correspondent, for the purpose of safety in remitting to him certain banknotes of the defendant, cut them in halves, and sent to plaintiff one set of the half parts in one letter, and the remaining halves in another. Those sent in the first letter were received, but the second letter was lost. Held that, since plaintiff was a bona fide holder of the halves which he produced, he was entitled to recover. Bullet *v.* Bank, Fed. Cas. No. 2,125, 2 Wash. C. C. 172.

"It is well settled, by several American cases, that where a banknote has been cut for the purpose of transmission by mail, and one of the parts is lost or stolen, the holder of the other part, upon satisfactory proof of the loss, may recover at law, and upon the ground that the halves of a bill or note are not separately negotiable. Hinsdale *v.* Bank (N. Y.), 6 Wend. 378; Bullet *v.* Bank, Fed. Cas. No. 2,125, 2 Wash. C. C. 172; Patton *v.* State Bank (S. C.), 2 Nott & McC. 464." Union Bank *v.* Warren, 36 Tenn. (4 Sneed.) 167.

46. Demand necessary.—And where a banknote is cut in two, and one-half sent by mail and lost, in the case of the presentation of the moiety of the note, a demand for payment must be made at the bank. Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186; Bank *v.* Ward, 20 Va. (6 Munf.) 166.

47. Proving loss of other parts.—Bullett *v.* Bank, Fed. Cas. No. 2,125, 2 Wash. C. C. 172; Bank *v.* Ward, 20 Va. (6 Munf.) 166.

48. Accounting for mutilation.—Bullet *v.* Bank, Fed. Cas. No. 2,125, 2 Wash. C. C. 172.

49. Indemnifying bank.—Where the owner of a banknote loses one-half of it, he may recover the amount of the whole note, in an action against the bank which issued it, where he offers security to indemnify the bank against the claim of any other person upon the lost half. Armat *v.* Union Bank, Fed. Cas. No. 535, 2 Cranch C. C. 180. See Bank *v.* Ward, 20 Va. (6 Munf.) 166; Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186.

A bank will be responsible for the amount of a note issued by it, on proof of its loss and contents. So, on production of half of a note, where the absence of the other half is fairly accounted for, the bank will be bound to pay the full amount for which it was issued, on being secured against liability for the other half. Little *v.* Consolidated Ass'n, 2 La. Ann. 1012.

On the production of the half of a note, where the absence of the other half is accounted for, the bank will be bound to pay the full amount for which it was issued, on being secured against liability for the other half. Murdock *v.* Union Bank (La.), 2 Rob. 112, 38 Am. Dec. 197.

50. Recovery of whole amount—Establishment of right and gives indemnity.—Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186; Moses *v.* Trice, 62 Va. (21 Gratt.) 556, 8 Am. Rep. 609; Exchange Bank *v.* Morrall, 16 W. Va. 546; Bank *v.* Ward, 20 Va. (6 Munf.) 166.

words, the half notes on which the bill is founded must be specifically and satisfactorily identified as the counterparts of the halves transmitted.[51]

Effect of Notice That Whole Note Must Be Presented.—Where the holder of a banknote cuts it in halves, for the purpose of more safely transmitting it, and one of the halves is lost, but the other arrives at its destination, he may recover at law the whole amount, though the note was thus cut after notice from the bank that, after a certain day, when their notes were voluntarily cut into parts they would not pay them, unless all the parts were produced, which was known to the party prior to his cutting the note in question.[52] The reason of this rule is that the cutting of a banknote does not discharge the debt, the owner of the debt being the owner of the paper also.[53]

Effect of Fraudulent Purpose.—Where a number of banknotes are mutilated and cut, with the fraudulent purpose of forming out of them a greater number of notes, each of which should contain a part of a genuine banknote, and with the intent to pass them all as genuine, no recovery can be had against the bank upon any of the notes so mutilated.[54]

§ 208 (5b) Negotiability of Half of Note.—Severing a banknote destroys its negotiability, and a person who receives half of it acquires no right thereby against the bank. He does not become even prima facie owner, possession being necessary for that purpose.[55] Its negotiability can only be

51. **Necessity to prove ownership—Interests and costs in suit.**—Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186; Bank *v.* Ward, 20 Va. (6 Munf.) 166.

52. **Effect of notice that whole note must be presented.**—United States Bank *v.* Sill, 5 Conn. 106, 8 Am. Dec. 44.

53. **Reason of rule.**—Cutting a banknote into two parts, for the purpose of remitting them separately by mail, does not discharge the bank from the debt, but it may be recovered by the true and bona fide holder of one of the parts, upon sufficient proof that the other part has been lost or destroyed. Commercial Bank *v.* Benedict (Ky.), 18 B. Mon 307.

The owner of a debt is also the owner of the paper representing the same, and the Bank of the United States can not relieve itself from liability on a banknote by giving notice that it will pay no more notes where all parts are not produced, and where the holder of such note cuts it into two parts, for the purpose of more safely transmitting it, he may recover the whole amount, where one part is lost in transmission, although it was cut after the holder had received the said notice from the bank. Martin *v.* Bank, Fed. Cas. No. 9,156, 4 Wash. C. C. 253.

54. **Effect of fraudulent purpose.**—Northern Bank *v.* Farmers' Bank (Ky.), 18 B. Mon. 506.

55. **Negotiability of half of note.**—Armat *v.* Union Bank, Fed. Cas. No. 535, 2 Cranch, C. C. 180; United States Bank *v.* Sill, 5 Conn. 106, 8 Am. Dec. 44; Patton *v.* State Bank (S. C.), 2 Nott & McC. 464, following Armat *v.* Union Bank (S. C.), 2 Nott & McC. 471, note.

"The proposition that the half of a bill or note is negotiable is an absurdity. By dividing it into two parts, the quality of negotiability, which belonged to it as a whole, is destroyed until the parts are again reunited. This the authorities very generally, English and American, admit. It is said (Chitty on Bills, 10th Am. Ed. 259) that if part of a banknote sent by mail 'be lost, stolen, or misapplied, no person but the real owner can acquire a right to or lien upon the same, however bona fide his conduct may have been;" because, as the instrument was not perfect when he received the same, he had no right to rely on the authenticity of the transaction. So, in Byles on Bills, it is said, 'A man who takes half

restored by reuniting its several parts.[56]

§ 208 (6) Forgery or Alteration—§ 208 (6a) Forged Notes.—Rights of Holders.—Where the bills of a bank, after being prepared by the cashier for the president's signature, are stolen, and a forged signature of the president added, the bank is not liable to a bona fide holder, on the ground that the cashier had declared them to be genuine, nor by reason of the negligence of the directors in so keeping the paper prepared for signature.[57]

Adoption or Ratification.—Considerations of public policy authorize a distinction between cases where a bank receives forged notes purporting to be its own, and those where it receives the notes of other banks in payment or upon general deposit. It is bound to know its own paper, and the receipt of forged notes purporting to be its own must be deemed an adoption of them.[58]

Rights of Bank Paying Note.—Where a bank pays notes on which the president's name is forged, and does not return them till 15 days afterwards, it loses its remedy against the person from whom the notes were received.[59]

§ 208 (6b) Alteration.—The alteration of a note or bill which will have the effect to discharge the party bound must be in a material part.[60] And all the authorities agree that the figures denoting the number in a particular series to which the instrument belongs is no part of the contract or obligation, and its alteration or erasure is immaterial.[61] It is not sufficient to show that the holder was negligent in making inquiry, or that he took the note under circumstances which would excite the suspicions of a man of

a note, takes it necessarily under suspicious circumstances, and can not recover to the injury of the maker.' Byles on Bills, 429; Bailey on Bills, 6th Ed. 379; Hinsdale *v.* Bank (N. Y.), 6 Wend. 378." Union Bank *v.* Warren, 36 Tenn. (4 Sneed) 167.

56. Restoration of negotiability.—The half of a banknote cut in two is not negotiable. The negotiability of the note can only be restored by reuniting the parts. Murdock *v.* Union Bank (La.), 2 Rob. 112, 38 Am. Dec. 197.

57. Liability on forged paper to bona fide holder.—Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111.

58. Adoption or ratification.—Third Nat. Bank *v.* Allen, 59 Mo. 316, following Bank *v.* Bank (U. S.), 10 Wheat. 333, 6 L. Ed. 334; Gloucester Bank *v.* Salem Bank, 17 Mass. 33.

Rights of bona fide holders of forged notes.—A. presented to the officers of a bank, for payment, bills of the bank from a genuine plate, but with one forged signature. They hesitated for some time whether to receive them; but, before A. left, returned them to him, still being in doubt whether they were counterfeit or not. Held, that there was no ratification of the forged signature, so as to make the bank liable. Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111.

59. Right of bank paying forged note—Loss of remedy.—Gloucester Bank *v.* Salem Bank, 17 Mass. 33.

60. Alteration—Must be material.—Blair *v.* Bank, 30 Tenn. (11 Humph.) 84; Taylor *v.* Taylor, 80 Tenn. (12 Lea) 714.

61. Immaterial alteration—Changing number of series.—Birdsall *v.* Russell, 29 N. Y. 220; Commonwealth *v.* Emigrant Industrial Sav. Bank, 98 Mass. 12; Elizabeth *v.* Force, 29 N. J. Eq. 591, overruling same case, 28 N. J. Eq. 587." Note Holders *v.* Funding Board, 84 Tenn. (16 Lea) 46.

"The number, like a vignette or other marking, only serves to identify, and if the instrument is otherwise fully identified a change in the number is immaterial. Note Holders *v.* Funding Board, 84 Tenn. (16 Lea) 46.

ordinary prudence. The law exonerates him from any such burden, and he can rest secure in his possession, as the evidence of his right to recover, until the defendant shows that he was in privity with the wrong, or acquired the note mala fide or with notice.[62] Of course, the rule operates more strongly in the case of a bank bill, where mere possession is sufficient prima facie evidence of bona fide ownership for value, and the holder may enforce its payment, unless his position as a bona fide holder be successfully impeached.[63]

§ 208 (7) Right of Person Taking after Payment Refused.—Banknotes, payment of which, when presented at bank, has been refused, are but evidences of debt, fluctuating in value according to the credit of the bank, and fair subjects of commerce. Trading in them is not putting them in circulation anew, so as to deprive a subsequent holder of the benefit of the original demand and the effect of nonpayment.[64]

§ 208 (8) Redemption of Overissue.—The directors of a bank are its agents, held out to the public as possessing the power, according to the general usage, practice, and course of business in banks, to issue bills, and their fidelity in the discharge of this duty is impliedly warranted. Consequently the bank is bound, notwithstanding an overissue, to redeem the bills thus put into circulation, when in the hands of innocent holders, as are also stockholders who have guarantied the ultimate redemption of the bills issued by the bank.[65]

§ 208 (9) Payment of Depreciated Bills.—Where one bank is indebted to another, which also holds bills of the former, the latter may take bills of exchange of the former in payment of such indebtedness and of the bank bills, though the bank bills are depreciated.[66]

§ 208 (10) Sufficiency and Medium of Payment.—The act of congress making treasury notes a legal tender is within the constitution, and valid; and hence the state banks, by redeeming in treasury notes, do not expose their franchises to forfeiture under charter provisions that they shall not at any time suspend or refuse payment in gold or silver of their obligations or moneys received on deposit.[67] A tender of half dollars, issued under the act of congress approved Feb. 21, 1853, is a legal tender.[68]

62. **Bona fide ownership essential.**—Note Holders *v.* Funding Board, 84 Tenn. (16 Lea) 46.

63. **Rule operates strongly against bank.**—Note Holders *v.* Funding Board, 84 Tenn. (16 Lea) 46.

64. **Rights of person taking notes after payment refused.**—Denton *v.* Commercial, etc., Bank, 13 La. 486.

65. **Duty to redeem overissue.**—McDougald *v.* Bellamy, 18 Ga. 411.

66. **Transfer of property to pay depreciated bank bills.**—Lafayette Bank *v.* Bank, Fed. Cas. No. 7,987, 4 McLean 208.

67. **Medium of payment—Compliance with charter provision.**—Reynolds *v.* Bank, 18 Ind. 467.

68. **Tender of half dollars.**—A person holding 30 bills of the Mechanics' Bank of Michigan, of the denomination of five dollars, presented them, at one time, at the bank for redemption. The bank tendered him three hundred half dollars, of the coin of the United States, issued under the act of con-

But a protest of the bills of a bank for a refusal on the part of the bank to pay their notes of more than $10 in anything but quarter dollar pieces should aver, before calling on the auditor to proceed against the bank, that the quarters were coined under the act of 1853, as quarters coined prior to that act are legal tender to any amount.[69] A tender "in current silver coin of the United States" or "in silver coin of United States," has been held insufficient.[70] The requirement of the state constitution that the bills and notes put in circulation as money shall be made redeemable in specie by the legislature is not operative so far as to authorize the sale of the securities of a bank that refuses to redeem its bills in specie, when the legislature has only directed such sale, upon failure to redeem in "lawful money of the United States."[71]

Each Bill Separate and Distinct Demand.—The bank in tendering payment has a right to consider each bill as a separate and distinct demand.[72]

Delay by Manner of Payment.—Where bills of a bank were presented to it for redemption, it had no right to delay by a dilatory manner of counting out small change in payment of each bill.[73] The bank is only entitled to a reasonable time in which to count the bills and make redemption.[74] It is not entitled as a right to insist on paying bill by bill.[75]

Foreign Gold or Silver—Payment by Weight.—The holder of a bank bill demanding payment is not obliged to take foreign gold or silver coin at

gress approved February 21, 1853. Held, that the tender so made was a legal tender. Strong *v.* Farmers', etc., Bank, 4 Mich. 350.

69. Payment in quarter dollar pieces—Protest.—People *v.* Dubois, 18 Ill. 333.

70. Tender held insufficient.—Suit against a bank on 18 $5 bills, which it was alleged that the bank refused to pay on presentment. Held, that a replication that the bank tendered the sum "in the current silver coin of the United States," or "in the silver coin of the U. S.," was bad; the tender alleged being insufficient. Bank *v.* Lockwood, 16 Ind. 306.

71. Constitutional provision inoperative by failure of legislature to act in accordance.—Metropolitan Bank *v.* Van Dyck, 27 N. Y. 400, writ of error dismissed 1 Wall. 512, 17 L. Ed. 500.

72. Each bill separate and distinct demand.—The banks incorporated by the law of this state have the right to consider each bank bill as a separate and distinct demand, and to tender in payment thereof five dollars in the silver coin of the United States, struck under the act of congress of February 21, 1853, and the balance of each note in gold coin. Such tender avoids the penalty of 20 per cent interest imposed by the law of this state incorporating the banks. Acts 1857, p. 17, § 9; Id. p. 23, § 44. Boatman's Sav. Inst. *v.* Bank, 33 Mo. 497, 84 Am. Dec. 61.

73. Delay by manner of payment—Counting out small change.—Reapers' Bank *v.* Willard, 24 Ill. 439.

A bank has no right on the presentation of a package of its bills for payment to count out the change for redemption in a dilatory way, so as to delay or harass the holder. Reapers' Bank *v.* Willard, 24 Ill. 433, 76 Am. Dec. 755.

74. Reasonable time.—Where banknotes are tendered to a bank for payment in specie, the bank is only entitled to a reasonable time to count the bills offered and to count or weigh the specie, but is not entitled as a right to insist on paying bill by bill. Jones *v.* Coos Bank (N. & H.), Smith 249.

Where plaintiff tendered bank bills for payment in specie, the bank was entitled to so much time to redeem the bills as it would take to receive the same sum in specie and give such sum in banknotes in exchange. Jones *v.* Coos Bank (N. H.), Smith 249.

75. Paying bill by bill.—Jones *v.* Coos Bank (N. H.), Smith 249.

the bank counter, but the payment must be by weight.[76]

Bank Holder of Bills of Another Bank.—A bank holding the bank bills of another bank, and demanding payment, is not bound to accept its own bills in payment, but is entitled to specie.[77]

Effect of Confederate Money Scaling Acts.—Where a bank had no authority under its charter to issue bills intended to be redeemed in Confederate notes, such bills are not affected by an ordinance, providing for the scaling of the values of Confederate money.[78]

§ 208 (11) Rights of Purchaser at Discount.—Though the holder of the bills of a bank obtains them at a discount, he may collect them in full.[79] Such notes are negotiable, and the purchaser takes, in regard to payment, all the rights and equities of the vendor.[80]

Rights as against Insolvent Bank.—As to the rights of bona fide holders of the bills of an insolvent bank, as against the bank, see ante, "Rights of Holders of Circulating Notes," § 79.

Liability of One Selling Notes of Insolvent Bank.—Where one sells banknotes at the usual rate of discount, but the bank had previously failed, unknown to either party, and on learning the fact the seller verbally promises to refund, an action will lie, not on the promise, but on the original agreement or understanding that for the discount the buyer was to take the trouble of collecting only, and not the risk of the notes being actually bad.[81] The original agreement need not be in writing, it and the sale being simultaneously executed.[82] Such subsequent promise is evidence of the original agreement.[83]

§ 208 (12) Interest on Notes.—In General.—Some of the state banks organized under free banking acts are exempt from paying interest

76. **Foreign gold or silver—Payment by weight.**—Suffolk Bank *v.* Lincoln Bank, Fed. Cas. No. 13,590, 2 Mason 1.

77. **Bank holder of bills of another bank.**—Suffolk Bank *v.* Lincoln Bank, Fed. Cas. No. 13,590, 2 Mason 1.

78. **Effect of act scaling value of Confederate money.**—Manufacturer's Bank *v.* Ellis, 51 Ga. 154.

A state bank, not specially authorized by its charter to do so, could not, in 1862, issue any of its bills, intended to be used as money, redeemable otherwise than with gold or silver coin. Where it did issue bills at that date, in the usual form, it is inadmissible in a suit on them by a bona fide holder, who did not receive them from the bank, but purchased them from others, to prove that they were intended by the bank to be payable in Confederate currency, and were so understood by the community in which the bank was located. The ordinance of 1865 does not apply to such contracts. Manufacturers' Bank *v.* Lamar, 46 Ga. 563.

79. **Rights of purchasers at discount.**—Robison *v.* Beall, 26 Ga. 17; Taylor *v.* Cook, 14 Iowa 501.

Parties have the right to purchase the circulation of free banks at a discount. The fact that the complainants purchased many of the notes held by them at large discount, does not lessen or effect their rights in the premises. The statute makes no discrimination against such purchases. Clark *v.* State, 47 Tenn. (7 Coldw.) 306.

80. **Purchase acquires all rights and equities.**—Clark *v.* State, 47 Tenn (7 Coldw.) 306.

81. **Selling notes of insolvent bank.**—Houghton *v.* Adams (N. Y.), 18 Barb. 545.

82. **Writing not necessary.**—Houghton *v.* Adams (N. Y.), 18 Barb. 545.

83. **Subsequent promise as evidence.**—Houghton *v.* Adams (N. Y.), 18 Barb. 545.

on its notes in circulation.[84] But as a general rule, bank bills bear interest from the time of demand and refusal,[85] and the fact that the note is not expressed to be payable "with interest" does not defeat the right.[86] The holders of the bills of a broken bank, where a demand and refusal have been made, and the bank has not been proceeded against as an insolvent institution, are entitled to interest after the date of the demand.[87] The bills of a bank being payable on demand, at a particular place, the holder is entitled to interest thereon from the time of such demand of payment of the bank or its trustees and refusal to pay, and not from the time of the general suspension of specie payments by the bank, or from the date of such bills;[88] while under the Ohio Act of Jan. 28, 1824, the holder is held to be entitled to interest from the time of suspension.[89]

Interest—Penalty for Suspension.—A party who protested notes of a bank upon its suspension can recover the interest imposed by the charter as a penalty for suspension, only during the time of suspension.[90]

Recovery of Interest Where Note Lost or Mutilated.—Where a banknote is cut in two, and one half sent by mail and lost, in an action by the holder of the remaining half against the bank, the holder can not recover interest without, before suit brought, proving ownership, and giving bond, with adequate security, for the indemnification of the bank.[91] However, it

84. **Bank exempt from paying interest.**—Barker *v.* Union Bank, 20 La. Ann. 293.

85. **General rule—When interest begins to run.**—Crawford *v.* Bank, 61 N. C. 136; Estate of the Bank, 60 Pa. 471.

Under the Act of 1869-70, requiring bank bills to be received in payment of judgments rendered in favor of banks chartered prior to May 1, 1865, in adjusting balances interest on the bank bills tendered in payment should be allowed from the date of the demand and protest. Bank *v.* Hart, 67 N. C. 264.

86. **Need not be expressly payable "with interest."**—Estate of the Bank, 60 Pa. 471.

87. **Demand and refusal made—Bank not proceeded against as insolvent.**—Bank Com'rs *v.* La Fayette Bank, 4 Edw. Ch. 287.

88. **Effect of general suspension of specie payment.**—Ringo *v.* Biscoe, 13 Ark. 563.

Where a bank charter declares that if it "shall, at any time, suspend or refuse payment of any of its notes," etc., "the holder of such notes," etc., "shall be entitled to interest thereon, from such suspension or refusal until the same be paid, at the rate of," etc., the holder of a note can recover interest at that rate, only from a demand on each note, or the bank's default, and not from the date of a general suspension of specie payments without such demand. Bartlett *v.* New Orleans, etc., Banking Co. (La.), 1 Rob. 543; Bank *v.* Fowler (La.), 10 Rob. 196.

89. **Ohio Act—Interest runs from time of suspension.**—Act Jan. 28, 1824, "to regulate judicial proceedings where banks or bankers are parties," provides (§ 1) that in actions against any bank or banker to recover money due from such bank or banker, on notes or bills by it or him issued, plaintiff may file a declaration for money had and received generally, and give in evidence any notes or bills of such bank or banker which plaintiff may hold at the time of trial, and may recover the amount thereof, "with interest from the time the same shall have been presented for payment and payment thereof refused, or from the time such bank or banker shall have ceased and refused to redeem his notes with good and lawful money of the United States." Held that, where defendant bank has suspended specie payment, plaintiff is entitled to interest from the time of suspension. Atwood *v.* Bank, 10 O. 526.

90. **Interest—Penalty for suspension.**—Commercial Bank *v.* Foster, 5 La. Ann. 516.

91. **Recovery of interest where half not lost.**—Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186. See ante, "Payment of Mutilated Notes," § 208 (5).

is held in Louisiana that in such case, interest will not be allowed from judicial demand, if objected to by defendant.[92]

§ 208 (13) Right of Bank to Set Off Debt.—It seems that where a party, presenting to a bank its notes for payment, is indebted to such bank in a sum equal to the amount of notes presented, the bank may refuse to pay the notes on demand, and may set off such debt in an action brought against it on the notes or for the penalty.[93]

§ 208 (14) Funding Past Notes.—Where the law authorizes and directs the redemption and funding of "all legitimate outstanding postnotes," meaning the demand notes written on the postnote forms,[94] notes, found to be genuine, should be funded, notwithstanding two or three of them bore the same number; or that the number had been altered; or that some of them bore no date, or were mutilated by time or accident, there being enough remaining to show identity.[95]

§ 208 (15) Contract by Third Person to Redeem Notes.—As a bank is bound to redeem its notes and bills, it must be presumed to have authority to contract with a third person to do so, or to furnish funds for that purpose.[96]

§ 208 (16) Banknotes Issued without Authority of Bank.—A bank bill stolen from a bank and fraudulently put in circulation is good, as against the bank, in the hands of a bona fide holder for value, and the mere possession of any holder is sufficient to impose the burden of proof on the bank to show the fraud or bad faith of the plaintiff.[97] The

92. *Louisiana.*—Little *v.* Consolidated Ass'n, 2 La. Ann. 1012.

93. **Right of bank to set off debt.**—Long *v.* Farmers' Bank (Pa.), 1 Clark 284.

94. **Laws directing funding of postnotes.**—Note Holders *v.* Funding Board, 84 Tenn. (16 Lea) 46.

95. **Notes to be funded.**—Note Holders *v.* Funding Board, 84 Tenn. (16 Lea) 46.

96. **Contract by third person to redeem notes.**—In an action by a Connecticut bank on a promissory note given by defendant, it was shown that the bank had agreed to supply defendant with its bills, which were to be put in circulation in New York by defendant, and, when redeemed by the bank, were to be sent to defendant for further use, defendant to provide funds to meet what was paid in redeeming them from time to time, to secure the payment of which the note in suit was given. Defendant objected to the recovery because it was not shown that the bank was authorized to make such an agreement. Held that, the bank was authorized to make such an agreement. Central Bank *v.* Empire Stone Dressing Co. (N. Y.), 26 Barb. 23.

97. **Rules as to money stolen and put in circulation.**—Pelletier *v.* State Nat. Bank, 114 La. 174, 38 So. 132.

"Where a stolen banknote has been acquired for full value, in the usual course of business, and without any notice of the circumstances, the holder will recover; but the finder of a banknote acquires no title as against the owner. Daniel, Neg. Ins. (5th Ed.) 1674." Pelletier *v.* State Nat. Bank, 114 La. 174, 38 So. 132.

"The same author states the American doctrine to be that a holder of a banknote 'can rest secure in its possession, as the evidence of his right to recover, until the defendant shows that he was in privity with the fraud, or acquired the note mala fide or with notice.'" Id. 1680. Pelletier *v.* State Nat. Bank, 114 La. 174, 38 So. 132.

"This distinction between banknotes and other negotiable instruments is not admitted in England, except as to the notes of the Bank of England; and

same principle applies to bank bills which have been lost by the bank.[98] But neither the thief, nor the finder, nor the holder in bad faith, who has good reason to believe that the bill has been stolen or lost, can recover on the instrument.[99]

§ 208 (17) Exchange or Substitution of Security.—A certificate setting forth that the holder had on deposit a stated amount of its notes, which would be paid to his order thereon, with interest, is not of equal dignity or priority, with the bills of the bank. Such certificate furnishes evidence of a new contract, by which the holder surrendered his bills to the bank, in consideration of the undertaking on its part to pay him their amount with eight per centum interest per annum. The bills thus surrendered, and for which the certificate was taken, may have been reissued by the bank, and in other hands may constitute a separate claim entitled to the priority.[1]

Exchange of Security as Extinguishing Original Liability.—The surrender to a bank agent of his notes, and the acceptance from him of his draft on a third person, is but the substitution of one security for another, and does not extinguish the original liability on the notes, unless the draft is drawn in good faith, and accepted as an absolute payment and discharge of the notes; and even if it is, through the fraud of the agent, accepted as an absolute payment, the fraud would prevent it from so operating.[2]

§ 208 (18) Special Preference and Lien of Bill Holders.—As to special preference to bill holders in case of the bank's insolvency, see ante, "Rights of Holders of Circulating Notes," § 79.

In Case of Insolvency—Lien of Bill Holders.—Holders of bills issued by a railroad company authorized by its charter to bank and issue such bills, have a paramount lien for the payment of their bills, only upon that part of

the American doctrine seems to rest on the difficulty, if not impossibility, of a business man proving when or where, or from whom, or for what consideration, he received any particular banknotes in his cash drawer." Pelletier *v.* State Nat. Bank, 114 La. 174, 38 So. 132.

"In Bank *v.* Bank, 9 Mart. (O. S.) 398, it was held that possession is prima facie evidence of property in a banknote alleged to have been stolen from the holder, and that the burden of proof was on the defendant bank to show that plaintiff bank received the note in bad faith, and with a knowledge that it was stolen. The note was in circulation, and had been stolen from the holder, and there was no evidence to show how plaintiff had acquired it." Pelletier *v.* State Nat. Bank, 114 La. 174, 38 So. 132.

98. **Application to bank bills lost.**—Pelletier *v.* State Nat. Bank, 114 La. 174, 38 So. 132.

99. **Rule applicable to thief, finder, or holder in bad faith.**—Pelletier *v.* State Nat. Bank, 114 La. 174, 38 So. 132.

Where plaintiff, having obtained possession of banknotes, purporting to have been issued in 1856, through third persons acting as his secret agents, collected from defendant bank some of such notes, either found by him or acquired with notice that they had never been issued by the bank, and such payments were made by the bank in ignorance of the facts, plaintiff will be condemned to restore the money thus unduly received by him. Pelletier *v.* State Nat. Bank, 114 La. 174, 38 So. 132.

1. **As constituting new contract—Loss of priority.**—Bullard *v.* Central Bank, 1 Ga. 461.

2. **Exchange of security as extinguishing original liability.**—Bank *v.* St. John, etc., Co., 25 Ala. 566.

the road built by the company, the lien of a subsequent contractor being superior upon the part built by him.[3]

§ 209. From Funds Deposited as Security.—Whether or not a bank refused to redeem its circulating notes depends upon the circumstances of each individual case. The action of the bank officers, though not an express refusal, may be evasive and tantamount to a refusal to redeem.[4]

Duty of Treasurer to Redeem.—A provision in the charter that, upon filing affidavits of refusal to redeem, etc., with the state treasurer, he shall thereupon give notice that the notes of said bank will be redeemed at his office, makes it the duty of the treasurer to act at once, and he has no right to delay for counter affidavits from the bank.[5] And, the affidavit, on motion for mandamus to compel a state treasurer to redeem circulating notes secured by stock deposited with him as he is directed by the charter of a bank to do, need not state that the notes were countersigned by the state treasurer, and registered as required by its charter.[6]

Share of Proceeds.—Under the general banking law of Illinois, the owner of protested bills, should receive his proportion of the proceeds of the sale of the stocks deposited with the auditor as collateral, to be estimated upon the principal, and damages computed at 12½ per centum on the amount of bills protested, to be calculated from the date of protest.[7]

Foreclosure of Mortgage.—The state comptroller has power to foreclose a mortgage assigned to him by a bank to secure the redemption of its circulating notes, though such power is not expressly conferred by statute.[8]

§ 210. Penalties for Failure to Pay—§ 210 (1) In General.—In most cases a right to recover a certain per centum as interest or damages attaches to the note in consequence of a suspension or refusal to pay.[9] The

3. **Lien of bill holders.**—Collins *v.* Central Bank, 1 Ga. 435; Woodward *v.* Central Bank, 4 Ga. 323, both distinguished in Brunswick, etc., R. Co. *v.* Hughes, 52 Ga. 557. See, also, Howard *v.* Central Bank, 3 Ga. 375.

4. **What amounts to a refusal by bank to redeem.**—Upon the presentation of the circulating notes of a bank at the counter for redemption, the mode of redeeming, adopted by the officers, was to take up and separate from the rest one bill at a time, examine it, step back to a table, pick up the requisite amount of coin, and pay over to the bill holder; and so proceed, redeeming the notes one by one, until the close of banking hours, and then refuse to redeem further for the day. The officers also tendered to the bill holders bags of coin, at the sums marked thereon, but on condition that there should be no recourse to the bank for the correction of errors, if any, but to those only from whom the bank itself received the coin. The bank also refused to employ more than one person to redeem its circulating notes; and large amounts presented were refused redemption, upon the claim that the bank was unable to make further redemption during banking hours. Held, that the course of the bank officers was evasive, and tantamount to a refusal to redeem. People *v.* Whittemore, 4 Mich. 27.

5. **Duty of treasurer to redeem.**—People *v.* Whittemore, 4 Mich. 27.

6. **Requisites of affidavit.**—People *v.* Holmes, 3 Mich. 544.

7. **Proportionate share of proceeds—Damages.**—Willard *v.* Dubois, 29 Ill. 48.

8. **Foreclosure of mortgage.**—Flagg *v.* Munger (N. Y.), 14 Barb. 196; S. C., 9 N. Y. 483, Seld. Notes 230.

9. **Penalty—Interest or damages.**—Ringo *v.* Biscoe, 13 Ark. 563.

A demand duly made for specie at any bank in Kentucky, and refused, en-

general rule is that a bank is not liable for the penalty until it has been put in default by demand actually made.[10] A general suspension of specie payment is insufficient to render it liable on a particular note or obligation, as such act is only a passive violation.[11] When defendants are held liable on the original banknotes held by complainants, they are liable only for the amount of the bills and interest, and not for statutory demands on a draft which was substituted for the notes, and protested for nonpayment.[12]

Neglect—Unreasonable Delay.—Where a bank unreasonably delays payment of bank bills offered in exchange for specie, such delay is sufficient evidence of the bank's neglect and refusal to redeem the bills.[13]

Constitutionality of Statutes.—Such laws are held to be constitutional. Thus a statute imposing (prospectively) a penalty of 2 per centum a month

titles the holder of the note to 12 per cent damages or interest. Bank *v.* Thornsberry (Ky.), 3 B. Mon. 519.

The true construction of the eleventh section of St. 1831, c. 119, to regulate banks and banking, is that if the officers of a bank refuse or delay payment, in gold or silver money, of any bill demanded and presented for payment at the bank in the usual banking hours, the corporation is made liable, after fifteen days from such demand, to pay additional damages of 24 per cent per annum. Bryant *v.* Damariscotta Bank, 18 Me. 240.

Thus, in New York the holder of bills that the bank refuses to pay in specie may recover not only the principal sum due, with usual interest, but also 10 per cent per annum on the same principal, from the day of demand till payment. Wendell *v.* Washington, etc., Bank (N. Y.), 5 Cow. 161.

By the Act of 1840, banks suspending specie payments are declared liable to pay to the state a certain amount per month during the suspension. Held, that the amount to be paid was a penalty and not a debt. State *v.* Banks, 12 Rich. Law, 609.

10. Actual demand necessary.—Bartlett *v.* New Orleans, etc., Banking Co. (La.), 1 Rob. 543; Bank *v.* Fowler (La.), 10 Rob. 196.

The penalty imposed by St. Feb. 9, 1836, § 9, incorporating the New Orleans Improvement & Banking Company, which declares that if the said company shall, at any time, suspend or refuse payment in lawful money of the United States of any of its notes, bills, or obligations, the holder of any such note, bill, or obligation, or person entitled to demand and receive such money, shall be entitled to receive interest thereon from the time of such suspension or refusal, until fully paid, at the rate of 12 per cent a year, can not be recovered without a demand of payment of each note, and proof of failure to pay, then only from the date of such demand and failure. The suspension of specie payments by the bank will not relieve the holder from the necessity of making such a demand, to entitle him to interest at that rate. In re New Orleans, etc., Banking Co., 4 La. Ann. 471.

11. Passive violation.—The charter of a banking company provides that if said company shall, at any time, suspend or refuse payment in current money of any of its notes or obligations, the person entitled to demand and receive such money shall be entitled to interest thereon from the time of such suspension or refusal, at 12 per cent per annum. Code, art. 1926, provides that, when there is an "active violation" of contract, damages are due from the act of contravention, and the debtor need not be put in default. Article 1925 defines an "active violation" as consisting in doing something inconsistent with the contract, and a "passive violation" in not doing what was covenanted to be done. Article 1927 declares that, when the breach has been passive, only damages are due from the time the debtor has been put in default. Held, that such bank is not liable for the penalty. Bartlett *v.* New Orleans, etc., Banking Co. (La.), 1 Rob. 543; Bank *v.* Fowler (La.), 10 Rob. 196.

12. Penalty—Refusal or neglect to pay.—Bank *v.* St. John, etc., Co., 25 Ala. 566.

13. Neglect—Unreasonable delay.—Jones *v.* Coos Bank (N. H.), Smith 249.

on the amount of banknotes, which the bank issuing them should refuse or neglect to pay on demand, is constitutional and valid.[14]

Who Is a Bill Holder.—It is held that the holder of a banking company's deposit of notes of said company, payable to the order of the depositor with interest, is not a bill holder.[15]

Transfer of Right.—Such right is transferable with the notes and passes by delivery to any holder.[16]

In Case of Forfeiture of Charter.—Where there is a legal declaration of forfeiture, the bank, as a creature of the law, becomes extinct. Its franchises all revert to the state who gave them. It can neither sue nor be sued in its corporate name.[17] Thus, the legal existence of the bank being annihilated, no demand is practicable. It can create no new liability. The right—conditional right—in the bill holder is lost by the extinction of the corporation.[18] The assignee of the bank receives the assets to pay debts existing at the time of the assignment. He has no power to increase their amount by an act of omission or of commission. The assets are transferred to him to pay debts, not to redeem bills. He has none of the franchises of the bank. He is not capable of committing a tort by retroaction for his extinct assignors. The law which authorizes the demand, contemplates a bank—it looks to those relations which exist between a bank and the public—none of which existed at the time.[19]

14. **Constitutionality of law.**—Brown *v.* Penobscot Bank, 8 Mass. 445.

15. **Who is a bill holder.**—The charter of the Monroe Railroad & Banking Company, § 9, provides that, if the corporation shall refuse payment of its bills in gold and silver, the holders of such bills shall be entitled to receive 10 per cent interest in addition to legal interest. Section 11 gives to "bill holders" only, a lien on the road and equipments. Held, that the holder of the banking company's certificate of deposit of notes of said institution, payable to the order of the depositor, with 8 per cent interest, is not a "bill holder," within said sections. Bullard *v.* Central Bank, 1 Ga. 461.

16. **Transfer of right.**—In a suit against the trustees of a bank, which had suspended payment and assigned its effects, it was held that any right to recover interest or damages, which became attached to the notes of the bank in consequence of the suspension and refusal to pay them, was transferable with the notes, and passed by delivery to any holder. Ringo *v.* Biscoe, 13 Ark. 563.

17. **In case of forfeiture of charter.**—Carey *v.* Greene, 7 Ga. 79.

18. **Forfeiture defeats conditional right.**—Carey *v.* Greene, 7 Ga. 79.

19. **Assignee can create no new liability.**—Carey *v.* Greene, 7 Ga. 79.

The Bank of Columbus made an assignment of its effects, and its charter was forfeited by a judgment of the proper court at the instance of the state of Georgia. The legislature, subsequently to the forfeiture, affirmed the assignment, and placed the assignee upon the footing of a receiver. In a suit by a holder of bills against the assignee, it was held that a demand of payment of the bills, made by the plaintiff on the receiver, after the forfeiture, did not entitle him to recover 10 per cent damages under the Act of 1832. Carey *v.* Greene, 7 Ga. 79.

The assignee of the bank, by the forfeiture of its charter by order of the legislature, and the affirmation, by law, of the assignment, becomes the agent of the people, to take assets of the bank which devolved upon them, and apply them to the payment of the debts of the incorporation. As agent of the state, or the people, he was not liable to demand and forfeiture; and the plaintiff acquires no rights of any kind, by making the demand upon him. Carey *v.* Greene, 7 Ga. 79.

§ 210 (2) What Amounts to Refusal or Neglect.—In general it may be said that a statute imposing a penalty, until tender, for neglecting or refusing payment of its notes, requires that payments must be made within a reasonable time after demand, according to circumstances; that a sum of ordinary magnitude should be paid at least during the day of demand; that the officers must employ themselves diligently, in paying, in the order of time that demands are made; that the bank cannot, at its option, pay in small pieces when it has large bills in its vault, thus causing delay; that it should keep money counted out, or servants sufficient to count it out in a reasonable time; and that unreasonable delay was refusal to pay, and subjected the bank to said penalty.[20] If the cashier's conduct is intended, or necessarily result, in preventing the holder from receiving payment on the day of demand, there is a refusal or neglect to pay allowing damages to the holder in such case.[21] The holder of several bank bills has a right to demand payment of all at once, and, if a tender of payment of part only is made, it amounts to a refusal or neglect to pay all, entitling the holder to damages.[22] The fact that a bank offered to pay its bills in other bank bills, or in a check on another bank, is no legal excuse for its refusal or neglect to pay in specie, so as to relieve from payment of damages fixed by Stat. Mass. 1809, c. 38, in case of a refusal or neglect to pay.[23] The holder of bank bills is entitled to be paid in specie the amount of the bills upon a demand within the usual banking hours, and a bank holding the bank bills of another bank, and demanding payment of the same at the banking house of the latter, is not bound to receive its own bills in payment, but may demand specie, and the omission to pay under such circumstances is a neglect or refusal.[24] The holder of a bill is entitled to receive foreign gold or silver by weight, and is not obliged to take it at the bank count; and where a bank does not keep its money counted or weighed, or employ servants sufficient to count it or weigh it, so as to pay all demands made within the usual bank hours, it is a neglect or refusal.[25]

§ 210 (3) Failure to Indorse Refusal on Bills.—Suspension of Payment.—It is provided, in some instances, by statute, that, if a bank suspend the payment of its notes in gold and silver, it shall be the duty of

20. **Requirements of statute.**—Hubbard *v.* Chenango Bank (N. Y.), 8 Cow. 88.

21. **Neglect or delay amounting to refusal—Stat. Mass. 1809, c. 38.**—Suffolk Bank *v.* Lincoln Bank, Fed. Cas. No. 13,590, 2 Mason 1.

22. **Tender of part—Stat. Mass. 1809, c. 38, construed.**—Suffolk Bank *v.* Lincoln Bank, Fed. Cas. No. 13,590, 2 Mason 1.

23. **Omission to pay specie.**—Suffolk Bank *v.* Lincoln Bank, Fed. Cas. No. 13,590, 2 Mason 1.

24. **Bank presenting other bank bills.**—Suffolk Bank *v.* Lincoln Bank, Fed. Cas. No. 13,590, 2 Mason 1.

25. **Mode or manner of counting and weighing.**—So held with reference to the Massachusetts law (St. 1809, c. 38), which provides that any banking corporation neglecting to pay on demand any bill issued by such bank shall be liable to the holder thereof at the rate of 2 per cent per month on the amount from the time of such neglect or refusal. Suffolk Bank *v.* Lincoln Bank, Fed. Cas. No. 13,590, 2 Mason 1.

the cashier, when a bill is presented and gold and silver payment demanded, if such payment is refused, to indorse the refusal and the date thereof on the back of the bills.[26] And the cashier is made subject to a fine for refusal to make such indorsement, to be recovered in the name of the state for the use of the person aggrieved.[27] The object of such a law is to guard against a general suspension of payment.[28] It is not unconstitutional as impairing the charter of a bank.[29]

Recovery of Penalty.—Debt was the proper form of action for the recovery of the penalty provided for by such statute.[30]

§ 210 (4) Sufficiency of Tender to Stop Running of Penalty.—A tender after action brought on a banknote is ineffectual to bar an action for damages.[31] But a tender, after action brought, of the sum due on a banknote, with costs, is sufficient to stop the running of interest, the statutory penalty allowed for refusal by a bank to redeem its notes upon presentation.[32] When the law provides that the bank shall pay interest on all sums demanded on its notes, and not paid in specie on demand, until the same shall be paid, or tendered to be paid, in specie at their banking house, where demand has been made and refused, a subsequent tender at the banking house, without notice to the creditor, will prevent the running of interest; but it must be not only of the principal sum, but also of the interest between the refusal and tender.[33]

26. **Indorsement of refusal on note.**—Rockwell *v.* State, 11 O. 130.

27. **Fine for refusal.**—If any cashier should refuse to indorse any bill or bills, according to the provisions of the act, such cashier should forfeit and pay a fine of not less than five nor more than fifty dollars for every such bill so presented and refused, to be recovered before any court having jurisdiction, in the name of the state of Ohio, for the use of the person or persons aggrieved. Rockwell *v.* State, 11 O. 130.

28. **Object of law.**—This provision was to guard against a general suspension or the suspension of the payment of its notes generally by the bank, and was not intended to give the penalty upon an isolated controversy between an officer of a bank and the holder of a bill, resulting in a demand for payment and a refusal to pay or to indorse. Rockwell *v.* State, 11 O. 130.

In a suit, therefore, under this act against the officer of a bank, for refusing to indorse its bills on presentment, it was necessary to aver in the declaration a general suspension by the bank of specie payments. This was a penal statute, and had to be construed strictly, and it was therefore necessary that all the circumstances should be stated, which were provided to bring the cashier within its provisions, or the judgment could not be sustained. If there were a title to recover, defectively set out, such defects were cured by the judgment; but if the title itself to recover, as spread forth in the declaration, were defective, the judgment had to be reversed. Rockwell *v.* State, 11 O. 130.

29. **Statute constitutional.**—This act and section was not unconstitutional as impairing the charter of a bank, where such charter provided that the legislature might, at any time, enact laws enforcing and regulating the recovery of notes, bills or debts of which payment should be refused. Rockwell *v.* State, 11 O. 130.

30. **Recovery of penalty.**—Rockwell *v.* State, 11 O. 130.

31. **Sufficiency of tender—After action brought.**—Suffolk Bank *v.* Worcester Bank (Mass.), 5 Pick. 106.

32. **Sufficient to stop running of interest—Statutory penalty.**—Suffolk Bank *v.* Worcester Bank (Mass.), 5 Pick. 106.

33. **Notice to creditor—Amount of tender.**—Hubbard *v.* Chenango Bank (N. Y.), 8 Cow. 88.

§ 210 (5) Procedure to Recover.—Penalty for Failure to Pay—Pleading.—To entitle the holder of a bank bill to recover penal damages given by statute on neglect of the bank to pay in coin on demand, or within the time limited, he must specially aver the bank's liability for such damages, and make claim therefor, it not being sufficient merely to set forth facts showing the liability.[34] Where the law provides that, if any bank in the state shall suspend specie payment of its notes, it shall be the duty of the cashier to indorse the refusal upon any note presented for payment, and subjects him to a penalty for refusing such indorsement, in an action to recover the penalty for refusing to so indorse a note, it is not sufficient to allege a refusal to pay the note and a refusal to indorse the demand and refusal on the note, but it is necessary, also, to aver a general suspension of specie payments.[35]

Amendment of Pleading.—Where, in an action on a bank bill, defendants have been defaulted on the declaration as it stood, and plaintiff has been paid the principal of the bill, with legal interest, he will not be allowed to amend to claim penal damages fixed by statute for neglect of the bank to pay in coin on demand.[36]

Copying Bills in Declaration.—In an action against a bank to recover the penalty for delaying payment of its bills, it is not necessary to set out copies of the bills in the declaration.[37]

Penalty for Failure to Indorse Refusal of Payment on Note.—See ante, "Failure to Indorse Refusal on Bills," § 210 (3).

§ 211. Liability of Stockholders or Officers—§ 211 (1) Members of Association.—Where an unincorporated banking association issues notes in the form of banknotes, the individual members are personally liable notwithstanding such notes are by their terms payable "out of the joint funds according to the articles of association."[38] And the fact that the articles of association stipulate against such liability, and that those becoming creditors shall thereby be held to expressly disavow any recourse against the stockholders individually does not absolve the stockholders from liability although such articles were published in a newspaper, pasted in customers' bank books, and pasted in a conspicuous place in the bank.[39]

§ 211 (2) Stockholders—§ 211 (2a) In General.—The stockholders are, in some cases, liable in their individual capacity for the notes issued

34. **Procedure—Pleading.**—Palmer *v.* York Bank, 18 Me. 166, 36 Am. Dec. 710.

35. **Suspension of specie payment—Refusal to indorse refusal to pay on notes.**—Rockwell *v.* State, 11 O. 130.

36. **Amendment of pleading.**—Palmer *v.* York Bank, 18 Me. 166, 36 Am. Dec. 710.

37. **Copying bills in declaration.**—Suffolk Bank *v.* Lowell Bank (Mass.), 8 Allen 355.

38. **Members of association.**—Hess *v.* Werts (Pa.), 4 Serg. & R. 356.

39. **Effect of stipulation in articles of association.**—Riggs *v.* Swann, Fed. Cas. No. 11,831, 3 Cranch C. C. 183, reversed in 2 Pet. 482, 7 L. Ed. 493. See ante, "Liability for Debts and Acts of Bank," § 46, et seq.; "Rights of Holders of Circulating Notes," § 79.

and intended to circulate as money.[40] Where the charter of a bank makes the stockholders liable for the ultimate redemption of all notes or bills issued by that bank, the shareholder is liable both in person and in property.[41] But such personal liability of stockholders extends only to bills and notes issued by the bank.[42] They are not liable to one receiving bills with the express understanding that they should not be put into circulation.[43] Nor are stockholders in a bank whose charter has expired liable to pay notes called "post notes," issued by the bank, payable on time and with interest.[44] Although stockholders not incorporated under the general banking law by their articles of association, agreed that they should not be individually liable for the debts of the corporation if the law subsequently declare, that, after a certain date, stockholders in such corporation, in case of the issuing of banknotes by them, should be personally liable for the issuance of bills after that time, the minority would be bound against their consent by the exercise, through the majority, of the powers to issue such bills originally vested in or afterwards conferred by, the legislature upon the corporation.[45]

When Liability Arises.—The liability of the stockholders of a bank, whose charter contains a provision binding their individual property for the ultimate redemption of its bills, arises when the bank refuses or ceases to redeem and is notoriously and continuously insolvent.[46]

Expiration of Charter.—In some cases the law specifically provides that the stockholder's liability shall arise when the bank's charter expires.[47] The

40. Individual liability of stockholders.—Terry *v.* Tubman, 92 U. S. 156, 23 L. Ed. 537.

Under the Ohio statute of 1816, entitled "An act to prohibit the issuing and circulation of unauthorized bank paper," and the act amendatory thereof, passed March 18, 1839, the stockholders of the Cincinnati & Whitewater Canal Company are holden in their individual capacity for notes issued by the company, intended to circulate as money. Lawler *v.* Walker, 18 O. 151.

Under a law subjecting the stockholders of any company to liability to the holder of notes issued by the company intended to circulate as money, the stockholders are liable on notes issued by a corporation in the corporate name. Lawler *v.* Walker, 18 O. 151.

41. Nature of liability.—Adkins *v.* Thornton, 19 Ga. 325.

42. Liability extends only to bills and notes.—Adkins *v.* Thornton, 19 Ga. 325.

43. Bills received not to be put into circulation.—A., being a creditor of the Ocmulgee Bank, in Georgia, for advances, required and received bills of that bank with the express stipulation that they should not be put into circulation. Held, that the stockholders of that bank were not liable to him as a bill holder under the ninth section of their charter, as the ground for that personal liability, viz, the security of the public in taking the bills, did not exist in this case, and that this decision was in accordance with those in Georgia, on the principle that the judicial interpretations of the statutes of a state, as made by its own courts, are to be followed by the courts of other states. Johnston *v.* Southwestern R. Bank (S. C.), 3 Strob. Eq. 263.

44. Post notes.—Crease *v.* Babcock (Mass.), 10 Metc. 525.

45. Issuance of bills under power conferred—Effect of original agreement of stockholders.—In re Application of Gibson, 21 N. Y. 9.

46. When liability arises.—Terry *v.* Tubman, 92 U. S. 156, 23 L. Ed. 537.

Such insolvency having occurred prior to June 1, 1865, an action against a stockholder, not commenced by January 1, 1870, is barred by the statute of limitations of the state of Georgia of March 16, 1869. Terry *v.* Tubman, 92 U. S. 156, 23 L. Ed. 537.

47. Arises on expiration of charter.—Wiswell *v.* Starr, 48 Me. 401; Dane *v.* Young, 61 Me. 160.

charter of a bank expires, within the meaning of the law, when an injunction against conducting the affairs of the bank is made perpetual and receivers appointed.[48]

Extent of Liability.—Where the charter provides for the individual liability of the stockholders, for the ultimate redemption of the outstanding notes each stockholder is liable to plaintiff to the extent of all the notes held by the latter, and issued while the former was a stockholder.[49] The measure of recovery by the owners of bank bills in an action against a stockholder is to be ascertained from the amount of outstanding bills of the bank at the time action is brought.[50] In such cases the stockholders are liable for such bills as shall be ultimately unpaid after the application of the assets of the bank towards the payment thereof.[51] The remedy against the individual stockholder of a bank whose charter has expired is not confined to those who held the bills of the bank at the time when the charter expired, but extends to those who, after the charter expired, took the bills in the ordinary course of business, or otherwise acquired a good title to them.[52] If the holder of the bills of a bank settles with one stockholder and discharges him, the amount he receives is not material to the ascertainment of the proportionate liability of another stockholder.[53]

Effect of Words Written on Bills.—When the charter of a bank provides for an individual liability of the stockholders, the writing of the words, "Individual property of stockholders liable," on all bills payable by the bank, does not constitute an independent undertaking by the stockholders, but must be understood as referring to the liability created by the charter.[54]

48. **When charter expires.**—The charter of a bank expires, within the meaning of Act 1841 (Act of Amendment, c. 1, § 8), § 45, providing that the holders of stock, at the time its charter expires, shall be liable individually for the redemption of all bills which may have been issued by said bank, and which remain unpaid in proportion to the stock held by them at the dissolution of the charter, when an injunction against conducting the affairs of the bank is made perpetual, and receivers are appointed. Wiswell *v.* Starr, 48 Me. 401.

Within the meaning of Rev. St. 1857, c. 47, § 46, making holders of stock in a bank when its charter expires liable to contribute for the redemption of bank bills, the charter of a bank expires by operation of law when an injunction restraining it from doing business is made perpetual. Dane *v.* Young, 61 Me. 160.

49. **Extent of liability.**—Riggs *v.* Swann, Fed. Cas. No. 11,831, 3 Cranch, C. C. 183, reversed in 2 Pet. 482, 7 L. Ed. 493.

50. **Liability measured by outstanding notes.**—Branch *v.* Baker, 53 Ga. 502.

51. **Bills unpaid after assets distributed.**—Crease *v.* Babcock (Mass.), 10 Metc. 525.

52. **Persons receiving bills after expiration of charter.**—Crease *v.* Babcock (Mass.), 10 Metc. 525.

53. **Amount received from other stockholders.**—Robinson *v.* Bealle, 20 Ga. 275.

54. **Effect of words written on bills.**—Lowry *v.* Inman, 46 N. Y. 119.

Where the individual property of stockholders in a bank is made liable for its debts, and by a specified process, an indorsement on the bills of the bank of the words, "Individual property of stockholders liable," is but notice of the charter liability, and gives no right of action to the bill holders against the stockholders or against the president or cashier of a bank signing the bills officially. Lowry *v.* Inman, 46 N. Y. 119.

Apportioned Liability.—While the law provides that the holders of any stock in a bank shall be liable for the ultimate redemption and payment of all bills which may have been issued by said bank, and which shall remain unpaid, "in proportion to the stock they may respectively hold at the dissolution of the charter," the sum to be contributed by each will be in proportion of the whole number of shares actually held at the expiration of the charter.[55] It is immaterial that the holders of the stock are without the jurisdiction of the court.[56] If the whole number of shares were not actually taken up, the liability will be apportioned according to the number of shares actually held, rather than upon the capital named in the charter.[57] And when part of the stock is owned by the bank itself, the individual stockholders are not, for that reason, liable to any further extent than they would have been if none of the stock had been so owned.[58] Where a bank charter declares that the persons and property of the stockholders shall be pledged and held bound in proportion to the amount of shares, and the value thereof, which each individual may hold in said bank, for the ultimate redemption of the bills or notes, the value of the stock is to be estimated according to the valuation placed upon it by the charter.[59] Under such a charter each corporation is liable for the redemption of the notes in circulation, in proportion to his individual share in the capital stock; and this, whether the circulation be greater or less in amount than the capital of the bank.[60] Hence in an action brought against a stockholder thus liable, when the record does not show that any other bills of said bank are due and unpaid, nor that there has been any other recovery against such stockholder

55. **Apportioned liability.**—Wiswell *v.* Starr, 48 Me. 401.

Under Rev. St., c. 36, § 31, holders of bank stock, on the expiration of the charter of the bank, are not jointly responsible for each other for the payment of the bills of such bank, but each is severally liable in such sum, not exceeding the par value of his shares, as the amount of unpaid bills may require. Crease *v.* Babcock (Mass.), 10 Metc. 525.

Holders of stock in a bank when its charter expires are liable, under Rev. St. 1857, c. 47, § 46, to contribute for the redemption and payment of all bills issued by the bank, and remaining unpaid, in the proportion that the number of shares held by them respectively bears to the aggregate number of shares held by all the stockholders. Dane *v.* Young, 61 Me. 160.

So, by the charter of the Planters' & Mechanics' Bank of Columbus, the aggregate body of stockholders are liable for all the bills issued by the bank, and the liability of each is to be ascertained by this proportion; as the whole capital stock is to the entire outstanding circulation, so is each stockholder's share to his part to be redeemed. Robinson *v.* Lane, 19 Ga. 337.

Suit by stockholder upon unpaid bank bills.—One of a company of stockholders, who participated in the illegal organization of a bank, upon a spurious and not a specie basis, as required by the charter, can not, under the individual liability clause, maintain a suit upon the unpaid bills of the bank, against another stockholder; and evidence is admissible to show the fraudulent manner in which the bank was put into operation. Robinson *v.* Lane, 19 Ga. 337.

56. **Stockholders out of jurisdiction.**—Wiswell *v.* Starr, 48 Me. 401.

57. **Whole number of shares not taken.**—Wiswell *v.* Starr, 48 Me. 401.

58. **Part of stock owned by bank.**—Crease *v.* Babcock (Mass.), 10 Metc. 525.

59. **Estimating apportioned liability.**—Lane *v.* Morris, 10 Ga. 162; Branch *v.* Baker, 53 Ga. 502.

60. **Amount of circulation immaterial.**—Adkins *v.* Thornton, 19 Ga. 325.

upon bills of the bank, the plaintiff is entitled to recover his whole claim, if it does not exceed the amount of stock the defendant owns.[61]

Discharge of Stockholders.—An agreement by a bank, with a holder of its bills, to convey property to him in payment thereof, which agreement is not executed, by reason of an injunction on the bank and the placing of its assets in the hands of receivers, does not impair the billholder's remedy against the stockholders.[62]

By Payment of Apportioned Part.—When the charter of a bank makes each stockholder personally liable for the redemption of the notes, in proportion to the amount of the stock, a stockholder who has redeemed an amount of notes equal to his personal liability is discharged; and, if sued as a stockholder, he may plead that fact, and tender the notes in court, as a complete defense.[63] And if the amount of notes redeemed by him is less than the whole amount of his liability, the notes may be pleaded as a defense pro tanto.[64]

Wasting of Assets by Assignee.—If a bank, whose charter makes the stockholders personally liable, make an assignment, which is ratified by the legislature, of sufficient assets to redeem its circulation, which assets are afterwards wasted, so that on fi. fa. against the assignee, in favor of a billholder, nulla bona is returned, the stockholders are not discharged, but such billholders may immediately have recourse to them for payment.[65] The stockholders in such case do not occupy towards the billholders the position of mere sureties, who are discharged by the billholders' neglect to prevent the waste. They should have prevented it themselves.[66]

Waiver of Loss of Right by Holder.—When the assets of a bank are placed in the hands of receivers, the holders of its bills, who do not present their claims to the receivers, cannot recover of stockholders the full amount thereof, but only the balance which they would have been entitled to recover if they had proved their claims before the receivers and obtained part payment.[67]

Noncompliance with Charter as to Payment of Stock.—When the charter of a bank requires a certain amount of its capital stock to be paid in before commencing the business of banking, the noncompliance with the charter in this regard is no defense for the stockholders in an action against them on bills of the bank.[68]

61. **Recovery in action against individual stockholder.**—Lane *v.* Harris, 16 Ga. 217.

62. **Agreement rendered inoperative by injunction.**—Grew *v.* Breed (Mass.), 10 Metc. 569.

63. **Payment of apportioned part.**—Belcher *v.* Willcox, 40 Ga. 391; Lane *v.* Harris, 16 Ga. 217; Branch *v.* Baker, 53 Ga. 502.

64. **Defense pro tanto.**—Belcher *v.* Willcox, 40 Ga. 391; Branch *v.* Baker, 53 Ga. 502.

65. **Wasting of assets by assignee.**—Robinson *v.* Lane, 19 Ga. 337.

66. **Duty of stockholders to prevent waste.**—Robinson *v.* Lane, 19 Ga. 337.

67. **Waiver of loss of right by holder.**—Grew *v.* Breed (Mass.), 10 Metc. 569.

68. **Noncompliance with charter as to payment of stock.**—Johnston *v.* Southwestern R. Bank (S. C.), 3 Strob. Eq. 263.

§ 211 (2b) Necessity for Insolvency or Exhaustion of Deposit with State.—Under some statutes no suit can be maintained against a stockholder in a bank in his individual character for the payment of any portion of the regular notes issued by such bank and protested for nonpayment, until it is shown that the stocks deposited with the auditor of state, to secure the redemption of the circulation, are first exhausted,[69] or that the bank is insolvent,[69a] while in other cases they are liable after the bills have been presented and payment refused, although the assignee of the bank has assets in his hands sufficient to pay the bills.[70] It seems that a judgment in a suit against a corporate bank, a fi. fa., and return of a nulla bona, is sufficient to authorize the holder of bills to proceed against the stockholder personally.[71] The best and most reasonable rule, which can be prescribed as to proof of the bank's insolvency, where an action has been brought against a stockholder to enforce this liability, is that the return of nulla bona should not be considered conclusive against him, unless due and proper notice be previously given to him, by which he may, if he choose, be put upon diligence in the search for property.[72]

§ 211 (2c) Effect of Forfeiture of Charter.—Where the law or the bank's charter renders the stockholder ultimately liable for the redemption of the bank's circulating notes, this liability survives the dissolution of the charter and is not extinguished by the judicial forfeiture of the same.[73] Though, by the rule of the common law, the forfeiture of the charter ex-

69. **Exhaustion of security.**—Toucey *v.* Bowen, Fed. Cas. No. 14,107, 1 Biss. 81.

Act May 28, 1852 (of Indiana), requires banks organized thereunder to deposit public stocks with the state auditor, to be used exclusively for the redemption of the circulating notes of the bank which have been protested for nonpayment. Section 25 provides that every shareholder shall be liable individually for any contract, debt, or engagement of the bank to an amount over and equal to his stock. Held, the holder of a protested circulating note could not subject a stockholder to individual liability while any public stocks remain in the hands of the auditors. Toucey *v.* Bowen, Fed. Cas. No. 14,107, 1 Biss. 81.

69a. **Insolvency.**—Toucey *v.* Bowen, Fed. Cas. No. 14,107, 1 Biss. 81.

70. **When presented and payment refused.**—It was so held in a case against the stockholders of the Merchants' & Planters' Bank of Savannah, whose charter provides "that the persons and property of the stockholders shall be at all times liable, pledged, and bound for the redemption of the bills and notes of the bank, at any time issued, in proportion to the number of shares that each individual may hold and possess." Hatch *v.* Burroughs, Fed. Cas. No. 6,203, 1 Woods 439.

71. **Proceeding against stockholder authorized.**—Thornton *v.* Lane, 11 Ga. 459.

72. **Proof of insolvency.**—Lane *v.* Harris, 16 Ga. 217.

73. **Dissolution of or forfeiture of charter.**—Thornton *v.* Lane, 11 Ga. 459.

It was so held under the eleventh section of the charter of the Planters' & Mechanics' Bank of Columbus which provides that "the persons and property of the stockholders shall be pledged and held bound in proportion to the amount of shares and the value thereof that each individual or company hold in said bank, for the ultimate redemption of the bills or notes issued by said bank, in the same manner as in common actions of debt; and no stockholder shall be relieved from such liability by sale of his stock, until he shall have caused to be given sixty days' notice of said sale, in some public gazette of this state." Thornton *v.* Lane, 11 Ga. 459.

tinguishes all debts due by the corporation, yet a collateral undertaking of the stockholders, under the charter, making them individually liable for the redemption of the notes of the bank, remains unimpaired.[74]

§ 211 (2d) Liability for Interest.—In some cases the holders of stock in a bank whose charter has expired are not liable to pay any interest on unpaid bank bills, either from the time when payment was demanded of the bank or the time of filing a bill in equity to compel payment.[75] And where the charter renders the stockholders liable for interest, he is only liable to pay interest on the bills from the time of demand of payment thereof made by the billholder on the stockholder, and not from the time of demand of payment made on the bank.[76]

§ 211 (2e) Liability for Bills Wrongfully Issued—§ 211 (2ea) In General.—A holder of bank bills has the right, on the expiration of the charter of the bank, to recover against the stockholders for the full amount of the bills, unless he has notice when he takes them that they were improperly issued by the officers of the bank.[77] The fact that he bought them from a broker is not evidence of notice,[78] even though he agreed to keep them from circulation for a certain time.[79] Where the directors of a bank, contrary to their charter, issue bills before a certain portion of their capital is subscribed and paid in, in specie, if the bank becomes insolvent, the billholders may proceed at once against the stockholders for the subscribed stock not paid in.[80] One becoming a stockholder of a bank, after an amendment to its charter had prohibited it from issuing banknotes intended for a circulating medium, is not personally liable for such notes issued by the bank while he is such stockholder.[81]

74. **Rule at common law and under charter provision.**—Robinson *v.* Lane, 19 Ga. 337.

75. **Liability for interest.**—Crease *v.* Babcock (Mass.), 10 Metc. 525; Grew *v.* Breed (Mass.), 10 Metc. 569.

76. **When liability for interest begins.**—Lane *v.* Morris, 10 Ga. 162.

77. **Right of bona fide holder.**—Grew *v.* Breed (Mass.), 10 Metc. 569.

Effect of usury.—When the bills of a bank are sold by its officers, on a usurious contract, a subsequent bona fide purchaser of them is entitled to recover of the stockholders, on the expiration of the bank charter, the full nominal value thereof, without any deduction on account of the usury in the sale by the officers of the bank. Grew *v.* Breed (Mass.), 10 Metc. 569.

78. **Purchase from broker not notice.**—Grew *v.* Breed (Mass.), 10 Metc. 569.

79. **Agreement to withhold from circulation.**—One who buys bank bills of a broker, at a discount, under an agreement to keep them from circulation for a certain time, is entitled to the statute remedy against the stockholders, on the expiration of the charter of the bank, for the full amount of the bills, unless he has notice, when he buys them, that they are improperly issued by the officers of the bank. Grew *v.* Breed (Mass.), 10 Metc. 569.

80. **Liability for unlawful issue.**—Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

81. **Personal liability where charter forbids issue.**—Fulton *v.* Bates, 1 O. Dec. 404.

Promissory notes issued in 1840 by the Cincinnati & Whitewater Canal Company to its creditors to circulate as money, while the Act of January 27, 1816, amended by that of March 18, 1839, was in force, did not make the stockholders of said corporation, who had ordered such issue as its directors, liable as makers of the notes. Lawler *v.* Burt, 7 O. St. 340.

Direct and Primary Liability.—Where the charter of a bank provides that, in case of an overissue of bills, "the directors under whose administration it shall happen shall be liable for the same in their private and individual capacity," and also that the stockholders shall be liable for the ultimate redemption of all the bills issued, the liability of the stockholders for such excess is not secondary and collateral to that of the directors, so as to require their personal liability to be first exhausted.[82]

Liability to Other Stockholders.—A stockholder who has taken part in the illegal and fraudulent organization of a bank cannot maintain an action against another stockholder, on notes of the bank, under a personal liability clause in the charter.[83]

Liability to President of Bank.—The president of a bank cannot recover against the stockholders, on bills unlawfully issued, where he knew of the unlawfulness thereof, and was in fact engaged in perpetrating the wrong.[84]

§ 211 (2eb) Effect of Release of Directors or Stockholders.—Where the directors of a bank are liable to the stockholders for redemption of bills issued in excess of the value authorized by charter, a release of all liability, by a holder of such bills, to a director, releases the stockholders.[85] Where a holder of bills issued by a bank in excess of the amount authorized by charter releases a stockholder from liability, the amount of the consideration of the release is not material to the ascertaining of the proportionate liability of another stockholder.[86]

§ 211 (2f) Liability on Bond.—Under some statutes the stockholders of a bank are required to deposit a stockholder's bond as a security for the bank's bills.[87] Such bond is for a contingent liability only; and, where judgment has been rendered in an action thereon, the amount of such liability must be ascertained by the court in which the judgment is, which has exclusive jurisdiction thereof, before it can be enforced by exe-

82. **Direct and primary liability.**—McDougald *v.* Lane, 18 Ga. 444.

83. **Liability to other stockholders.**—Robinson *v.* Lane, 19 Ga. 337.

84. **Liability to president of bank.**—McDougald *v.* Bellamy, 18 Ga. 411. Where the charter of a bank required that a certain proportion of its capital should be paid in, in specie, and a certificate thereof under oath be rendered by its officers, before it should proceed to issue bills, and the president rendered such a certificate, knowing it to be untrue (in consequence of which the bank was illegally organized), and afterwards transferred his stock, his administrator can not recover of the stockholders upon the bills of which he died possessed. McDougald *v.* Bellamy, 18 Ga. 411.

85. **Effect of release of director.**—Robinson *v.* Bealle, 20 Ga. 275.

86. **Release of stockholder.**—Robinson *v.* Bealle, 20 Ga. 275.

87. **Stockholders bond.**—Van Steenwyck *v.* Sackett, 17 Wis. 645; Rusk *v.* Sackett, 28 Wis. 400. The banking law, as amended in 1858, authorized an action on the stockholders' bond, if, after the securities deposited with the comptroller should have been depreciated for sixty days, and notice thereof had been served upon the president and cashier, the bank neglected for thirty days to make a further deposit of securities or of its circulating notes. Van Steenwyck *v.* Sackett, 17 Wis. 645.

cution, or by proof against the estate of a deceased maker.[88]

Merger of Bond in Judgment.—Where judgment has been rendered on a stockholder's bond given by a bank to the comptroller to secure bills issued by it, the bond is merged in the judgment, and no further action can be maintained thereon against the estate of a deceased maker.[89]

Bond by Part of Stockholders to Pay Debts.—Where part of the stockholders gives a bond to the others, conditioned to "pay all debts owing by the company," there can be no recovery for failure of the obligors to pay off the circulating notes of the bank. The obligees must first stop the circulation of the notes, by redeeming them, or making them exhibits in the suit, and causing them to be withdrawn from circulation.[90]

§ 211 (2g) Liability of State as Stockholder.—Where the state becomes a stockholder in a bank, it is liable for the ultimate redemption of the bills of that bank, in proportion to the value of the shares held by the state according to the charter provision relative to the individual liability of stockholders. In some cases it is a liability to redeem a portion of the whole circulation, and not a portion of each bill; and when the state redeems more than its share of the outstanding circulation of the bank, it is discharged from further liability to be bill holders.[91]

§ 211 (2h) Liability of Stockholders of Foreign Corporations.—The stockholders of a foreign banking corporation, which issues and puts in circulation its notes, are sometimes rendered individually liable for their payment.[92] An action will not lie in one state by an individual bill holder against an individual stockholder to enforce the personal liability of a stockholder of a corporation of another state by whose charter it is provided that the persons and property of the stockholders of such bank should be pledged and bound in proportion to the amount of the shares that each individual might hold in such bank for the ultimate redemption of thé bills or notes issued by or from such bank during the time he may hold such stock, as in commercial cases, or similar cases of debt.[93]

§ 211 (3) Officers.—Where the directors of a bank, contrary to their charter, issue bills before a certain portion of their capital is subscribed and paid in, in specie, if the bank becomes insolvent the bill holders may proceed at once against the directors for a breach of trust.[94] But it is held that personal liability of the directors for an overissue is extinguished by

88. For contingent liability.—Rusk *v.* Sackett, 28 Wis. 400.

89. Merger of bond in judgment.—Rusk *v.* Sackett, 28 Wis. 400.

90. Bond by stockholders to pay debts.—Pollard *v.* Kentucky Exporting Co., 27 Ky. 52.

91. Liability of state as stockholder.—Robinson *v.* Bank, 18 Ga. 65. See ante, "In General," § 211 (2a).

92. Liability of stockholders of foreign corporation.—Bank *v.* St. John, etc., Co., 25 Ala. 566. Clay's Dig., p. 133, § 3.

93. Action against stockholders of foreign corporation.—Scott *v.* Roberts (N. Y.), 34 How. Prac. 185.

94. Liability for wrongful issue.—Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

the expiration of a bank charter.[95] A holder of the bills of a bank cannot maintain an action against the directors on the ground that their misconduct has rendered such bills worthless.[96] In an action to enforce a personal liability of directors of a bank organized under a general bank, making the directors and stockholders individually liable for the debts of the bank, it is immaterial whether or not plaintiff paid full value for bills of the bank on which the action was founded, since defendants are liable for their face value in any event.[97]

Officers of foreign banking corporations who issue notes and put them in circulation are sometimes rendered personally liable for their payment.[98]

§ 211 (4) Action to Enforce Liability—§ 211 (4a) In General.—The right given the bill holder to go upon the stockholder for the ultimate redemption of the bill is independent of any claim upon the assets of the corporation, one which may be asserted directly in his own name, and one which could not be enforced by the assignee or receiver of the bank.[99]

Proper Proceeding in Equity.—Where a bill holder seeks to enforce a personal liability of the stockholders, given by the charter, for the circulating notes of the bank the proper proceeding is in equity.[1] Where the stockholders are liable in proportion to the number of shares held by each, an action cannot be maintained in equity against the individual stockholder, but should be against all of them.[2]

Conditions Precedent.—See ante, "Necessity for Insolvency or Exhaustion of Deposit with State," § 211 (2b).

§ 211 (4b) Limitation of Actions.—An act providing that every stockholder of an unauthorized bank shall be liable for the whole amount of circulation notes issued by such bank, creates a liability in tort and not on contract; hence it is subject to the limitation applying to such tort actions.[3]

§ 211 (4c) Attachment of Bank's Property.—Where a suit is brought against stockholders, under a statute which provides that stockholders in any bank, at the time its charter shall expire, shall be liable in their individual capacities for payment of all bills issued by the bank, and

95. **Liability for overissue—Extinguishment of liability.**—Moultrie *v.* Hodge, 21 Ga. 513.

96. **Effect of misconduct of officer.**—Branch *v.* Roberts (N. Y.), 50 Barb. 435.

97. **Amount paid for bills immaterial.**—Cook *v.* Wheeler (Mich.), Har. 443. See ante, "In General," § 211 (2a).

98. **Liability of officers.**—Bank *v.* St. John, etc., Co., 25 Ala. 566.

99. **Nature of right and by whom enforced.**—Lane *v.* Morris, 8 Ga. 468.

1. **Proceeding against stockholder.**—"The case of Pollard *v.* Bailey, 20 Wall. 520, 22 L. Ed. 376 is an authority against the maintenance of a separate action by one creditor who seeks to obtain his entire debt to the possible exclusion of others similarly situated. The proper proceeding is in equity, where all the claims can be presented, all the liabilities of the stockholders ascertained, and a just distribution made." Terry *v.* Tubman, 92 U. S. 156, 23 L. Ed. 537.

2. **Actions against all stockholders.**—Terry *v.* Martin, 10 S. C. 263.

3. **Liability in tort.**—Lawler *v.* Burt, 7 O. St. 340.

remaining unpaid, an attachment of the bank's property is wholly unavailing, as no judgment can be recovered against the bank.[4]

§ 211 (4d) Pleading and Evidence.—Pleading.—Where the law provides that the holder of a note issued by an unauthorized bank may recover against persons interested in such bank, and that in a suit, "it shall be sufficient for plaintiff to set forth," among other things, "that defendant was interested in said bank at the date of such note, * * * or subsequently thereto and that it remains unpaid," a declaration in the words of the statute, that defendant was interested "at the date of the note" sued on, is sufficient, without stating that he was interested at the time of "issuing" of said note.[5] The complaint against an insolvent bank and the stockholders in their individual capacity should sufficiently set forth an indebtedness due the plaintiff from the bank.[6] The ultimate liability of stockholders in a bank upon bank bills under the charter, attaches to the bills themselves and not to a decree against the bank or its assignees for the payment of such bills; hence in a suit against such shareholders upon the bank bills, the complaint should proceed upon the bank bills, and must set out and describe them.[7] As the individual stockholder is liable for precisely that proportion of the whole notes of the bank in circulation which his shares bear to the whole capital stock, it is necessary, in a suit by a creditor, that the declaration should contain an averment of the whole amount of outstanding unredeemed notes.[8]

Depositing Bills in Court.—In an action by a billholder against a stockholder in a bank to enforce the latter's liability to redeem sundry bills, the bills will not be required to be deposited in court before final judgment and payment of the same.[9]

Demurrer.—Of course a petition which does not set forth facts sufficient to constitute a cause of action is subject to demurrer.[10]

Necessity for Proof of Charter.—In an action against several parties

4. **Availability of bank's property—Attachment ineffective.**—Crease *v.* Babcock (Mass.), 10 Metc. 525.

5. **Allegation as to stockholder's interest.**—Kearny *v.* Buttles, 1 O. St. 362.

6. **Averment of indebtedness due plaintiff from bank.**—Bank *v.* St. John, etc., Co., 25 Ala. 566.

Averment held sufficient.—In an action against an insolvent bank and its stockholders under a statute making them personally liable for notes issued by it, an allegation in the bill that plaintiffs were the holders of $200,000 in bills purporting to have been issued by the bank, payable on demand, and that they presented said bills for payment at the bank, and payment was at first refused, and then made, by delivering a draft to plaintiffs on a person claimed to have funds of the bank, but payment of which was thereafter refused, sufficiently shows an indebtedness due plaintiffs from the bank and its stockholders to sustain an attachment issued against the bank and its president, who was the principal stockholder. Bank *v.* St. John, etc., Co., 25 Ala. 566.

7. **Complaint proceeds upon bills—Description of bills.**—Branch, Sons & Co. *v.* Knapp, 61 Ga. 614.

8. **Averments as to outstanding circulation.**—Adkins *v.* Thornton, 19 Ga. 325.

9. **Depositing bills in court.**—McDougald *v.* Lane, 18 Ga. 444.

10. **Demurrer.**—Patterson *v.* Baker (N. Y.), 3 Hun 398, 6 Thomp. & Co. 76.

alleged to have been directors and officers of a chartered bank, to recover on bills issued by them, which had become worthless, it is incumbent on the plaintiff to prove the charter, where, under the act of incorporation, a charter was necessary to create the bank a body corporate.[11]

Admissibility of Evidence.—In an action to enforce a bank stockholder's liability, where the outstanding circulation is a necessary fact to be determined, any evidence pertinent to the inquiry should be admitted.[12]

§ 211 (4e) Judgment.—In an action against parties as stockholders of an unauthorized banking association, under a statute to "prohibit the issuing and circulating of unauthorized bank paper," where a verdict is found in favor of a part of the defendants and against a part, judgment may be rendered against those found liable by the jury.[13]

§ 211 (5) Liens and Priorities.—A charter of a bank making the individual property of the stockholders liable for the redemption of its bills, in proportion to the amount of his stock, entitles the holder of two judgments against the bank to be first paid from any money raised by the sheriff out of a stockholder's property.[14]

§ 212. Actions on Notes or for Nonpayment Thereof—§ 212 (1) Jurisdiction.—Where the law provides that no circuit court shall have cognizance of any suit to recover the contents of any note or other chose in action in favor of an assignee unless a suit might have been prosecuted in such court if no assignment has been made, except in case of foreign bills of exchange, a suit will lie in that court by a holder of banknotes against stockholders in the same bank to recover on such notes, since holders of banknotes payable to bearer are not assignees.[15]

Suit in Justice's Court.—Where a party holds the bills of an incorporated bank to a large amount, he may select any number, not exceeding the maximum cognizable by a justice's court and maintain suit therein for the nonpayment thereof in specie. And the justice may render judgment for the amount of the bills, with interest, and damages, as provided by law.[16]

§ 212 (2) Mode of Procedure—Form of Action.—The bearer of bills of a bank, by each of which the bank promised to pay him, on demand, a certain sum of money, has ordinarily the right, by legal process, to compel their performance by the levy of an execution on the goods, chattels, lands, and tenements of the bank, by garnisheeing its debtors, and by resorting to a court of equity to reach equitable assets, or property conveyed

11. **Necessity for proof of charter.**—Gardner *v.* Past, 43 Pa. 19.

12. **Admissibility to determine amount of outstanding circulation.**—Adkins *v.* Thornton, 19 Ga. 325.

13. **Judgment—For against whom rendered.**—Porter *v.* Kepler, 14 O. 127.

14. **Liens and priorities.**—Lowry *v.* Parsons, 52 Ga. 356.

15. **Jurisdiction—Suits by assignee—Suit against stockholders.**—Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason 308. See post, "Jurisdiction and Venue," § 218.

16. **Suit in justice's court.**—Bank *v.* Brooks, 12 Ga. 531.

to others than creditors and bona fide purchasers.[17]

Action for Money Had and Received.—A law authorizing plaintiffs in suits against banks and bankers on account of notes or bills issued by them to declare generally for money had and received, does not change the law of the actions as it regards parties and privies; it only authorizes a recovery on the common courts for any notes of the bank held at the time of the trial.[18] Under such a law it is sufficient to declare for money had and received.[19]

§ 212 (3) Enforcing Payment of Lost or Destroyed Notes.—A party who proves the loss of a banknote, is entitled to have the same established, as a lost paper, by pursuing the method prescribed therefor by statute or by the rule of court, and to require payment of said established note from the bank from whence it issued.[20] Where a banknote has been destroyed, thus rendering it impossible that the bank can be made to pay it a second time, the owner at the time of the loss may maintain an action at law against

17. **Enforcement by legal process.**—Curran *v.* Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705. See post, "Nature and Form of Remedy," § 216.

18. **Law authorizing declaration for money had and received.**—Goodenow *v.* Duffield (O.), Wright 455; Ohio Act of 1824, construed.

19. **Sufficient to declare for money had and received.**—Atwood *v.* Bank, 10 O. 526; Goodenow *v.* Duffield (O.), Wright 455.

20. **Establishment and enforcement of lost paper.**—Waters *v.* Bank (Ga.), R. M. Charl. 193. See ante, "Payment of Lost or Destroyed Notes," § 208 (3).

A person holding banknotes, which he alleges have been burnt, can not prove his declarations at the time of the fire, to establish the loss. Nor can such person be admitted to prove he had a bundle of notes on a bank, which were burnt, or state their general amount as the foundation of his recovery. A party is sometimes admitted to prove loss of a paper to let in other evidence of its contents. A party can not recover for the amount of negotiable paper, without producing or identifying it, so that the maker may know if he has already paid it, or protect himself against future payment. Burridge *v.* Geauga Bank (O.), Wright 688.

Where a banknote is divided for transmission, and one-half is lost, the owner or bona fide holder of the other half, after demand and refusal of the bank where it is payable, may recover the whole in a court of law upon the common counts in assumpsit or debt. It is competent for a court of law to require indemnity to the bank in such case; but the simple payment by the bank of the amount to the bona fide holder, upon the presentation of the other half, is sufficient for its protection without any other indemnity. Union Bank *v.* Warren, 36 Tenn. (4 Sneed) 167.

Alabama statute.—Code, § 2151, providing that "suit may be brought on a bond, note, bill of exchange, or other mercantile instrument which has been lost or destroyed by accident, and, if affidavit is made by plaintiff of such loss and destruction, and the contents thereof, * * * and accompanies the complaint, it must be received as presumptive evidence, * * * unless defendant under oath denies the execution of the bond, note, or bill, * * * but this section must not be so construed as to authorize a suit for the recovery of a note or bill issued by an incorporated bank to pass as money, and alleged to be lost or destroyed," merely furnishes a cumulative remedy, and does not abrogate the common-law remedy for the recovery of lost or destroyed banknotes. Bank *v.* Meagher, 33 Ala. 622.

Nor does the proviso to that act, in regard to a suit, for the recovery "of a note or bill issued by any incorporated bank to parties as named and alleged to be lost or destroyed," amount to an inhibition to an action at law on such note or bill. Bank *v.* Meagher, 33 Ala. 622.

the bank for its value, and need not go into chancery.[21] But it is held that when a banknote has been cut in halves, and one-half lost, the holder can not recover upon the other half at law, because the owner can only recover on establishing his title by the judgment of a court of equity, and giving a satisfactory indemnity to secure the bank against further loss from the appearance or setting up of the other half of such note.[22]

Evidence.—See post, "Evidence," § 212 (11).

§ 212 (4) Limitation of Actions.—The statute of limitations does not apply to circulating bank bills.[23] But bank bills that have ceased to circulate as currency, and to be taken in and reissued by the banks, no longer have that distinctive character which excepts them from the operation of the statute of limitations.[24] The statute of limitations, in its ordinary acceptation, can not apply to bank bills circulating as money, they being constantly paid in and reissued.[25] And for the same reason the face of bank bills that circulate as money is not evidence of the date of their issue.[26] It has been held that the term "actions upon contracts," in the statute of limitations applies to actions on notes of a suspended bank.[27] And it has been held that

21. **Lost or destroyed paper—Action at law.**—Bank *v.* Meagher, 33 Ala. 622.

22. **Suit in chancery—Indemnity.**—Bank *v.* Ward, 20 Va. (6 Munf.) 166; Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186, cited with approval in Moses *v.* Trice, 62 Va. (21 Gratt.) 556, 8 Am. Rep. 609; Exchange Bank *v.* Morrall, 16 W. Va. 546.

23. **Limitation not applicable to bank bills.**—Dougherty *v.* Western Bank, 13 Ga. 287. See post, "Time to Sue and Limitations," § 219.

24. **Bills not circulating as currency.**—Kimbro *v.* Bank, 49 Ga. 419.

25. **Reason for nonappliance of statute.**—Long *v.* Bank, 81 N. C. 41.

The general rule is, that the statutes of limitation do not apply to bank bills, because they are by the consent of mankind and course of business, considered as money, and that their date is no evidence of the time when they were issued, as they are being continually returned to and reissued by the bank. But if the bills have ceased to circulate as currency, and have ceased to be taken in and reissued by the banks, they no longer have that distinctive character from other contracts, which excepts them from the operation of the statute of limitations. Kimbro *v.* Bank, 49 Ga. 419.

The statute of limitations does not apply to bank bills; they are by consent of mankind and the course of business, considered as money. Dougherty *v.* Western Bank, 13 Ga. 287.

26. **Evidence of date issuance.**—Long *v.* Bank, 81 N. C. 41.

In order for a banking company to avail itself of the statute of limitations in an action on a note, the date when it was put into circulation must be shown, as the date of the bank note furnishes no presumption that it was put into circulation at that time. Greer *v.* Perkins, 24 Tenn. (5 Humph.) 588; F. & M. Bank *v.* White, 34 Tenn. (2 Sneed) 481.

"They are, as we know, prepared and kept ready for circulation previously to the time of their actual issuance; and, until they are actually issued, no liability is incurred, and no cause of action can exist." Greer *v.* Perkins, 24 Tenn. (5 Humph.) 588; F. & M. Bank *v.* White, 34 Tenn. (2 Sneed) 481.

"And, as the banks are constantly receiving their own notes from their debtors, each note so received is thereby paid up and discharged, and no cause of action can exist until it is reissued. Then a new liability is incurred, commencing, not from the date of the note, but from the time of such reissuance." Greer *v.* Perkins, 24 Tenn. (5 Humph.) 588.

27. **Limitation applicable to notes of suspended bank.**—Samples *v.* Bank, Fed. Cas. No. 12,278, 1 Woods 523. See post, "Time to Sue and Limitations," § 219.

a statute excepting from a statute of limitation all notes "issued or put in circulation as money," applies to notes issued by banking corporations under the laws of the state, whether the notes have ceased to circulate as money or not, or whether the bank has or has not ceased to exist as a corporation.[28]

Demand and Refusal as Starting Limitation.—The statute of limitations does not commence running upon a bank bill immediately upon its being issued, but when a demand of payment is made.[29] The fact that the bank has closed its doors, and has no place of business, is not equivalent to such demand and refusal of payment of bank bills payable upon demand as will cause the statute of limitations to begin to run from the time when the bank closed its doors.[30] Nor is the suspension of a bank equivalent to a demand and refusal.[31]

§ 212 (5) Necessity and Sufficiency of Demand.—It seems that presentment and demand of payment are conditions precedent to recovery against a bank on notes of the bank, except where from the condition of the bank or for other causes the same would be an idle ceremony.[32] Al-

28. Statute excepting notes from act of limitation.—State *v.* Bank, 64 Tenn. (5 Baxt.) 101.

29. Demand and refusal as starting statute.—Thurston *v.* Wolfborough Bank, 18 N. H. 391, 45 Am. Dec. 382. See post, "Time to Sue and Limitations," § 219.

Tennessee statute.—The statute of limitations barring actions on notes, unless brought within six years from the accrual of the cause of action, does not apply to the notes issued by banking corporations under the laws of this state; and this is so, whether the notes have ceased to circulate as money or not, or whether the bank itself is in operation, or has suspended, or has, from any cause, ceased to exist as a corporation. State *v.* Bank, 64 Tenn. (5 Baxt.) 101.

"It was held, however, in the F. & M. Bank *v.* White, 34 Tenn. (2 Sneed) 481, that the statute of limitations applicable to notes in general did not apply to banknotes issued and put in circulation as money until demand of payment at the counter of the bank and refusal, and that the suspension of the bank did not change this rule, so as to start the statute of limitations from the suspension of the bank. Following this, § 2779, of the Code, in the chapter on the limitation of actions, provides that 'the provisions of this chapter do not apply to actions to enforce payment of bills, notes or other evidences of debt issued and put in circulation as money.' So that, as to banknotes issued and put in circulation as money, we have no statute of limitations where there has been no demand of payment." State *v.* Bank, 64 Tenn. (5 Baxt.) 101.

The statute of limitations will not operate, unless the defendant show by proof that payment of said note had been demanded and refused more than six years before the suit was brought, or that the note had not been reissued within that time. And now Code, § 2779. Greer *v.* Perkins, 24 Tenn. (5 Humph.) 588.

An ordinary banknote, payable on demand, is not barred until after six years from demand and refusal at the counter of the bank. F. & M. Bank *v.* White, 34 Tenn. (2 Sneed) 481.

30. What constitutes demand and refusal.—Thurston *v.* Wolfborough Bank, 18 N. H. 391, 45 Am. Dec. 382.

31. The suspension of a bank is not equivalent to a demand and refusal to pay a banknote issued by it, so as to start the running of the statute of limitations. F. & M. Bank *v.* White, 34 Tenn. (2 Sneed) 481; State *v.* Bank, 64 Tenn. (5 Baxt.) 101.

32. Conditions precedent.—Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186; Bank *v.* Ward, 20 Va. (6 Munf.) 166; Hall *v.* Bank, 14 W. Va. 584. See post, "Conditions Precedent," § 215. And see ante, "Presentation and Demand," § 208 (2).

An action does not accrue on the promissory notes of a bank till demand and refusal. Crawford *v.* Bank, 61 N. C. 136.

In order to sustain an action upon

though it is held that in a suit against a bank on a banknote payable on demand, without more, it is not necessary to aver and prove a demand.[33] So where a bank bill is payable on demand, but having no place of payment appointed therein, it may be sued on and the action sustained, without proof of any special demand.[34]

Banknote Payable at Particular Time and Place.—If a banknote is payable on demand, at a particular time and place, a demand at the specified place is necessary, and at the specified time or afterwards, and must be averred and proved.[35] So an action can not be maintained against a bank on its notes made payable at the bank, until demand there, and failure to pay.[36]

Bank Closing Doors or Suspending Payment.—In order to sustain an action upon a bank bill promising payment upon demand, it is not necessary to show demand where the bank has closed its doors, and has no place of business.[37] A suspension and failure to pay specie on demand to bill holders generally, is sufficient to enable the bill holder to sue. He need not prove a special demand in his case.[38]

Requisites and Sufficiency of Demand.—Where there is proof of a demand for specie for bills presented, the jury may infer that a demand was intended, and understood to be for such coin as constitutes a legal tender.[39] A demand on a bank for payment of a bank bill is sufficient if made by an agent, if the agency is avowed, and the principal is disclosed.[40] Where several banking firms establish a bank of issue, and publish a card stating that

a bank bill promising payment upon demand, there must be a demand of payment, or circumstances must exist excusing a demand, although the bill is not made payable at any particular place. There is a material difference, in this respect, between a promissory note and a bank bill issued for the purpose of being circulated as money or its representative. Thurston *v.* Wolfborough Bank, 18 N. H. 391, 45 Am. Dec. 382.

An attachment issued in 1864, during the war, in a chancery suit in West Virginia, against the Bank of Virginia, as a nonresident, for a debt of $36,500 in notes of the bank owned by the plaintiffs, some of which had never been presented at the Virginia branches where payable. Held, that as these branches could not have paid the notes, owing to their condition, arising from the war, and the fact that plaintiffs were, in effect, their public enemies at that time, the failure to present them was immaterial, and payment was properly decreed of the whole $36,500 out of the attached effect of the bank. Hall *v.* Bank, 14 W. Va. 584.

33. **Bill payable on demand without more.**—Dougherty *v.* Western Bank, 13 Ga. 287.

A suit may be brought on banknotes, payable on demand, generally, without demand of payment at the banking house. State Bank *v.* Van Horn, 4 N. J. L. 382; Haxton *v.* Bishop (N. Y.), 3 Wend. 13.

34. **Place of payment not appointed.**—Bryant *v.* Damariscotta Bank, 18 Me. 240.

35. **Where bill payable on demand at particular time and place.**—Dougherty *v.* Western Bank, 13 Ga. 287.

36. **Bill payable on demand at bank.**—Bank *v.* Hickey (Ky.), 4 Litt. 225.

37. **Bank closing door.**—Thurston *v.* Wolfborough Bank, 18 N. H. 391, 45 Am. Dec. 382.

38. **Failure to pay bill holders generally on demand.**—Lane *v.* Morris, 8 Ga. 468.

39. **Requisites and sufficiency of demand.**—Bryant *v.* Damariscotta Bank, 18 Me. 240.

40. **Demand made by agent.**—Bryant *v.* Damariscotta Bank, 18 Me. 240.

their notes will be redeemed at either of their several banking houses, which notes are sent indiscriminately to each firm, and are circulated, without any designation thereon indicating where or by whom they are put in circulation, if a demand is necessary at all, a demand upon one of the copartners is sufficient to sustain an action against all, where the firm renders it impossible to present bills at their counter by closing its doors.[41]

Demand on Notes of Branch Bank.—If notes, made payable at a branch of the principal bank, are called in by the latter, a demand at the latter entitles the holder to sue that bank on nonpayment.[42] Where a statute authorizes a bank to establish a branch and declares that the notes of the branch bank shall be payable on demand at such branch, a demand at the principal bank alone is not sufficient.[43]

§ 212 (6) Parties.—An action for the recovery of certain bank bills is properly brought against the bank which issued them, and another bank which agreed to redeem them, and against certain individuals who, by written covenant, agreed that the bill should be redeemed, and the stockholders saved from loss. Neither all the billholders nor all the stockholders need be made parties.[44] A holder of bank bill of a bank whose charter has expired, purchased by him as trustee, is entitled to maintain a bill in equity in his own name, without joining the cestui que trust, against the stockholders, for himself and for all other holders of unpaid bills.[45]

In Whose Name Action Brought.—See post, "In Whose Name Action Brought," § 212 (7).

§ 212 (7) In Whose Name Action Brought.—A statute providing that "all bonds, bills, or notes" payable to the persons named therein, or bearer, shall have the effect of creating a liability to the payee only, expressly named, and no one but such payee or his indorsee "shall have a right to maintain, in his own name, an action on any such bond, bill, or note," applies only to paper made by persons in the course of their ordinary business transactions, and not to bank bills.[46] So the holder of bank bills issued by an unchartered banking association, payable to the persons named

41. **Place of demand.**—Taylor *v.* Cook, 14 Iowa 501.

42. **Demand on notes of branch banks.**—Nashville Bank *v.* Henderson, 13 Tenn. (5 Yerg.) 104, 26 Am. Dec. 257.

43. **Demand at principal bank insufficient.**—By the statute authorizing the Bank of Utica to establish an office of discount and deposit at Canadaigua, and requiring all notes issued at such branch at C. to be countersigned by the cashier, and declaring that the same should be considered as payable on demand at such branch at C., the holder of a note of the Bank of Utica, so countersigned and issued, can not maintain an action upon it against the Bank of Utica without having previously demanded payment of it at the branch at C. A demand of payment at the Utica Bank only is not sufficient. Bank *v.* Magher (N. Y.), 18 Johns. 341.

44. **Parties.**—Wilson *v.* Bank, 72 N. C. 621. See post, "Parties," § 220.

45. **Holder as trustee.**—Grew *v.* Breed (Mass.), 10 Metc. 569.

46. **In whose name suit brought.**—Kemper, etc., Banking Co. *v.* Schieffelin, 5 Ala. 493. See post, "Parties," § 220.

therein or bearer, may sue the bank in his own name.[47] The state auditor has no power in the absence of a statute giving it to him, the trust fund deposited with him being exhausted, to sue the bank for a balance due to a noteholder.[47a]

§ 212 (8) Pleading—§ 212 (8a) In General.—In a declaration in a suit brought upon bank bills it is not necessary, in describing them, to set out their letters and numbers.[48] Where an action can not be maintained against a bank on its notes made payable at the bank, until demand there and failure to pay, such demand need not be alleged in the declaration. It must come out by plea that such demand has not been made, and the ability and willingness of the bank to have paid on demand must be averred, and a tender of the money made in court.[49] A declaration on a bank bill, need not directly allege that the bill was signed by the president or cashier, or that the plaintiff was the owner thereof.[50]

§ 212 (8b) To Recover Value of Destroyed Notes.—To enforce banknotes alleged to have been destroyed, against the bank, there must be such certainty of description as will enable the bank to see that it had issued such notes, and as will enable the court to extend an adequate indemnity to the bank.[51] In an action at law to recover from the bank the value of destroyed banknotes, the complaint, in describing the notes, need not aver their dates, or the time when they were payable. The court will take judicial notice of the fact that they were payable on demand.[52]

§ 212 (9) Filing Bills or Notes.—In a suit against a bank upon its notes, after nonpayment on demand, the notes, or one of each denomination, or a copy of them, must be annexed to the petition.[53] In an action on banknotes, where it appeared that they had been protested for nonpayment, and that the bank's securities in the hands of the state auditor had been insufficient for their payment, it is no excuse for failure to file the notes or copies

47. Suit in holder's name.—Kemper, etc., Banking Co. *v.* Schieffelin, 5 Ala. 493.

47a. Gen. Banking Law 1852, § 8, which provides that, in case the makers of circulating notes shall on lawful demand fail to redeem the same, the holders may cause them to be protested for nonpayment, and the auditor on receiving and filing the protest shall give notice to the makers to pay the same, and if they shall omit to do so for a specified time he shall immediately give notice in a newspaper that all the circulating notes issued by the bank will be redeemed out of the stocks held by him for that purpose, confers no power on the auditor, the trust funds having been exhausted, to sue the bank for a balance due a note holder. Conwell *v.* Hill, 14 Ind. 131.

48. Setting out letters and numbers.—Carey *v.* Greene, 7 Ga. 79. See post, "Pleading," § 226.

49. Necessity to plead demand.—Bank *v.* Hickey (Ky.), 4 Litt. 225. See Churchill *v.* Merchants' Bank (Mass.), 19 Pick. 532.

50. Alleging signature by proper officer.—Churchill *v.* Merchants' Bank (Mass.), 19 Pick. 532.

51. Certainty of description.—Irwin *v.* Planters' Bank, 20 Tenn. (1 Humph.) 145. See post, "Pleading," § 226.

It is sufficient to describe the bills as 14 $100 bank bills of that bank. Bank *v.* Meagher, 33 Ala. 622.

52. Alleging dates or time of payment.—Bank *v.* Meagher, 33 Ala. 622.

53. Filing bills.—Conwell *v.* Hill, 14 Ind. 131.

thereof that the originals are on file in the auditor's office; non constat, that the plaintiff cannot obtain copies.[54]

§ 212 (10) Bill of Particulars.—In an action against a bank for the nonpayment of its notes, where the plaintiff demands a certain per centum by way of penalty, a bill of particulars, setting forth copies of the notes, and apprising defendants of the grounds of plaintiff's claim, is sufficient, though not formal.[55]

§ 212 (11) Evidence—§ 212 (11a) Burden of Proof.—Proof of Possession and Acquisition.—The holder of a bank bill, which has been stolen from the bank, need not prove how he came into possession of it, in order to recover against the bank.[56] Possession being prima facie evidence of property in a bank post note indorsed in blank, the holder is not obliged to prove his acquisition bona fide. The contrary must be shown by the opposite party, though the note had been stolen.[57]

Mutilated or Lost Instrument.—To entitle the plaintiff to recover on producing only one part of a severed bill, he must prove that he is owner of the whole, and account for the absence of the other part.[58]

Execution of Bill.—Where a bill holder of a bank sues the assignee thereon, and no plea of non est factum is filed, the plaintiff need not prove the execution of the bills.[59]

§ 212 (11b) Admissibility of Evidence.—Admissibility of Bills or Notes in Evidence.—Where the statute provides that the holder of bank bills may declare for money had and received, such holder may give in evidence any notes or bills of the bank which he may have in his possession, whether received before or after the commencement of the action.[60]

Evidence of Presentment and Refusal.—In an action against a bank for the nonpayment of its notes, where the plaintiff demands a certain per

54 **Excuse for failure to file.**—Conwell *v.* Hill, 14 Ind. 131.

55. **Bill of particulars.**—Stowits *v.* Bank (N. Y.), 21 Wend. 186.

56. **Proof as to possession.**—Worcester County Bank *v.* Dorchester, etc., Bank (Mass.), 10 Cush. 488, 57 Am. Dec. 120. See post, "Presumptions and Burden of Proof," § 227 (1).

57. **Bona fide character of possession.**—Louisiana Bank *v.* Bank (La.), 9 Mart. 398.

In a suit on banknotes purporting to have been issued in 1856, and which are genuine on their face, mere possession makes out a prima facie case in favor of the holder, and the burden of proof rests on defendant to show that such notes were not issued by its predecessor bank, but were lost or stolen, and that plaintiff acquired the same in bad faith or with notice. Pelletier *v.* State Nat. Bank, 114 La. 174, 38 So. 132.

In an action on a bank bill, which was stolen from the bank by which it purports to have been issued, the burden of proof is upon the defendant to show that the holder took it under such circumstances that he had no claim upon it. Wyer *v.* Dorchester, etc., Bank (Mass.), 11 Cush. 51, 59 Am. Dec. 137.

58. **Mutilated or lost instrument.**—United States Bank *v.* Sill, 5 Conn. 106. See Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186.

59. **Execution of bill.**—Bethune *v.* Dougherty, 30 Ga. 770.

60. Atwood *v.* Bank, 10 O. 526; Goodenow *v.* Duffield (O.), Wright 455. See post, "Admissibility of Evidence," § 227 (2).

cent. by way of penalty, presentment of the bills and refusal to pay are admissible in evidence under the common money counts.[61]

Proof of Value of Bills.—Where the value of depreciated bills, at a particular time, is to be proven, the proof should apply, with reasonable certainty, to that time, and sayings of persons, as to the value of the bills, cannot be admitted to prove their value.[62]

Evidence of Circulation of Bank.—Where the amount of the outstanding circulation of a bank is a fact necessary to be ascertained, any evidence should be received which aids in fixing that fact.[63]

Evidence of Purchase at Discount.—In an action on bank bills circulated by a banking firm as money, evidence on the part of the bank, showing that the holder of the bills purchased them at a discount, is inadmissible.[64]

§ 212 (11c) Weight and Sufficiency.—Where banknotes are protested and the auditor apportions and applies the collaterals held as security for the circulating medium, if there is a deficiency, for which the holder of the protested notes sues the bank, it is enough for him to show the amount received by him on the notes deposited by him at the auditor's office. He need not prove that the auditor has faithfully and properly performed his duties in the premises.[65]

Lost or Destroyed Notes.—In an action to recover the value of destroyed banknotes, plaintiff must first prove the existence and destruction of the notes, and adduce proof of their contents. Mere proof of their aggregate amount, and issue by the bank, is not sufficient to authorize a recovery.[66] Proof of the loss of a bank bill and of notice and demand at the bank is not sufficient to enable the owner to recover of the bank in an action of assumpsit, but proof of the actual destruction of the bill, with notice and demand, is sufficient.[67]

Mutilated Bill.—In an action by the holder of the half of a banknote against the bank, where the half on which the president's signature is usually affixed has been lost, the signature of the president need not be proved.[68]

Question for Jury.—In a suit against a bank on banknotes which have

61. **Evidence of presentment and refusal—Under common-money counts.** Stowits *v.* Bank (N. Y.), 21 Wend. 186.

62. **Proof of value of bills.**—Bethune *v.* McCrary, 8 Ga. 114.

63. **Evidence of circulation of bank.**—Robinson *v.* Lane, 19 Ga. 337.

64. **Purchase at discount.**—Taylor *v.* Cook, 14 Iowa 501.

65. **Weight and sufficiency—Suit for deficiency after exhausting security.**—Conwell *v.* Hill, 14 Ind. 131. See post, "Weight and Sufficiency of Evidence," § 227 (3).

66. **Lost or destroyed notes.**—Bank *v.* Meagher, 33 Ala. 622. The owner of bank bills which can not be identified or distinguished from other similar bills can not maintain an action against the bank which issued them, upon circumstantial evidence that they have been destroyed, and a tender of a bond of indemnity. Tower *v.* Appleton Bank (Mass.), 3 Allen 387, 81 Am. Dec. 665.

67. **Evidence of actual destruction and notice and demand.**—Ross *v.* Bank (Vt.), 1 Aikens 43, 15 Am. Dec. 664.

68. **Mutilated bill.**—Murdock *v.* Union Bank (La.), 2 Rob. 112, 38 Am. Dec. 197.

been destroyed, the quantity and character of the evidence relating to the destruction of the notes is for the jury; and where it is such as to justify the submission of the question to them, their finding is conclusive.[69]

§ 212 (12) Costs.—Where in an action against a bank on numerous banknotes, the summons and declaration contain special counts for each note, in addition to the usual money counts which are unnecessary, the costs therefor should not be allowed.[70] Where a banknote is cut in two, and one half sent by mail, and lost, in an action by the holder of the remaining half against the bank, the holder cannot recover interest or costs without, before suit brought, making demand, proving ownership, and giving bond with adequate security for the indemnification of the bank.[71]

§ 212½. Foreign Bank Bills—§ 212½ (1) Notes of Foreign Bank Doing Domestic Business.—By the Ohio Act of 1816, the notes of foreign banks, incorporated under the laws of another state, but doing business in Ohio, were made void.[72]

§ 212½ (2) Circulation of Foreign Currency—§ 212½ (2a) In General.—Where there is no statute regulating the circulation of foreign banknotes, as is the case in Wisconsin, where the circulation of foreign currency is not prohibited and where there is no statute indicating a policy adverse to it, incorporated banks may receive it and pay it out, and may borrow it, and their notes given for it are valid.[73]

§ 212½ (2b) Laws Prohibiting Circulation.—With Reference to Denomination.—In some states the law prohibits the circulation of foreign bank of less than a certain denomination.[74] And it is made, thereby, un-

69. **Question for jury—Conclusiveness of finding.**—Hagerstown Bank *v.* Adams Exp. Co., 45 Pa. 419, 84 Am. Dec. 499.

70. **Costs—Unnecessary special counts.**—People *v.* New York (N. Y.), 19 Wend. 113. See post, "Costs," § 231.

71. **Demand, proof of ownership, and giving bond necessary to recovery of costs.**—Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186.

72. **Notes of foreign banks—Ohio Act of 1816.**—Johnson *v.* Bentley, 16 O. 97, affirmed in 1 O. St. 366; Lawler *v.* Burt, 7 O. St. 340; Myers *v.* Manhattan Bank, 20 O. 283; Lewis *v.* McElvain, 16 O. 347. See Watson *v.* Brown, 14 O. 473.

73. **Circulation of foreign currency—No restriction in Wisconsin.**—Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

74. **Laws prohibiting circulation.**—Doty *v.* Knox County Bank, 16 O. St. 133.

Laws 1830, c. 295, prohibited the circulation of foreign banknotes under a certain denomination. Laws 1835, c. 37, forbade the circulation by any bank, whether in or out of the state, of notes under a higher denomination, and repealed all inconsistent provisions of the former act. Laws 1839, c. 26, repealed the last act unconditionally. Held, that the first act was still in force. Merchants' Bank *v.* Spalding (N. Y.), 12 Barb. 302, affirmed in 9 N. Y. 53, Seld. Notes 172.

It has not been lawful since 1830 to pass a foreign banknote under the denomination of five dollars, in the state of New York. The law of that year (St. 1830, c. 295) is still in force. Merchants' Bank *v.* Spalding, 9 N. Y. 53, Seld. Notes 172, affirming 12 Barb. 302.

A bank in another state discounted indorsed notes, paying therefor bills beneath the denomination of five dollars, with knowledge that such bills were to be circulated in New York, in violation of the statute. Held, that the bank could maintain no action on the notes against the indorser, with

lawful to pass or receive such bills in any form.[75] And sometimes forfeitures and penalties are providing for so doing.[76] Some of the statutes do not render unlawful, paper given for such bills;[77] nor provide penalties for giving or taking the same, further than to render all such securities void.[78] Some of the statutes annul all transactions, so far as they are accomplished by such unlawful paper. It would seem that the purpose is to make all payments with such paper, and contracts in direct relation thereto, as worthless as the statute declares the paper itself to be.[79]

Contracts Relating to Prohibited Notes.—A statute which prohibits the circulation of foreign bank bills of a denomination less than a specified denomination render void such contracts as are given for, or relate directly to, such bank bills.[80] Where a bill of exchange given in renewal of several others, all of which are valid, except one that is rendered void by said act, the point as to whether such renewed bill is totally void or void to the extent only of the invalid consideration, and good as to the balance has been decided both ways.[81]

Value of Foreign Notes Not Destroyed.—A statute prohibiting the circulation of foreign bank bills of a less than a specified denomination does not divest the property in such bills, so as to deprive the owner of his right

whom the agreement for the discount was made. Pratt *v.* Adams (N. Y.), 7 Paige 615.

The sale, at a discount, by one banking association to another, for the purpose of effecting their redemption, of Canada bank bills under the denomination of five dollars, received by the former, not in payment of debts, but at a discount allowed by chapter 223 of Laws 1853, was not a violation of chapter 295 of Laws 1830, declaring it unlawful for any person to pass or circulate foreign bank bills under the denomination of five dollars. The bank could send them home for redemption itself, or employ another to do it. This is not passing, issuing, uttering, or circulating them, within the sense of either of those statutes. Buffalo City Bank *v.* Codd, 25 N. Y. 163.

75. Unlawful to pass or receive.—Doty *v.* Knox County Bank, 16 O. St. 133.

76. Forfeiture and penalties.—Doty *v.* Knox County Bank, 16 O. St. 133.

77. Paper not unlawful.—Doty *v.* Knox County Bank, 16 O. St. 133.

78. No penalty save securities void.—Doty *v.* Knox County Bank, 16 O. St. 133.

79. All paper, payments, etc., annulled.—Doty *v.* Knox County Bank, 16 O. St. 133.

80. Effect on contracts relating to such notes.—Doty *v.* Knox County Bank, 16 O. St. 133.

Contract to secure notes of fraudulent foreign bank.—A bond and mortgage executed in Ohio and delivered to a fraudulent banking company in another state, under an arrangement to obtain its worthless paper and put the same into circulation in Ohio, would be void as against public policy. Curtis *v.* Hutchinson, 1 O. Dec. 471, 10 West. L. J. 134.

81. Partial invalidity of renewed obligation.—The Act of May 1, 1854, prohibits the circulation of foreign bank bills of a less denomination than $10, and avoids a bill of exchange part of the consideration of which is such bank bills; but if a bank takes a bill of exchange in renewal of several others, overdue, one of which is void under this act, the renewed bill will be held void only to the amount of the void bill. Doty *v.* Knox County Bank, 16 O. St. 133.

"As to the third point of the syllabus of Doty *v.* Knox County Bank, 16 O. St. 133, which holds that, in so far as the prior illegal bill entered into the consideration of the renewal bill, the latter was merely rendered void pro tanto for want of consideration, a majority of the court, upon full consideration, think it can not be reconciled with the current of the authorities, and that, in so far as it conflicts with the present decision, it is untenable." Widoe *v.* Webb, 20 O. St. 431, 5 Am. Rep. 664.

to maintain a suit on them against the bank of issue. The illegality of the act consisted in circulating the bills as a substitute for money.[82] In the hands of the owner such notes still had the value of promissory notes, and were of unimpaired validity against their makers, and retained their value in market without the state.[83]

Recovery from Seller.—Where one becomes the purchaser of spurious foreign banknotes he may return them to the seller and recover what he paid for them.[84]

Effect as to Criminal Law.—The statutes hereinbefore referred to do not exclude such bank bills from the operation of the law providing for the punishment of crimes. And the uttering and publishing false, forged and counterfeit bank bills of such denomination upon foreign banks, as true and genuine, is within the provisions of such law.[85] And such notes may be the subject of larceny.[86]

§ 212½ (2c) Statutes Applicable to Particular Persons and Transactions.—In some cases the prohibitions and penalties are directed against a particular class of persons; to wit, persons or corporations engaged in dealing in money as a business; banks, bankers, brokers, persons who receive money on deposit, or buy and sell bills of exchange, or loan money, or exchange one kind of bank bills for another with a view to profit. This class of persons are prohibited from issuing, paying out, or giving in exchange for other money, so as to go in circulation in the state, any circulating notes or bills, except the notes or bills of the banks, of the state, issued according to law.[87] A statute prohibiting banks and bankers from receiving foreign bank bills exceeding a specified rate of discount and

82. **Value of foreign notes not destroyed.**—Burt *v.* Kentucky Trust Co. Bank, 1 Disn. 30, 12 O. Dec. 467; Thompson *v.* State, 9 O. St. 354; Starkey *v.* State, 6 O. St. 266.

83. **Valid against makers and in market without state.**—Thompson *v.* State, 9 O. St. 354; Starkey *v.* State, 6 O. St. 266.

84. **Recovery from seller.**—Haire & Co. *v.* Beattus & Co., 3 O. Dec. 5.

85. **Under criminal law.**—Thompson *v.* State, 9 O. St. 354.

86. **Subject of larceny.**—The circulating notes of banks of other states were property which might be the subject of larceny, although they were, in amounts, below the denomination of ten dollars, and, at the time of the felonious taking, their circulation was prohibited by positive law. Starkey *v.* State, 6 O. St. 266.

87. **Statutes applicable to particular person.**—Reznor *v.* Hatch, 7 O. St. 248.

Ohio statute.—The Act of February 24, 1848, provides as follows, in the first and fourth sections: "Sec. 1. That it shall be unlawful for any bank, or incorporated company doing a banking business, or dealing in money as a business, or exchange broker, money broker, or private banker, or other person or persons who shall receive money on deposit, or buy and sell bills of exchange, or loan money, or exchange one kind of bank bills or money for another, with a view to profit, to issue, pay out, or give in exchange for other money, so as to go into circulation in this state, any circulating notes or bills, except the notes or bills of the banks of this state, issued according to law." The act does not propose to affect the demand for, and market price of, the products of the state, by prohibiting the produce dealer from paying for them in foreign bank paper. Nor is there any restriction imposed upon the vendor as to the kind of currency to be received by him in payment. There is no indication of an intention to prohibit a manufacturer in Massachusetts

from uttering them for circulation as money within the state, does not prevent one bank from selling such bills to another bank at a greater rate of discount than that prescribed, where the purchasing bank takes them, not for the purpose of circulating them, but of sending them home for redemption; and therefore the selling bank is entitled to recover the contract price of the bills.[88]

§ 212½ (2d) Unlawfully Issuing Foreign Bills for Circulation.—In some cases the charter of the bank prohibits it from acting as the agent of a foreign bank in unlawfully issuing its bills for circulation.[89] A banking company with whom a foreign bank has made a general deposit of bills of the foreign bank, in using, and paying out those bills, acts in its own right as with its own money, and not as the agent of the depositor. Therefore, in an action by the local bank against the indorser of a bill discounted by plaintiff with the foreign bills, defendant cannot urge that plaintiff violated its charter by acting as the agent of the foreign bank in unlawfully issuing its bills for circulation.[90]

§ 212½ (2e) Criminal Prosecution.—Where the law makes it a misdemeanor for a bank to utter and circulate as money foreign bank bills, an indictment must allege a violation of the statute by the bank, and that the defendants acted as its officers in doing the acts in question. It is not sufficient to describe the defendants as officers of the bank, and then simply charge that they did the acts complained of.[91] The defendants are not liable as individuals under such statute, unless they are "authorized to carry on the business of banking in this state," and, where the intent is to charge them as such, the allegation bringing them within such act must be made in the indictment.[92]

from borrowing of banks in his own neighborhood, where he would be best known, their notes of circulation, and using the funds thus obtained, in the purchase of wool, in Ohio. Reznor *v.* Hatch, 7 O. St. 248.

But a note, originally given in this state, on the 7th of August, 1854, to a private banker, in exchange for notes of a bank in Tennessee, which were to go into circulation in Ohio, was not collectible in the hands of an indorsee for value, who took the note after maturity, the transaction being in violation of the Act of February 26, 1848, "to prevent unauthorized banking and the circulation of unauthorized paper." Best *v.* Frost, 2 O. Dec. 277.

Contracts made without the state.—Act Feb. 24, 1848, prohibiting the issuing of any circulating notes or bills of foreign banks, and declaring that every note, bill, or draft discounted by any bank or individual, and paid for in such circulating notes of a foreign bank, shall be null and void, does not render void a draft discounted in Kentucky by a bank of that state, and paid for in its notes, even though the bank understood that the notes were to be put into circulation in Ohio, and were afterwards delivered by it in Ohio; as the statute can not operate on contracts made outside the state. Reznor *v.* Hatch, 7 O. St. 248.

88. **Receiving bill for return and redemption.**—Sackett's Harbor Bank *v.* Codd, 18 N. Y. 240.

89. **Unlawfully issuing foreign bills for circulation.**—Wray *v.* Tuskegee Ins. Co., 34 Ala. 58.

90. **Bank acting in own right.**—Wray *v.* Tuskegee Ins. Co., 34 Ala. 58.

91. **Criminal law—Necessary averments—Description of defendants.**—People *v.* Williams, 1 Buff Super. Ct. 568, 4 Packer Cr. R. 249.

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CHAPTER XIV.

H. Actions.

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H. ACTIONS.[1]

§ 213. Capacity to Sue and Be Sued[2]—§ 213 (1) Capacity to Sue—§ 213 (1a) In General.—Banking institutions possess much the same right as individuals to maintain suits,[3] provided any required conditions

1. Bank in process of liquidation, see ante, "Insolvency and Its Effect in General," § 73. By or against national banks, see post, "Attachment and Garnishment," § 278. By or against savings banks, see post, "Actions," § 306 (1-7). Enforcement of liability of bank officers, see ante, "Actions and Proceedings to Enforce," § 55 (1-6). On loans or on paper discounted by bank, see ante, "Actions on Loans or on Paper Discounted," § 187. Representation of bank by officers and agents, see ante, "Actions," § 110. After voluntary liquidation, see ante, "Voluntary Liquidation and Dissolution," § 64. Actions by and against directors, see ante, "Actions and Proceedings to Enforce," § 55. Action for overdraft, see ante, "Overdrafts," § 150. Actions for lending money without taking security, see ante, "Collateral Security," § 179. By depositors for refusal of bank to pay checks, see ante, "Liability of Bank to Drawer for Refusal to Pay," § 143.

2. Action by or against branches, see ante, "Transfer of Stock," § 40.

3. **The Bank of Lexington** may prosecute its suits by petition and

precedent have been complied with,[4] and provided further, that the cause of action was accrued.[5]

§ 213 (1b) Suits by Foreign Banks.—Foreign banking corporations may enforce their legal rights in the courts of a state other than the one in which they were organized.[6]

summons. Bank *v.* Turner, 10 Ky. 567.

The branches of the Bank of Tennessee having distinct corporate authority to acquire property, the title of which becomes vested in the principal bank, such principal bank may maintain suit in its own name for its recovery. Bank *v.* Burke, 41 Tenn. (1 Coldw.) 623.

Suspension of specie payment as affecting right to sue.—A bank did not lose its capacity to sue and stand in judgment by suspension of specie payments. Union Bank *v.* Mortee, 14 La. 541.

Interpleader may be maintained by a bank whenever maintainable by an individual. German Exch. Bank *v.* Commissioners (N. Y.), 6 Abb. N. C. 394, 57 How. Prac. 187.

Suit to erase stock subscription.—The charter of a bank provided that, if subscriptions to its capital stock should exceed the aggregate limit, the excess should be deducted from the largest subscriptions till they equaled those next below in amount. A subscriber sought to evade this provision by subdividing his subscription among several nominal subscribers. Held, that the bank in its corporate capacity was the proper party to bring suit to erase the subscription. Union Bank *v.* McDonough, 5 La. 63.

Joint action on promissory note.—But in Ohio suits by banks are not within the meaning of the Act of March 4, 1844 "to regulate the practice of the judicial courts" providing for joint actions by "any lawful holder of a note" or bill; said section has reference to suits by individuals only. Clinton Bank *v.* Hart, 19 O. 372.

Authority of bank to sue.—An action being litigated and pursued by a banking corporation from one court to another, in itself, refutes a claim that it was not the purpose of the board of directors to institute and maintain it, and amounts to an adoption of the act of that board in that regard, and ratifies it by conduct. Kalb *v.* American Nat. Bank, 11 O. C. D. 437, 21 O. C. C. 1, affirmed in 65 O. St. 566, 63 N. E. 1129.

4. See post, "Conditions Precedent," § 215.

5. **Premature suits.**—Where a banking firm entered into a contract with a bank by which it agreed to assume the bank's debts, and the bank brought suit on the contract to recover money, which, because of the firm's not performing its agreement, it had had to pay to a depositor, it was held that the cause of action did not accrue until the defendant had made default in the performance of their contract to pay the amount of the deposit and until the bank had paid the same. Hoskins *v.* Velasco Nat. Bank, 48 Tex. Civ. App. 246, 107 S. W. 598.

6. **Suits by foreign banks.**—Lewis *v.* Bank, 12 O. 132, 40 Am. Dec. 469; Freeman *v.* Bank, 3 Tex. App. Civ. Cas., § 338.

A foreign banking corporation may sue in our courts upon a contract with them valid according to the laws of the country in which the contract was made, unless it is contrary to the policy of our laws. Rees *v.* Conococheague Bank, 26 Va. (5 Rand.) 326, 16 Am. Dec. 755, citing Bank *v.* Pindall, 23 Va. (2 Rand.) 465, as to deciding. And, in Taylor *v.* Bank, 32 Va. (5 Leigh) 471, Tucker, P., who delivered the opinion of the court, said: "If the object of the demurrer to the declaration was to try the right of a foreign corporation to sue, that right is settled by the case of Bank *v.* Pindall, 23 Va. (2 Rand.) 465, in which my brother Cabell has, with his accustomed clearness, established the affirmative of the proposition, upon the soundest reason." Also cited in Freeman's Bank *v.* Ruckman, 57 Va. (16 Gratt.) 126.

A joint action against a drawer and indorser may be brought under the Ohio statute by a foreign bank, as well as by banks incorporated in the state. Lewis *v.* Bank, 12 O. 132, 40 Am. Dec. 469.

Texas Const. 1887, art. 16, § 16, providing that no corporate body shall be hereafter created, renewed, or extended with banking or discount privileges, does not prohibit a foreign banking corporation from suing on a

§ 213 (2) Capacity to Be Sued.—Both at common law and under the statutes banking institutions may be sued,[7] even when owned or controlled by the state.[8]

And a foreign banking corporation may be sued by its creditors wherever it does business.[9]

§ 213 (3) Abatement of Actions.—At law no action can be maintained against a bank after it has ceased to exist, except upon express legislative authority. But the dissolution of a bank does not prevent a court of equity from collecting and administering its assets.[10]

demand not growing out of a banking transaction. Freeman *v.* Bank, 3 Tex. App. Civ. Cas., § 338.

7. **Suits against banks.**—The provision of the general banking law (St. 1838, p. 250, § 21) that persons having demands against a banking association "may" sue the president thereof does not take away the right, at common law, and under 1 Rev. St., p. 599, §§ 1, 2, to sue the corporation itself. Delafield *v.* Kinney (N. Y.), 24 Wend. 345.

8. **State banks.**—"Many of the states of this union who have an interest in banks are not suable, even in their own courts, yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign capacity so far as respects the transactions of the banks, and waives all the privileges of that character." Western, etc., R. Co. *v.* Taylor, 53 Tenn. (6 Heisk.) 408.

9. **A savings bank** incorporated in and for the District of Columbia may do business in Tennessee, and its depositors may proceed against it in Tennessee. Hadley *v.* Freedman's Sav., etc., Co., 2 Tenn. Ch. 122.

10. **Abatement of action by dissolution of bank.**—National Bank *v.* Colby (U. S.), 21 Wall. 609, 22 L. Ed. 687; White *v.* Campbell, 24 Tenn. (5 Humph.) 38; Hopkins *v.* Whitesides, 38 Tenn. (1 Head) 31; State *v.* Bank, 64 Tenn. (5 Baxt.) 101; Kyle *v.* Ewing, 73 Tenn. (5 Lea) 580.

As a general principle, the dissolution of a corporation by the expiration of its charter pendente lite, is an abatement of the suit, and the suit can not be renewed unless provision is made by law for such a contingency, but the principle has no application to a case where, although the judgment rendered while the corporation was in existence was in its name, yet the beneficial interest was vested by legislative assignment in the common-school fund. The court saying: "When this judgment was rendered at law, the bank was in existence, but if it had been defunct, this would not have affected the claim of the representatives of the common-school fund, because the fund had been assigned for such use by law, and the equitable right thereto at least was perfect. But when the defendant by his bill of injunction removes the case from a court of law in a court of chancery, upon well-settled chancery principles, the party interested in and actually owning the fund by equitable assignment, becomes the real party to the bill, and the nominal party at law is no longer necessary for the carrying on the suit, and his death can in no wise affect the interest of him who is the party really interested." Ingraham *v.* Terry, 30 Tenn. (11 Humph.) 572.

Upon the dissolution of a moneyed corporation its assets becomes trust funds for the benefit of its creditors and stockholders, and while in a court of law no suit could be maintained by or against such dissolved corporation without special authority from the legislature yet a court of chancery, by virtue of its inherent equity powers, has ever had the right to take charge of the funds and administer them for the benefit of those entitled. Section 1493, et seq., of the Code, extending the corporate life of corporations five years for winding-up purposes, does not take away the jurisdiction independently subsisting in the court of chancery. State *v.* Bank, 64 Tenn. (5 Baxt.) 101, citing Ingraham *v.* Terry, 30 Tenn. (11 Humph.) 572; White *v.* Campbell, 24 Tenn. (5 Humph.) 38; Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471.

Creditors of an insolvent bank, whose charter has been forfeited, and who have exhausted their legal reme-

§ 215. Conditions Precedent—§ 215 (1) In General.—Failure to File Reports.—Statutes in some jurisdictions prohibit banks that have failed to file their reports, from suing in the courts of the state.[11]

Security.—And in others, banks are required to furnish security as a condition precedent to bringing suit when exacted of other suitors, even though it be a state bank.[12]

Action for Conversion of Remittances.—But where money is borrowed by a bank for a stipulated purpose, and is received by the bank and afterwards wrongfully appropriated by it, an action for conversion may be maintained against the bank without averment that the purposes of the loan had been complied with.[13]

§ 215 (2) Demand.—The question whether a demand is a condition precedent to an action by or against a banking institution depends on the statutes in the various jurisdictions.[14]

dies against it, may sue in chancery for the assets of that bank, and have them applied in payment of their debts. Hightower *v.* Mustian, 8 Ga. 506.

Assignees of bank.—But where the act of incorporation of a bank has expired, no action can be maintained at law by the bank itself. Hence, the assignees of the bank may sue in equity for the bank. Lenox *v.* Roberts (U. S.), 2 Wheat. 373, 4 L. Ed. 264.

11. Failure to file report.—Cal. Sts. 1876, p. 729. See, also, statutes in various jurisdictions. Bank *v.* Barling, 44 Fed. 641.

St. 1875-76, p. 729, provides that banking corporations shall publish and record statements each year in January and July, and prohibits one violating the same from prosecuting any action in the state until the statute is complied with. Held, that such disability is universal, and therefore plaintiff bank, which had not filed a statement, could not maintain an action on the bills in suit on the ground that the transactions out of which the suit grew were personal contracts made out of the state, and that plaintiff ought not to be deprived of the privilege accorded foreigners of pursuing their remedies against residents of the state on such contracts. Bank *v.* Alaska Imp. Co., 97 Cal. 28, 31 Pac. 726.

Right to sue in federal courts.—St. Cal. 1876, p. 729, prohibiting every banking corporation failing to file for record a sworn statement of its condition, as required, from suing in the courts of the state, has no application to the federal courts located in that state, and does not prevent a foreign bank doing business there from maintaining suits in a United States circuit court in California, notwithstanding its failure to file such report. Barling *v.* Bank, 50 Fed. 260, 1 C. C. A. 510, affirming Bank *v.* Barling, 44 Fed. 641.

12. Injunction bond.—Where the bank of the state brings suit for injunction, it must, like other suitors, give bond. It will not escape this requirement by joining the state as a complainant. Ex parte State, 15 Ark. 263.

13. Conversion or remittances.—An owner of land on which an elevator was in process of erection borrowed money from a loan company, securing its payment by mortgage. By agreement the money borrowed was to be paid on certain claims for material and machinery to avoid a mechanic's lien. The mortgagee was to distribute the money, and through a bank sent part of it to another bank, with directions to pay a certain claim against the contractor; but the receiving bank applied the amount to a debt owing to it by the contractor, and a lien was foreclosed on the elevator. Held, that the mortgagee could recover against the bank, which had misapplied the remittance, without showing that it had paid for the machinery or foreclosed its mortgage. Winfield Nat. Bank *v.* Railroad Loan, etc., Ass'n, 71 Kan. 584, 81 Pac. 202.

14. Demand.—Under § 17 of the charter of the Southern Bank of Georgia, no action can be brought against the bank under the charter, before special demand made for the payment

§ 216. Nature and Form of Remedy.—In General.—Unless restricted by the charter or statutory provisions, a creditor may elect any form of action in a suit against a bank, appropriate to such a case, which he may deem most convenient and advantageous to him.[15]

Assumpsit may be maintained against a bank on a contract under the seal of the president and cashier.[16]

§ 217. Summary Remedies—§ 217 (1) In General.—By statute in some jurisdictions it is provided that certain banks may proceed by the summary remedy of a motion for judgment, after giving notice, to recover debts due to them by note or other contracts for the payment of money.[17]

of the debt. Southern Bank *v.* Mechanics' Sav. Bank, 27 Ga. 252.

Garnishment.—A bank may be garnished by a creditor of a depositor without first demanding payment, of the bank, of the depositor's debt. Birmingham Nat. Bank *v.* Mayer, 104 Ala. 634, 16 So. 520.

Actions on negotiable paper.—Under the charter of the Central Bank of Georgia (§ 26), providing that "in all suits commenced by said corporation upon any note * * * upon which there shall be any indorser or indorsers, the maker and indorsers may be sued in the same action, and no proof of notice, demand, or protest shall be required, on any trial, to authorize a recovery," no demand or notice is necessary to charge an indorser on a bill due said bank. Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Mahone *v.* Central Bank, 17 Ga. 111.

Section 26 of the charter of the Central Bank of Georgia, dispensing with proof of demand and notice by that bank in order to charge indorsers, applies as well to notes not made payable at that bank as to those which are. McDougald *v.* Central Bank, 3 Ga. 185.

15. Nature and form of remedy.—Adkins *v.* Thornton, 19 Ga. 325.

Debt.—But the charters of most banks which give a remedy against directors for excessive issue of notes prescribe the remedy. In all these cases the action of debt is given. Adkins *v.* Thornton, 19 Ga. 325.

An action on the case will not lie against a banker for failing to pay over money collected by him in that capacity for another, because a bank receives no fee for its services, but only the use of the money until called for by the creditor. Tinkham *v.* Heyworth, 31 Ill. 519.

Trover does not lie if a bank in accepting the property of a corporation for trust purposes acts beyond the scope of its powers. Frederick & Sons *v.* Commercial German Nat. Bank, 153 Ill. App. 485.

16. Assumpsit on sealed contract.—Bank *v.* Guttschlick (U. S.), 14 Pet. 19, 10 L. Ed. 335.

"The action, in this case, was assumpsit against the bank, on a contract under the seals of the president and cashier. Held, that the action was well brought; it makes no difference, in an action of assumpsit against a corporation, whether the agent was appointed under the seal or not; nor whether he puts his own seal to a contract which he makes in behalf of the corporation." Bank *v.* Guttschlick (U. S.), 14 Pet. 19, 10 L. Ed. 335.

17. Summary remedies by banks.—Act June 30, 1837; (La.) Stats. March 13, 1818, No. 39; Bank *v.* Bush, 1 Miss. 265.

The Bank of the State of Mississippi can not proceed by notice against an indorser of a note made payable at one of its offices of discount and deposit. Bank *v.* Bush, 1 Miss. 265.

Negotiability.—Under the statute of 1837 "to extend the time of indebtedness to the State Bank," etc., it is not necessary that a note should be negotiable at the bank, to authorize the bank to institute the summary remedy given by its charter. Hancock *v.* Branch Bank, 5 Ala. 440.

Unendorsed notes held by bank.—But where a note is payable to the maker, and is not indorsed by him, and the holder is a bank, it can not maintain proceedings by notice, under the statute, on the certificate of the president that the note is bona fide the property of the bank. Lea *v.* Branch Bank (Ala.), 8 Port. 119.

Notes payable at bank.—**The Bank of the State of Mississippi** can not proceed by the statutory notice against

But since this statute is in derogation of the common law it must be strictly construed and will not be extended beyond its plain terms.[18]

§ 217 (2) Parties—§ 217 (2a) Parties Plaintiff.—This summary remedy by notice and motion is available to the trustees of the bank as well as the bank itself.[19]

§ 217 (2b) Parties Defendant.—But the summary remedy provided by statute in favor of banks will not lie against the representatives of a deceased debtor of a bank.[20]

§ 217 (3) Notice of Motion—§ 217 (3a) Functions of Notice.—In summary proceedings by notice and motion against bank debtors, a dec-

the indorser of a note payable at one of its offices of discount and deposit. The remedy is limited by the charter to notes payable at the bank itself. Bank *v.* Bush, 1 Miss. 265.

Ordinary business paper.—The remedy of judgment on summary motion, given to parties, bound for the payment of any bill of exchange, the property of the Bank of Alabama, or any of its branches, by Act 1830, § 2, does not extend to ordinary business paper, but is confined to accommodation paper discounted by said bank or its branches. Edgerly *v.* Butler (Ala.), 3 Port. 344.

Note discounted for indorsees.—Under St. March 13, 1818, No. 39, giving summary process to the banks to recover money loaned, they can not proceed summarily against the maker of a note discounted at the request of indorsees. United States Bank *v.* Fleckner (La.), 8 Mart. (O. S.) 141.

Recovery of wages by agent of bank.—The eighteenth section of the charter of the Bank of Alabama, authorizing proceedings by and against it, by notice and motion, on a bill, bond, etc., does not authorize such proceeding by an agent of the bank to recover stipulated wages while employed as such. Wrigglesworth *v.* State Bank, 1 Ala. 222.

18. Strict construction of statute.—Murphy *v.* Branch Bank, 5 Ala. 421; Alexander *v.* Branch Bank, 5 Ala. 465.

Retroactive operation of statute.—Act June 30, 1837, giving banks the right to sue under their charters by summary remedy on bills, notes, etc., applies only to such as are acquired after its passage. Levert *v.* Planters', etc., Bank (Ala.), 8 Port. 103.

The charter of a bank provides that if any person shall be indebted to the corporation as maker or indorser of any note expressly made negotiable and payable at said bank, and shall delay payment thereof, the bank may, after giving notice, move for judgment and execution. Act June 30, 1837, provides that if any person shall become indebted to any of said institutions (including said bank) by note or other contract for the payment of money, and shall delay payment thereof, the said banks may sue for and collect the same by summary remedy, as in other cases under the charter of said banks. Held, that such act applies only to future acquisitions of such bank, and therefore, to be entitled to such summary remedy, it must appear either that the note on which claim is made was expressly made negotiable and payable at said bank, or that it was acquired after June 30, 1837. Levert *v.* Planters', etc., Bank (Ala.), 8 Port. 103.

19. Trustees may maintain suit.—The trustees of the Planters' & Merchants' Bank of Mobile, appointed under the Act of 1845, were authorized to take individual notes to secure a balance due to the bank from a suspended bank of another state, and to institute suit thereon by the summary remedy of notice and motion. Jemison *v.* Planters', etc., Bank, 23 Ala. 168.

20. Representatives of deceased debtor as parties defendant.—Andrews *v.* Branch Bank, 10 Ala. 375.

The summary remedy given by its charter to the Branch Bank at Mobile, to recover judgment against the maker or indorser of a note, on thirty days' notice, must be strictly construed, and can not be used against the representative of a deceased maker or indorser. Murphy *v.* Branch Bank, 5 Ala. 421.

laration is unnecessary,[21] for the notice serves the double purpose of a writ and declaration.[22]

§ 217 (3b) Form and Requisites.—This summary process by notice, etc., is remedial, and does not require technical nicety.[23] But the rule is well settled that the notice which the statute requires to be given in summary proceedings is sufficient if it describes the debt upon which the motion is to be made with reasonable certainty,[24] though it has not the technical precision of a declaration.[25] But the notice must show that title to the indebtedness sued on is in the bank,[26] and also the time when the motion is to be submitted to the court.[27] But the notice need not allege that the debt is

21. No declaration necessary.—In proceeding to take summary judgment against one indebted to the State Bank, a declaration is not necessary, though the record must show every material fact to have been proven. Lyon *v.* State Bank (Ala.), 1 Stew. 442.

22. In summary proceedings by notice and motion against bank debtors, this notice serves the double purpose of a writ and declaration, and prevents the statute of limitations from creating a bar, although the motion for judgment is afterwards delayed. Stanley *v.* Bank, 23 Ala. 652.

23. Branch *v.* Harrison (Ala.), 2 Port. 540.

24. Description of indebtedness.—Colgin *v.* State Bank, 11 Ala. 222.

Where a debtor of a branch of the State Bank of Alabama, against whom the summary remedy by motion for judgment, provided by its charter, has been prosecuted, pleads to the merits, and a verdict and judgment are rendered against him, an objection that the notice is defective can not be allowed if it show, prima facie, that he is indebted to the plaintiff. Crawford *v.* Branch Bank, 7 Ala. 205.

Description of interest and damages.—In a summary proceeding by the State Bank against its debtor, the notice alleged that the drawer and indorser were indebted to the plaintiff by a bill of exchange, purchased under the first section of the Act of 1843, and informed them that a motion would be made against them for the amount of money due and unpaid on the bill, together with the interest and damages at the rate of 30 per cent, which shall have lawfully accrued thereon. The damages prescribed by the statute on one description of bill to which it referred was 30, and on another 5, per cent. Held, that as the plaintiff, upon proof of default and notice, might recover at least 5 per cent damages, the notice was not bad on demurrer. Riggs *v.* Bank, 11 Ala. 183.

Surplusage in description.—In a summary proceeding by notice and motion at the suit of a bank, where the notice recites that the bank will move for judgment on a bill dated January 4, 1840, payable six months after date, and that "it was purchased under the first section of the Act of 1843," the recital as to the purchase may be treated as surplusage, since the only effect of the fact, if established, would be to entitle the bank to a penalty. State Bank *v.* Dent, 12 Ala. 187.

25. Lyon *v.* State Bank (Ala.), 1 Stew. 442.

26. Title in bank.—An allegation, in the notice of a motion for summary judgment in favor of the State Bank, that the president, etc., are "holders and owners of the bill" of exchange sued on, is tantamount to an averment that the bill is the property of the bank. Walker *v.* Bank (Ala.), 4 Stew. & P. 215.

Under the Act of December 4, 1841, providing that all notes, bills, etc., held by the State Bank or Branch Banks, payable to the cashier, may be sued and collected in the name of the several banks, in the same manner as if made payable directly to such bank or Branch Banks, a note payable to B. G., cashier, and described in a notice under the statute by the State Bank or Branch Banks, is sufficient to show that the title is in the bank. Crawford *v.* Branch Bank, 7 Ala. 383.

27. Designation as to time.—In a suit by a branch of the State Bank of Alabama against one of its debtors, upon motion and notice under its charter, the notice was received by the sheriff in April, 1842, and served on the 7th of May thereafter, and in-

due and unpaid, if the note or bill is set out in hæc verba, from which it appears to be overdue.[28] The notice need not be dated[29] but it must be under the corporate seal.[30]

A variance between the indebtedness set forth in the notice and that shown at the trial is fatal to the motion.[31]

§ 217 (4) Who May Give.—The statute directs that this notice be given by its president.[32]

§ 217 (5) Length of Notice.—The length of notice before making a motion for judgment is governed entirely by statute.[33]

§ 217 (6) Service of Notice and Time of Motion for Judgment.—In a summary proceeding by motion at the suit of a bank, it is not necessary that the notice shall be served thirty days before the commencement of the

formed the defendant that the plaintiff would move for judgment against him "at the next term," etc., "to be holden," etc., in 1841. In May, 1842, the defendant appeared and pleaded. Held that, the fair inference being that the motion was to be submitted at the next term of court succeeding the time when the notice was issued, so much of the notice as particularized the time when the court was to sit might be rejected as surplusage. Crawford *v.* Branch Bank, 7 Ala. 205.

28. Sale *v.* Branch Bank, 1 Ala. 425.

29. Dating notice.—A notice of a motion for judgment in a suit by a bank requiring its debtor to answer to an allegation of indebtedness need not be dated, unless the date is made material by a reference to it as indicating the time when the motion will be made. Griffin *v.* State Bank, 6 Ala. 908.

30. Corporate seal to notice.—In pursuing the summary remedy given to banks by the Alabama statute, the terms of the statute must be strictly observed. Notice of a motion for judgment must be given under the corporate seal. Logwood *v.* Planters,' etc., Bank (Ala.), Minor 23.

Notice of a motion for judgment by the Huntsville Bank must be under its corporate seal. Minor, 23. But the notice to the maker or indorser of a bill or note, which is authorized by the act incorporating the Branch of the Bank of the State of Alabama at Montgomery, need not be under the corporate seal. Branch *v.* Harrison (Ala.). 2 Port. 540.

31. Variance.—On a plea of non assumpsit to a notice by a bank requiring its debtor to answer to an allegation of indebtedness, if the note sought to be recovered is misdescribed as to the time of its maturity, the variance will be fatal to the motion. Griffin *v.* State Bank, 6 Ala. 908.

32. President de facto may give notice.—A notice for judgment, by motion, made by one assuming to be president of the bank, is sufficient, whether he be president of the bank de jure or not, if the act is adopted by his successor, who is legally president of the bank. Blackman *v.* Branch Bank, 8 Ala. 103.

Notice by president "and directors."—In a summary proceeding for judgment at the suit of a bank, a notice by the president "and directors" of the bank is sufficient, where its charter requires the notice to be given by the president of the bank. Crawford *v.* State Bank, 5 Ala. 679.

Notice by trustees.—The acts of February 13, 1843, for the final settlement of the affairs of the Planters' & Merchants' Bank of Mobile, not having reserved to the bank the power to sue after the forfeiture of its charter, but having vested it first in commissioners, and then in trustees, to be by them exercised in the name of the bank, a notice in its name against one of its debtors, which fails to show that the proceeding is instituted by direction or for the use of the trustees, is bad on demurrer. Jemison *v.* Planters', etc., Bank, 17 Ala. 754.

33. Thirty days notice in Alabama.—Murphy *v.* Branch Bank, 5 Ala. 421.

The statute of 1821, authorizing summary judgment against banks on ten days' notice, was repealed, as to the time of notice by the charter of the Branch Bank at Decatur, requiring thirty days' notice. Branch Bank *v.* Jones, 5 Ala. 487.

term of the court, or that the motion should be made on any certain day, unless, perhaps, the notice in this respect is special.[34]

§ 217 (7) Raising and Waiving Objections to Notice.—In a summary proceeding by notice issued at the instance of a bank against its debtor, the notice, after it has served the purpose of bringing the debtor into court, may be treated as a declaration, to which the defendant may either demur or plead.[35]

§ 217 (8) Amending Notice or Curing Defects Therein.—The notice may be amended so as to cure defects therein,[36] but the certificate required by statute, that the debt is bona fide the property of the bank, cannot be used for this purpose.[37]

§ 217 (9) Execution and Return of Process.—The notice of process may be executed[38] and returned[39] by the officers of the bank as well as a sheriff or other public officer.

§ 217 (10) Certificate as to Indebtedness to Bank.—Before a bank may institute this proceeding by notice and motion, there must be a certificate of the president showing that the indebtedness declared on is the bona fide property of the bank; this is a jurisdictional necessity.[40] The

34. Ticknor *v.* Branch Bank, 3 Ala. 135.

Time for tendering motion.—Where a bank gave notice, under the statute, of a motion for judgment against four persons, and judgment was taken against two only, which was set aside, and at a subsequent term judgment rendered against all, such judgment was held erroneous as to all, because it did not appear that a motion was submitted at the first term for judgment against all. Crawford *v.* Planters', etc., Bank, 4 Ala. 313.

35. Jemison *v.* Planters', etc., Bank, 17 Ala. 754.

36. **Amendment of notice.**—Where the notice in a summary proceeding, under the statute, by a bank, the charter of which has been forfeited, and the affairs of which have been placed in the hands of trustees for settlement, is defective for the want of an averment that the suit was instituted by authority of the trustees, it may be amended by annexing the trustees' certificate to the notice, averring that the bank, "by its trustees, named in the certificate annexed hereto, appointed under the act therein specified, will move," etc. Jemison *v.* Planters', etc., Bank, 23 Ala. 168.

37. On motion of a bank for judgment against its debtor, the certificate required by statute that the debt is bona fide the property of the bank is intended merely to give the court jurisdiction, and can not cure a defect in the notice. Jemison *v.* Planters', etc., Bank, 17 Ala. 754.

38. **Power of bank's agent to execute process.**—An agent, appointed by the Bank of the State, or one of its branches, under the statute of 1843, to execute the process, is the sheriff of the bank, and is invested with the power and authority to perform the duties of his office by deputy. Draine *v.* Smelser, 15 Ala. 423.

The agents of the State Bank and its branches, appointed under the statute, possess the same powers in executing process in favor of the bank conferred on sheriffs, and are bound to observe the same rules. Branch Bank *v.* Darrington, 14 Ala. 192; Morgan *v.* Ramsey, 15 Ala. 190.

39. The Act of 1841 (Clay's Dig., p. 118, § 86) authorizes the State Bank and its several branches to appoint an officer to serve notices and writs and perform other duties which hitherto have appertained to the office of sheriff. Held, that the courts will ex officio take notice of the returns made by the bank agents in the same manner as they do returns by sheriffs. Crawford *v.* Branch Bank, 7 Ala. 383.

40. **Certificates as to indebtedness to bank.**—Roberts *v.* State Bank (Ala.),

certificate must be made by the president of the bank[41] and contain a sufficient description of the indebtedness,[42] and be under seal,[43] but the certificate of indebtedness is sufficient if it identifies the debt with reasonable certainty though it has not the technical precision of a declaration.[44] The certificate may be made at the time of the trial.[45]

§ 217 (11) Defenses Available to Debtor—Under the Act of 1793, incorporating the Bank of Columbia, which gives to the bank a summary remedy against its debtors, such debtors are deprived of no defense which might have been interposed to an action brought in the ordinary way.[46]

§ 217 (12) Burden of Proof.—The plea of non assumpsit to a no-

9 Port. 312; Bates *v.* Planters', etc., Bank (Ala.), 9 Port. 376.

Filing a declaration in support of a motion for summary judgment by a chartered bank is unnecessary, and does not so alter the proceeding as to dispense with the necessity of the certificate of the president of the bank that the debt is bona fide, as required by the charter. Duncan *v.* Tombeckbee Bank (Ala.), 4 Port. 181.

On motion by the Bank of Mobile for judgment, the certificate of the president of the bank that the note sued on is bona fide the property of the bank is necessary to give the court jurisdiction, but can not be used for any other purpose, or looked to by the jury as evidence. Gazzam *v.* Bank, 1 Ala. 268.

Certificate as proof of jurisdiction.—In a summary proceeding by notice and motion against a bank debtor, if the proper certificate is appended to the notice that the note is really and bona fide the property of the bank, the certificate is proof of the jurisdictional fact to the end of the suit, although the note is sold or assigned before judgment. Jemison *v.* Planters', etc., Bank, 23 Ala. 168.

41. **The president pro tem. of the Branch Bank at Mobile may** certify, under the charter, that a note sued on is bona fide the property of that branch. Bancroft *v.* Branch Bank, 1 Ala. 230.

Proof of official character.—To authorize the rendition of judgment by motion in favor of the Planters' & Merchants' Bank of Mobile, it is not sufficient to produce to the court the certificate of one assuming to be the president of the bank, or a commissioner, under the Act of 1843, that the debt is the property of the bank, but the official character of the person assuming to act must be proved, and the genuineness of their signature. Crawford *v.* Planters', etc., Bank, 6 Ala. 289.

Where the record in a suit by a bank against an indorser of a promissory note, by motion, recites that the certificate of W. R. H., its president, was produced that the debt was really and bona fide the property of the bank, and no objection was made in the court below to the testimony by which the fact that W. R. H. was the president was established, it will, on appeal, be held sufficient. Lester *v.* Bank, 7 Ala. 490.

42. **Merely stating amount insufficient.**—In a summary proceeding by a bank against one of its debtors to recover the amount of a promissory note as authorized by the special Act of June, 1837, the certificate of the president of the bank as to the title of the note must identify it with reasonable certainty by some other description than by merely stating its amount. Sale *v.* Branch Bank, 1 Ala. 425.

43. **Certificate must be sealed.**—Logwood *v.* Planters,' etc., Bank (Ala.), Minor 23.

44. **General sufficiency of certificate.**—Lyon *v.* State Bank (Ala.), 1 Stew. 442.

45. **Execution of certificate.**—On motion for judgment by a bank on a bill of exchange, the certificate, required by statute to be made by the bank, that the bill is bona fide its property, may be made at the time of the trial. Ford *v.* Branch Bank, 6 Ala. 286.

46. Bank *v.* Sweeney (U. S.), 2 Pet. 671, 7 L. Ed. 557.

This act did not intend to interfere with any legal defense against the claim of the bank the party might have; it does not prescribe the nature of the defense, nor deprive him of any which might have been used, had the action been commenced in the usual way. Bank *v.* Sweeney (U. S.), 2 Pet. 671, 7 L. Ed. 557.

tice of a motion for judgment at the suit of a bank requiring its debtor to answer to an allegation of indebtedness, throws upon plaintiff the onus of proving the material facts stated in the notice.[47]

§ 217 (13) Record and Judgment—§ 217 (13a) Matters to Be Shown by the Record.—In a summary proceeding on a bank notice, everything necessary to give the court jurisdiction, and to sustain its judgment, must appear on the record.[48] Accordingly the record must show that the president's certificate was produced and was under seal.[49] But it need

47. Griffin *v.* State Bank, 6 Ala. 908.

48. **Matters to be shown by the record.**—Bates *v.* Planters', etc., Bank (Ala.), 8 Port. 99.

In cases where bank debtors are proceeded against summarily by notice, the judgment, whether by default or otherwise, must show affirmatively every fact necessary to give the court jurisdiction; and in judgments by default the liability of the defendant for the debt must be also shown. Curry *v.* Bank (Ala.), 8 Port. 360.

The notice.—In summary proceeding on a bank notice, the notice issued to defendant and attached to the transcript is not considered as part of the record, so as to show the bank entitled to recover judgment on motion. Levert *v.* Planters', etc., Bank (Ala.), 8 Port. 103.

Acceptance of bill.—To charge one as acceptor of a bill of exchange, under the process prescribed, by which the State Bank takes summary judgment against its debtors, the record must show that positive proof was given that he accepted the bill. A default in this sort of cases is not an admission of the cause of action. Walker *v.* Bank (Ala.), 4 Stew. & P. 215.

Negotiability of instrument sued on.—The judgment on a bank notice must disclose that the instrument sued on was negotiable and payable at the bank. Sayre *v.* Bank (Ala.), 9 Port. 423.

Legal title in bank to sue.—In a summary proceeding by a bank, the judgment entry, if the judgment is by default, must show a legal title in the bank to maintain the action; and if the note is described as payable to A. A., cashier, or bearer, the legal title will not be presumed to be in the bank, unless the judgment entry avers the note to have been indorsed by the bank, or avers that the note was payable to the bank by the name of A. A., cashier. McWalker *v.* Branch Bank, 3 Ala. 153.

To sustain a summary judgment of the State Bank for 30 per cent damages upon the dishonor of a bill of exchange, it must be shown by the record that it was purchased by the bank to make a remittance in payment of the state bonds. The statement of a fact from which such an inference might be drawn is not sufficient. Leigh *v.* State Bank, 10 Ala. 339.

Liability of defendant.—To sustain a judgment by default on a motion by a bank, under Act 837, p. 9, authorizing a joint judgment against all the parties liable on any bill or note to the state bank or any of its branches, the liability of the defendant must be shown by the judgment entry, as well as the notice and certificate which authorized the court to exercise the summary jurisdiction. Clements *v.* Branch Bank, 1 Ala. 50.

Where a judgment by default, or nil dicit, is rendered upon motion in favor of a bank, the record must show the liability of the defendant for the debt or demand, and that the facts were proved which gave the court jurisdiction. Andrews *v.* Branch Bank, 10 Ala. 375.

49. **President's certificate.**—Logwood *v.* Planters', etc., Bank (Ala.), Minor 23.

When the record does not show that the certificate of the president of the bank was produced and shown to the court, it has no jurisdiction, and the judgment can not be rendered. Bates *v.* Planters', etc., Bank (Ala.), 8 Port. 99.

To sustain a judgment on notes recovered by the Huntsville Bank, or the Tombeckbee Bank, on motion, pursuant to the provisions in their respective charters, the record must show that the certificate of the president was produced, stating that the bank was owner of the notes. Logwood *v.* Planters', etc., Bank (Ala.), Minor 23; Duncan *v.* Tombeckbee Bank (Ala.), 4 Port. 181.

But the certificate of the president of the bank, appended to a notice to defendant, attached to the transcript, is

not appear from the record that the defendant was called before judgment;[50] nor, if no issue is made up, and a verdict is returned for the plaintiff, is it necessary that the judgment should affirm with particularity the proof of every fact which was necessary to have authorized their verdict. It is enough if it distinctly sets forth the facts which are essential to the exercise of the summary jurisdiction.[51]

§ 217 (13b) The Judgment.—Form and Requisites.—The judgment rendered on the return of notice must be certain and complete in itself without reference to anything else by which to ascertain its meaning.[52]

Amendments and Corrections.—Clerical errors or misprision in the judgment are amendable.[53]

§ 217 (14) Execution without Judgment.—The fourteenth section of Maryland Act of 1793, c. 30, entitled "An act to establish a bank in the District of Columbia," authorized the president of this bank, upon nonpayment of a note made expressly negotiable at that bank, to order execution without judgment, "on which the debt and cost may be levied by selling the property of the defendant for the sum mentioned in said note."[54]

no part of the record, unless the court has acted on it. Bates *v.* Planters', etc., Bank (Ala.), 8 Port. 99.

50. Logwood *v.* Planters', etc., Bank (Ala.), Minor 23.

51. Riggs *v.* Bank, 11 Ala. 183.

52. Certainty in judgment.—A judgment in a summary proceeding at the suit of a bank against the drawer of a bill of exchange is sufficiently certain when it recites that the bill was presented for payment at "maturity," without specifying the day. Crawford *v.* Branch Bank, 6 Ala. 574.

53. Amendable defects in judgment.—Where a judgment is rendered in favor of "The President of the Bank," etc., omitting the words "and Directors," which are a part of the corporate name, the omission is a mere clerical misprision, amendable at the costs of plaintiff in error. Snelgrove *v.* Branch Bank, 5 Ala. 295.

Misrecitals in judgment.—In a summary proceeding by a bank against the indorsers of a note, the notice described the note as payable to J. C. W., by him indorsed to J. W. W., and by him indorsed to the bank. The judgment described the note as in the notice, except that it recited that it was indorsed to the bank by J. C. W. Held, that the misrecital was amendable by a reference to the notice. Jordan *v.* Branch Bank, 5 Ala. 284.

54. Validity of statute allowing execution without judgment.—In the case of Bank *v.* Okely (U. S.), 4 Wheat. 235, 4 L. Ed. 559, the supreme court decided that the 14th section of the charter of that bank was not unconstitutional.

That section of the charter, however, was repealed by the 8th section of the Act of congress of the 2d of March, 1821 (3 Stat. 618), entitled "An act to extend the charters of certain banks in the District of Columbia."

Issuance.—The execution must show upon its face all facts necessary to justify the clerk in issuing it, Okely *v.* Boyd, Fed. Cas. No. 10,476, 2 Cranch, C. C. 176; and the clerk has no authority to issue a second or alias writ of fi. fa. upon the same order on which the first was issued. Smith *v.* Bank, Fed. Cas. No. 13,011, 4 Cranch, C. C. 143.

The clerk of the District of Columbia could, however, issue the process. Bank *v.* Okely (U. S.), 4 Wheat. 235, 4 L. Ed. 559.

Property subject.—An execution so issued ought not to include a notary's fee for protest, Bank *v.* Bunnel, Fed. Cas. No. 863, 2 Cranch, C. C. 306; but if it erroneously includes a notary's fee for protest, the execution will not be quashed if the bank releases the fee. Bank *v.* Bunnel, Fed. Cas. No. 863, 2 Cranch, C. C. 306.

Such an execution may, however, include five dollars for an attorney's fee, and the interest which has accrued upon the debt up to the time of ordering the execution. Bank *v.* Bunnel,

§ 217 (15) Affidavit to Procure Execution.—To procure this execution an affidavit of the president was required stating that this indebtedness was due the bank.[55]

§ 217 (16) Review on Appeal.—Record on Appeal.—In a summary proceeding at the suit of a bank against its debtor, an appellate court will not look to the notice sent up with the record, for the purpose of contradicting the recital in the judgment, where there has been no contestation in the trial court.[55a]

Presumptions on Appeal.—Where the judgment in a summary proceeding at the suit of a bank recites that a notice and certificate as to ownership were produced to the court, it will be intended that the notice and certificate found in the transcript were those on which the court acted.[56]

§ 218. Jurisdiction and Venue—§ 218 (1) Jurisdiction—§ 218 (1a) At Law or in Equity.—In the absence of charter or statutory restrictions, a creditor of a bank may proceed in equity or at law to enforce his rights.[57] Equity will not entertain, however, a suit either by or against

Fed. Cas. No. 863, 2 Cranch, C. C. 306.

Upon the return of the execution, the court will not quash the execution because it appears on the face of the note upon which it was issued that it has been barred by the statute of limitations. Bank *v.* Cook, Fed. Cas. No. 864, 2 Cranch, C. C. 574; but the court will permit the defendant to plead the statute of limitations. Bank *v.* Cook, Fed. Cas. No. 864, 2 Cranch, C. C. 574; Bank *v.* Sweeny, Fed. Cas. No. 881, 2 Cranch, C. C. 704.

An order for an execution by the president is not a judgment, and a second execution can not issue without a new order. Bank *v.* Baker, Fed. Cas. No. 862, 3 Cranch, C. C. 432; therefore, where such execution is discontinued, a new order must be given to entitle the bank to a new execution. Bank *v.* Baker, Fed. Cas. No. 862, 3 Cranch, C. C. 432.

The reason for this is that such execution is but the commencement of the suit, and, if not prosecuted, it is discontinued. Bank *v.* Baker, Fed. Cas. No. 862, 3 Cranch, C. C. 432.

This execution binds the lands and goods of the debtor from the time of the delivery of the writ to the marshal. Smith *v.* Bank, Fed. Cas. No. 13,011, 4 Cranch, C. C. 143.

Stay of execution pending appeal.—The clause of the charter of 1793, c. 30, § 14, of the Bank of Columbia, which provides that "such execution shall not be liable to be stayed or delayed by any supersedeas, writ of error, appeal, or injunction from the chancellor," was only applicable to such writ of supersedeas, error, and injunction as the debtor himself might attempt to interpose, or as might be interposed by some person who has involuntarily subjected himself to the summary remedy by becoming a party to a note expressly made negotiable at the Bank of Columbia. Smith *v.* Bank, Fed. Cas. No. 13,011, 4 Cranch, C. C. 143.

55. Affidavit to procure execution.—Under the charter of 1793, c. 30, of the bank of Columbia, which authorizes the president thereof, upon nonpayment of a note made expressly negotiable at that bank, to order execution without judgment, provided the president shall make oath ascertaining whether the whole or what part of the note is due to the bank, an affidavit stating that "the note was not paid when due, according to the best of his knowledge and belief," and that the sum of —— remained due upon the note, is sufficiently certain, although it does not state that it remained due from the defendant, nor that the defendant is the person who signed the note. Bank *v.* Cook, Fed. Cas. No. 864, 2 Cranch, C. C. 574.

55a. Snelgrove *v.* Branch Bank, 5 Ala. 295.

56. Presumptions on appeal.—Jordan *v.* Branch Bank, 5 Ala. 284.

57. At law or in equity.—Adkins *v.* Thornton, 19 Ga. 325.

a bank, if there is an adequate remedy at law.[58] But a suit is plainly one of equitable cognizance, where the bill is filed to charge a bank, as a trustee, for a breach of trust in regard to a specific deposit;[59] or to charge them with fraud and misapplication of assets,[60] or to enforce a trust generally;[61] or to enforce the payment by the bank of moneys in its hands to which the complainant's title is equitable merely, as where a principal is seeking to recover funds deposited by his factor.[62]

§ 218 (1b) Particular Courts.—The question what particular courts have jurisdiction of actions by or against banks is wholly dependent on statute.[63]

§ 218 (2) Venue.—The venue of actions by[64] or of actions against

58. Bank in equity.—Upon the statute regulating judicial proceedings where banks and bankers are parties, a bank can not ask the aid of a court of equity against a party to a joint and several contract, until all legal remedies are exhausted. Bank *v.* Yoe, 4 O. 125.

Suit against bank on collaterals.—Where a banking corporation borrowed money from another bank for the purpose of paying its depositors, and hypothecated its notes and credits as collateral to the loan, a suit in equity is not the proper proceeding by an unsecured creditor of the debtor bank to reach such collaterals. Overstreet *v.* Citizens' Bank, 12 Okl. 383, 72 Pac. 379.

59. Suit for breach of trust as to deposit.—Manhattan Bank *v.* Walker, 130 U. S. 267, 32 L. Ed. 959, 9 S. Ct. 519.

60. Bank *v.* St. John, etc., Co., 25 Ala. 566.

61. Enforcement of trust.—As one object of a suit against a national bank and its stockholders, upon a debt evidenced by a note, was to subject to the satisfaction of the debt certain property conveyed to a trustee as security therefor, no judgment at law was a prerequisite. Wyman *v.* Wallace, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495.

62. Equitable title.—While, when a bank has money in its possession which, in fact, belongs to a third party, received from whatever source, it may be an action at law will lie, and therefore, no case for equitable cognizance is presented, this latter proposition has some limitations. It may be true if the full legal title to the moneys is in such third party; but it is not true when his title is equitable rather than legal; and the right of these complainants as against the bank, to the moneys deposited by their factor, is equitable. True, the obligation of a factor to his principal for moneys received on the sale of property consigned to him for sale is not a debt created by one acting in a fiduciary capacity, within the meaning of the bankrupt law, but it does not follow that no fiduciary obligation inheres in such debt. Union Stock Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 34 L. Ed. 724, 11 S. Ct. 118.

63. See statutes in various jurisdictions.

Jurisdiction of justice's court.—A justice's court, in this state under the Act of 1819, § 3, has jurisdiction to award judgment against a bank, for the nonpayment of its bills in specie, to the amount of thirty dollars, with interest thereon, and ten per cent damages, as provided by the act of 1832. Bank *v.* Brooks, 12 Ga. 531.

Amount in controversy.—Where a party is the holder of the bills of an incorporated bank in this state, to the amount of $150, he may divide the bills so held by him; that is to say, he may select three ten-dollar bills, or six five-dollar bills, and maintain suit thereon in a justice's court, according to the provisions of the Act of 1842. Bank *v.* Brooks, 12 Ga. 531.

64. Under Louisiana Act March 13, 1818, which provides that drawers of notes made in favor of banks, and payable in a certain city by persons who have no domicile therein, elect a domicile in that city, and are suable on such notes in the courts sitting there, and Act 1828, p. 160, provides that all the rules of proceeding which existed before the promulgation of the Code of Practice (except a few, which do not touch the Act of 1818) are abro-

banks[65] is wholly dependent on statutory provisions in the various jurisdictions.

§ 219. Time to Sue, and Limitations.[66]—The limitation on actions by or against banks is, of course, regulated by statute in the different jurisdictions.[67] But where a bank is owned or controlled by the state it enjoys the same exemption from the statute of limitations that the state itself enjoys.[68]

§ 220. Parties—§ 221. In General.[69]—The answer to the question who are the proper parties to suits by or against banks depends on who are interested in the litigation. All whose interests may be prejudiced by the proceedings should be joined.[70] Hence it follows as a corollary that per-

gated, it was held, that the Act of 1818 is repealed, and that courts have no jurisdiction in such cases. Union Bank *v.* Lattimore (La.), 4 Rob. 342.

65. Venue of suit against bank.—A bank is suable only where located, and a judgment rendered against it in another county, by consent of the directors, as to the jurisdiction, is void, both as to third persons and inter partes. Central Bank *v.* Gibson, 11 Ga. 453.

In Pennsylvania, an action can not be instituted against the Bank of Pennsylvania in a county where it has only a branch. Brobst *v.* Bank (Pa.), 5 Watts & S. 379.

66. See post, "Judgment," § 229.

67. Time to sue and limitations.—In a suit on a note by the Bank of Arkansas, the defendant pleaded general limitation act. The plaintiff replied a payment on the day of the maturity of the note. Held, that the general law must govern, unless plaintiff's replication contained a special allegation to bring the case within the liquidation act of January 31, 1843. Woods *v.* State Bank, 12 Ark. 692.

68. Nullum tempus occurrit rege.—A debt due to the State Bank of Illinois is a debt due to the state, and not barred by the statute of limitations. State Bank *v.* Brown (Ill.), 1 Scam. 106.

Under the provisions of Act 1829, § 11, amending the charter of the Central Bank of Georgia, and vesting in the corporation the rights, powers, privileges, or immunities reserved by law, or accruing to the state in virtue of its sovereign capacity in regard to the collection of bonds, notes, etc., due it or to become due, and § 12, declaring that the general assembly did not devest the state of any of its rights in regard to the collection of bonds, etc., further than to vest the said rights in the bank, the statute of limitations does not run against debts due to such bank. Mahone *v.* Central Bank, 17 Ga. 111.

69. Action against bank by payee of check, substituting drawer, see ante, "Action by Payees or Holders of Checks against Bank," § 155.

Pleading in action against bank by payee of check, see ante, "Action by Payees or Holders of Checks against Bank," § 155.

70. The liability of a bank for money deposited subject to check is only to the depositor, and, in a suit to establish a trust in a deposit, the depositor is a necessary party. Gregory *v.* Merchants' Nat. Bank, 171 Mass. 67, 50 N. E. 520.

Surplus money.—In contemplation of the consolidation of the C and F. banks, J., a stockholder of the C. bank, sold defendant fifty shares of stock to be issued in stock of the consolidated concern; but, in an action on the note given for the purchase price, defendant claimed that, as certificates had never been issued to him, he was not a stockholder, and, having never received anything in consideration for his note, was entitled to a portion of the surplus of the C. bank. Held that, to justify a decree giving him such surplus, it was not enough that J. was a party, but the bank or other stockholders must be represented. Long *v.* Gilbert (Tenn.), 59 S. W. 414.

Manner of joining parties.—An order requiring A, president of the Union Bank, and B, cashier, to testify as to an indebtedness of the bank to C., without otherwise naming the bank, or indicating otherwise the object of the order, does not make the bank a party

sons having no interest in the subject matter of litigation need not be joined.[71] Nor is it necessary to join the mere officers or agents of the bank, not personally liable.[72]

§ 231½. —— Parties by Representation.—Where the parties are numerous but have a common interest, one may be made defendant and represent the interests of all.[73]

§ 222. —— Use of Name of Bank or Officer—§ 222 (1) Suing in Name of Bank.—An incorporated bank must sue and be sued in its corporate name.[74] Thus, a bank may maintain an action in its own name upon

to the proceedings. Union Bank *v.* Union Bank, 6 O. St. 254.

Joinder of parties by charter provision.—Where a clause in a bank charter authorizes the joining in one action of all parties, to a note or bill given to be negotiated, or actually negotiated in that bank, such joinder is proper. Such a clause in a bank charter is not unconstitutional, because not expressly recited in the title of the act of incorporation. Davis *v.* Bank, 31 Ga. 69.

71. The bank is not a necessary party to a suit to subject the stock of an individual to the payment of his debts. The only reason for making the bank a party was to get a discovery of the number of shares owned by the defendant, and to have the bank before the court that it might be compelled to make such transfer of the stock on its book as the court might direct. Brightwell *v.* Mallory, 18 Tenn. (10 Yerg.) 196.

Suit to enforce stockholder's liability.—When a banking corporation has been shown to be insolvent and its assets placed in the hands of a receiver, and in pursuance of an order of the court the receiver undertakes to collect by suit the liability of the stockholders for the payment of the debts of the bank as fixed by the statute, all of the stockholders so liable may be joined as defendants in one action. But in such a suit it is not necessary that the bank as a corporation shall be made a party defendant. Moore *v.* Ripley, 106 Ga. 556, 32 S. E. 647.

72. Officers and agents of bank.—A bank and an investment company held certain securities as collateral for loans made to the deceased, which they held after his death under an alleged contract consummated by C., the cashier of the bank, and H., the general manager of the investment company. Held, that C. and H. were not necessary parties to an action by deceased's administrator for an accounting for such securities, since they acted for their principals, and were not personally liable. Stennett *v.* First Nat. Bank, 112 Iowa 273, 83 N. W. 1069.

73. In a bill against an unincorporated banking company, the members of which are numerous, and, in part, unknown, it is not necessary to bring all the stockholders before the court before a decree can be made. Mandeville *v.* Riggs (U. S.), 2 Pet. 482, 7 L. Ed. 493.

Parties to suit by creditors against stockholders.—Where the personal statutory liability of the stockholders of a bank is to be apportioned amongst all according to the relative amount of stock owned severally by each, and where the corporation is insolvent and has no assets applicable to the payment of its unsecured creditors, one or more of these creditors may bring suit, in behalf of themselves and all others who may choose to come in and be made parties, against all of the stockholders to enforce their statutory liability and apportion the amount which each should contribute to discharge the claims of the various creditors. That some of the stockholders are dead and their estates unrepresented, and some can not be found within the jurisdiction of the court, is a sufficient reason for omitting them from the suit as parties defendant. Brobston *v.* Downing, 95 Ga. 505, 22 S. E. 277.

74. McVeigh *v.* Bank, 67 Va. (26 Gratt.) 188; Porter *v.* Nekervis, 25 Va. (4 Rand) 359; First Nat. Bank *v.* Huntington Distilling Co., 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878.

In whose name suit brought.—Case *v.* Mechanics' Banking Ass'n, 3 N. Y. Super. Ct. 693; Mason *v.* Farmers'

a note given to its cashier, upon an averment that it was made to the corporation by that name.[75] And a statute allowing suit to be brought in the name of a bank on notes given to its cashier as such is constitutional.[76]

Bank, 39 Va. (12 Leigh) 84; Stewart *v.* Thornton, 75 Va. 215.

Action by cashier not action by bank.—An action by A B, cashier of a certain bank, upon a note to him as such cashier, is not an action by the bank and although the declaration states that notice was given and protest made in behalf of the bank, such allegation is a mere surplusage, especially where the note is nonnegotiable; and hence the question as to whether the bank could deal in paper of the kind sued on does not arise in such case. Porter *v.* Nekervis, 25 Va. (4 Rand.) 359.

Suit by bank to recover pledges.—Where a bank borrows money from another bank, and authorizes its cashier in his own name to pledge notes taken in the name of the cashier, but belonging to the borrowing bank as security for a loan and the loaning bank fails, having money belonging to the borrowing bank in excess of the amount borrowed, the borrowing bank may sue in its own name the receiver of the failing bank for recovery of the notes pledged, and on proper allegation and proof is entitled to the return of the notes, and to have the sum borrowed on them set off against the amount on deposit. Rankin *v.* Blaine County Bank (Okl.), 93 Pac. 536.

Action on lease by bank.—The State Bank may sue in its own name on a lease of its real estate, when, by the terms of the lease, the rent is reserved to it, although the demise is in the name of an assistant commissioner. Douglass *v.* Branch Bank, 19 Ala. 659.

75. Action on note to cashier.—Smith *v.* Branch Bank, 5 Ala. 26; Caldwell *v.* Branch, 11 Ala. 549.

A note payable to the cashier of a bank is payable to the bank, and it may sue thereon as payee. Nave *v.* Hadley, 74 Ind. 155.

A bank may, in its own name, recover on a note payable to "Andrew Armstrong, Cashier," on an averment that it was made to the corporation by that name and description. Smith *v.* Branch Bank, 5 Ala. 26.

A bank which discounts a bill of exchange payable to the order of "A. B., Cashier," may maintain an action on such bill in its own name. Barney *v.* Newcomb (Mass.), 9 Cush. 46.

Where bills of exchange are drawn in favor of the cashier of a bank, and are discounted by the bank, they are, in law, drawn in favor of the bank; and it may sue thereon in its own name. Wright *v.* Boyd (N. Y.), 3 Barb. 523.

A bank may sue as payee on a note payable to its cashier, alleging either that the promise was made to the cashier for it, or that the cashier's name was used by adoption for that of the bank. Darby *v.* Berney Nat. Bank, 97 Ala. 643, 11 So. 881.

Where a promissory note was made payable "to the cashier of the Commercial Bank, or his order," and the consideration proceeded from the bank, it was held that an action on the note might be maintained in the name of the bank as the promisee. Commercial Bank *v.* French (Mass.), 21 Pick. 486, 32 Am. Dec. 280.

Necessity for cashier's endorsement.—A note made payable to a certain person as "cashier" need not be indorsed by the cashier to give the bank of which he is cashier the right to sue on the instrument as payee. First Nat. Bank *v.* Hall, 44 N. Y. 395, 4 Am. Rep. 698.

Alabama Act 1841 (Clay's Dig., p. 112, § 47), declaring that a note payable to the cashier of the State Bank or Branch Banks, may be sued on and collected as a note payable to the bank, applies to notes made since the passage of the act, as well as to those which had been executed at the time of its passage. Davis *v.* Branch Bank, 12 Ala. 463.

76. Constitutionality of statutes.—Where a note was made payable to B. Gayle, cashier, this designation as cashier was not made, it is presumed, as matter of description, but to show that the note was given to the agent of the bank, and for its use. A law was passed in Alabama authorizing suits to be brought on such notes in the name of the bank. The law is strictly remedial. It in no respect affects the obligation of the contract. Neither the manner nor the time of payment is changed. The bank, being the holder of the note, and having the beneficial interest in it, is authorized by the statute to sue in its own name. This is nothing more than carrying out the contract according to

But if the bank does not hold the legal title to the subject matter of the suit, it may use the name of the person who does.[77] And in like manner where the legal title is in the bank and the beneficial interest in another, the latter may proceed in the name of the bank.[78]

§ 222 (2) Suing in Name of Officer.—A bank cashier[79] or his successor[80] may sue in his own name on behalf of the bank to recover on notes or contracts of the bank. And the cashier of a bank may maintain an action in the name of the bank on a note made payable or indorsed to his predecessor; and such predecessor need not be made a party.[81]

By statute in New York, since repealed, all suits, actions or proceedings brought or prosecuted by or on behalf of banking associations, could be brought in the president's name,[82] but as this statute merely conferred a

its original intendment. Crawford *v.* Branch Bank (U. S.), 7 How. 279, 12 L. Ed. 700.

77. Where the bank has not the legal title to a note, it may sue in the name of the person who has the legal title to its use. Moore *v.* Penn, 5 Ala. 135.

78. **Action in name of bank for trustee in insolvency.**—A bank having, in pursuance of the Act of February 12, 1867, conveyed all its property to trustees for the purpose of closing up its affairs, a suit may be brought in the name of the bank for the benefit of the trustees upon a note discounted by the bank prior to the execution of this deed. Va. Code, 1873, ch. 56, § 31, p. 843; Crews *v.* Farmers' Bank, 72 Va. (31 Gratt.) 348.

79. **Suit by cashier in his own name.**—O'Brien *v.* Smith (U. S.), 1 Black 99, 17 L. Ed. 64; Dutch *v.* Boyd, 81 Ind. 146.

A cashier of an unincorporated banking association may receive and recover in his own name on a check for the use of the association. O'Brien *v.* Smith (U. S.), 1 Black 99, 17 L. Ed. 64.

The cashier and custodian of the funds of a banking partnership of which he is a member, who is in the habit of making contracts for the bank, may sue on such a contract in his own name in behalf of the bank, as he is a trustee of an express trust, within Code Civ. Proc., § 5, which provides that such trustee may sue without joining with him the person or persons for whose benefit the suit is prosecuted. Merchants' Bank *v.* McClelland, 9 Colo. 608, 13 Pac. 723.

A bank cashier may indorse to himself and sue on a note belonging to the bank. Young *v.* Hudson, 99 Mo. 102, 12 S. W. 632.

Assumpsit on the common money counts on a bill payable to B., "Cashier," may well lie, though the consideration moved from the bank of which he was the officer. Johnson *v.* Catlin, 27 Vt. 87, 62 Am. Dec. 622.

But under a bank's charter requiring all its notes to be made payable to the bank, a note made payable to "A., Cashier," can not be sued on by A. for the bank's use, but A. can transfer the note to the bank, which can then sue on it. Arnold *v.* Reid, 1 O. Dec. 347.

On negotiable paper payable to the order of a cashier, and alleged to have been delivered to him for the bank of which he is cashier, an action should be brought in the name of the bank, for that is the real party in interest. Camden Bank *v.* Rodgers (N. Y.), 2 Code Rep. 45, 4 How. Prac. 63.

80. A note payable to the cashier of a bank is, in effect, payable to the bank, and an action may be brought thereon in the name of the cashier's successor without an assignment; nor need he be made a party thereto. Dutch *v.* Boyd, 81 Ind. 146.

81. Dutch *v.* Boyd, 81 Ind. 146.

82. **Banking associations** organized under the Act of April 18, 1838, are corporations, and therefore suits on behalf of such banks may be prosecuted in the name of the president thereof. Thomas *v.* Dakin (N. Y.), 22 Wend. 9.

An action to recover a stock subscription to an association under the general banking law may be maintained in the name of one who was president when the suit was commenced. Stanton *v.* Wilson (N. Y.), 2 Hill 153.

Description "as president."—For the nominal plaintiff merely to describe

privilege and was not mandatory, the association might sue in its corporate name, if it pleased.[83]

§ 222 (3) In Actions by or against Branch Banks.—The corporate name of the principal or parent bank should be used in suits by or against branch banks.[84]

§ 222 (4) Raising and Waiving Objections.—To sue a branch bank other than in the name of the parent bank is not merely ground for abatement, but is a bar to any recovery.[85] And where a suit in the name of the president of a bank has been treated by both parties and the court as the suit of the bank, no objection can be raised at the final hearing.[86] It is too late to object on appeal to the name in which the bank sued.[87]

himself "as president" is insufficient, but if he also alleges that he is president of a named bank, duly established, and sets out a cause of action accruing to said bank, under St. 1858, the action must be deemed an action commenced by the plaintiff as a bank under St. 1858, and agreeably to § 21 of that statute. Hallett *v.* Harrower (N. Y.), 33 Barb. 537.

83. Construction of New York statute.—Columbia Bank *v.* Jackson, 4 N. Y. S. 433, 24 N. Y. St. Rep. 738; East River Bank *v.* Judah (N. Y.), 10 How. Prac. 135; Leonardsville Bank *v.* Willard, 25 N. Y. 574, affirming 16 Abb. Prac. 111.

Under the General Banking Act of New York (Act 1838, p. 250), providing that all suits and proceedings may be brought in the name of the president of a bank organized thereunder, suit may be brought on behalf of such bank, either in the name of the president or the name used in transacting its business. East River Bank *v.* Judah (N. Y.), 10 How. Prac. 135.

84. Suits by branch banks.—Tennessee Bank *v.* Burke, 41 Tenn. (1 Coldw.) 623.

Upon the construction of the Va. statute of March 19, 1832, authorizing suits against branches of banks in this commonwealth, it was held, that a suit can not be maintained against the president and directors of the branch; the suit must still be brought against the principal bank by its corporate name. Mason *v.* Farmers' Bank 39 Va. (12 Leigh) 84; Tompkins *v.* Branch Bank, 38 Va. (11 Leigh) 372.

In Hall *v.* Bank, 14 W. Va. 584, it is said: "They (the branch banks) were not in themselves corporations and could not be sued as such. The mother bank was alone liable to bring suit for the contracts of the branches; though suit could be brought in the counties where the branches were located. See Tompkins *v.* Branch Bank, 38 Va. (11 Leigh) 372."

What constitutes action against branch bank.—Mason *v.* Farmers' Bank 39 Va. (12 Leigh) 84.

Against whom summons must issue and declaration be filed.—Where an action is brought under the Act passed March 19, 1832, entitled "an act authorizing suits against the branches of banks in this commonwealth in certain cases," the summons is not to be issued nor the declaration filed against the branch bank, but both must be against the mother bank by its corporate name. Tompkins *v.* Branch Bank, 38 Va. (11 Leigh) 372; Mason *v.* Farmers' Bank, 39 Va. (12 Leigh) 84.

Cure by verdict.—Where a suit was brought against the president and directors of a branch bank instead of against the principal bank by its corporate name, the error was not cured by a verdict founded on a general issue. Mason *v.* Farmers' Bank, 39 Va. (12 Leigh) 84.

85. "President and directors"—Error—Jeofails.—Where a suit is brought against the president and directors of a branch bank, this is not a mere misnomer, which must be pleaded in abatement, but is a bar to any recovery; and though a verdict be founded upon the general issue pleaded, the error is not cured by the statute of jeofails. Mason *v.* Farmers' Bank, 39 Va. (12 Leigh) 84.

86. Suit in president's name as suit of bank.—Fortier *v.* New Orleans Nat. Bank, 112 U. S. 439, 28 L. Ed. 764, 5 S. Ct. 234.

87. "Farmers' Bank of Virginia"—Suit by that name—Objection on appeal.—It was held in Farmers' Bank *v.*

§ 223. Process and Appearance—§ 223 (1) Process—§ 223 (1a) Domestic Corporations—§ 223 (1aa) Form and Requisites.—Process against a bank should correctly describe the defendant by its corporate name.[88]

§ 223 (1ab) Upon Whom Served.—The statutes in most jurisdictions designate the officer of a bank upon whom process may be served, usually the president, cashier or some director. The process, however, must disclose the official capacity of the officer or agent served,[89] for jurisdiction over the bank cannot be obtained by service upon its officers and members as individuals.[90] But if the officer upon whom service is had is pecuniarily

Willis, 7 W. Va. 31, citing Mason *v.* Farmers' Bank, 39 Va. (12 Leigh) 84, that when "The Farmers' Bank of Virginia," by that name, brought suit, and the defendants made no objection, on that account, but pleaded in bar, and agreed the fact using that name, and the "president, directors and company of the Farmers' Bank of Virginia," indiscriminately, as the name of the same corporation, and submitted the case to the court, which gave judgment in favor of the bank; the defendants, who appealed, can not, in the appellate court, object successfully to the name in which the suit was brought.

88. **Description of bank.**—Where a restraining order was issued against "The President and Directors of the Bank of Virginia," it is not binding on the corporation whose corporate name by which it can sue and be sued under its charter was "The President, Directors, and Company of the Bank of Virginia." Bank *v.* Craig, 33 Va. (6 Leigh.) 399.

89. **Persons upon whom service may be made.**—See statutes in various jurisdictions and the following cases construing particular statutes. Bank *v.* Craig, 33 Va. (6 Leigh) 399.

In North Carolina the director upon whom process may be served under Rev. Code, c. 26, § 24, as applied to the Bank of Cape Fear, must be one of the eleven principal directors annually elected by the stockholders, and not a director appointed by the authorities of the bank for its branches or agencies. Webb *v.* Bank, 50 N. C. 288.

In South Carolina a bank is served with summons by service on the president and cashier. Meriwether *v.* Bank (S. C.), 1 Dud. 36.

In Tennessee it is provided, with regard to the Fayetteville, Tennessee bank, Act of 1821, ch. 197, § 5, that process be served upon the late president, cashier, or any director. Blake *v.* Hinkle, 18 Tenn. (10 Yerg.) 218.

Under Va. Code, 1887, § 3225, where the officers specified in the statute can not be found, process against any private corporation except a bank of circulation may be served on any agent thereof in the county or corporation in which he resides, or in which the principal office of the company is located, whatever may be the employment of such agent. Norfolk, etc., R. Co. *v.* Cottrell, 83 Va. 512, 3 S. E. 123.

Managing agent.—Where it appeared that the person on whom the summons and complaint were served, in an action against a bank (which was no longer doing a banking business, but was engaged in closing up its affairs), was in the habit of making its semiannual reports to the bank comptroller, employed attorneys to attend to its business, and was the only person exercising a general supervision over its affairs, it was not error to hold the service upon him good on the ground that he was the "managing agent" of the bank (Rev. St., c. 148, § 1), although he made affidavit that he was not such managing agent. Carr *v.* Commercial Bank, 19 Wis. 272.

90. **Service upon officer as individual.**—Where in a suit against a bank the writ is to a person not a party to the action, and service is had on him alone in his individual capacity, such service, not having been had on defendant, is valueless. Blodgett *v.* Schaffer, 94 Mo. 652, 7 S. W. 436.

Service on president.—Bill filed by the sureties of a guardian against him, and the president and directors of the Bank of Virginia, not the president, directors and company of the Bank of Virginia, which is its corporate name; injunction ordered by the court against

interested in the claim sued on, or when he acts as agent or attorney in fact for the person suing, then service upon such officer is void.[91]

§ 223 (1ac) Place of Service.—The place where service on a bank may be made is entirely dependent on the statutes in the various jurisdictions, though the most usual provision is that service is to be made where the business is located.[92]

§ 223 (1ad) Raising and Waiving Objections.—Defects in the process against the bank are usually availed of by plea in abatement.[93]

§ 223 (1b) Foreign Corporations.—Service by Publication.—Foreign banking corporations doing business in the state and having assets there but no officer or agent upon whom process may be served, may be brought in by order of publication.[94]

the guardian, to restrain him from selling his ward's stock in the bank; a subpœna, with an injunction indorsed by the clerk, to restrain the president and directors of the bank from permitting the guardian to transfer the stock, is served on the president; held, this process, so served, does not bind the bank, nor is it even notice to the bank, actual or constructive, of the equity asserted by the guardian's sureties in their bill, since the bank in its corporate character is not party to the bill, and the president is not the officer of the bank whose province it is to receive such notice. Bank *v.* Craig, 33 Va. (6 Leigh) 399.

91. Service on president.—V., an indorser on certificates of deposit issued by a bank, was compelled to pay the same, and he then indemnified the holder against costs, attorneys' fees, and expenses of suits which he induced him to bring against the bank, and, later, against a stockholder, for the purpose of enforcing his statutory liability as such. V., through his son, who was president of the bank, suggested the names of counsel to conduct the suits. Both V. and his son were active in prosecuting the cases. V. had no connection with the bank. Summons against the bank was served on V.'s son. Judgment was rendered by default. Held, that the president of the bank was not so far the agent of plaintiff in the suit as to render service on him void, and a judgment against the bank, based thereon, a nullity, nor did his interest on behalf of plaintiff have such effect. Thompson *v.* Pfeiffer, 60 Kan. 409, 56 Pac. 763.

92. Place of service.—See statutes in the various jurisdictions.

Arkansas.—The statute of 1838, allowing the state banks, in certain cases, to sue out writs running into any county where the defendant may be found, does not apply to an action by the state, for the use of the bank, upon a sheriff's bond. State *v.* Adams, 5 Ark. 677.

In Pennsylvania, in an action against a bank, service of process must be made at the place where the corporation is located. Brobst *v.* Bank (Pa.), 5 Watts & S. 379.

93. How advantage taken of defective process.—If a corporation can object to the form of the process by which it is brought into court, it must do so by plea in abatement, not by demurrer to the declaration. Nashville Bank *v.* Henderson, 13 Tenn. (5 Yerg.) 104, 26 Am. Dec. 257.

Louisiana practice.—Where a state sued to recover a license due by a bank in carrying on a banking department, and the president of the bank, on whom a copy of the petition and citation was served, excepted, to bring to the notice of the court the fact that he had no authority to stand in judgment for that department, the objection to the want of citation should be decided contradictorily with the bank, as also the issue of incorporation and estoppel, and whether or not there is a banking department of such bank. State *v.* Banking Department, 113 La. 150, 36 So. 921.

94. Order of publication.—Where a company doing business both in banking and insurance, is sued on a policy in a county where the insured property lies, and there is no agent residing

§ 223 (2) Appearance.—Where a bank is sued, an appearance by the bank to take advantage of an important privilege secured by the charter, is a waiver of any irregularity in the service of the writ.[95]

§ 224. Attachment and Garnishment—§ 224 (1) Attachment[96]—§ 224 (1a) Right to Sue Out Attachment.—Banks may proceed against a debtor by attachment.[97]

§ 224 (1b) Territorial Limits.—The statutes vary considerable as to the territorial limits of the writ, but as a general rule the writ may be sued out either where the bank is located or where the defendant resides.[98]

§ 224 (1c) Form and Requisites.—The attachment must be on the oath of the officer or agent designated by statute,[99] and must be served on the debtor.[1]

§ 224 (1d) Lien of Attachment.—To obtain a lien the writ or a copy thereof must be delivered to the defendant, as provided by the statute.[2]

§ 224 (2) Garnishment—§ 224 (2a) Who May Be Garnished.—As a general rule any person indebted to the bank, or having in his posses-

there on whom process may be served, an order of publication is proper. Wytheville Ins., etc., Co. *v.* Stultz, 87 Va. 629, 13 S. E. 77.

95. Waiver by appearance.—Southern Bank *v.* Mechanics' Sav. Bank, 27 Ga. 252.

96. Attachment of assets of insolvent bank in hands of bank examiner, see ante, "Remedies and Proceedings on Insolvency," § 76.

97. Planters', etc., Bank *v.* Andrews (Ala.), 8 Port. 404.

98. Venue of attachment proceeding.—The right conferred on the Alabama banks to sue out attachment in the county of their location is a privilege conferred on them, and does not abridge the power they previously possessed of suing out attachments in the county of the residence of the defendant. Pearson *v.* Gayle, 11 Ala. 278.

99. Oath or affidavit to attachment.—Under Act 1840, § 1, authorizing the State Bank and its branches to take out attachments on the oath of an officer, etc., and § 2, providing that "said banks are hereby severally authorized to take out attachments according to the first section of this act, on the application of any indorser or surety to the bill, note or other demand, and on satisfactory showing of such indorser or security, on oath or otherwise, that either of the grounds specified in this act exists," an officer of the bank need not reaffirm the ground stated by an indorser or security; but, if the showing is satisfactory to the bank, and the oath is sufficient in form, and duly made, the bank may take out an attachment thereon, as provided in section 1. Faver *v.* Bank, 10 Ala. 616.

1. Service of attachment.—Process of attachment against a foreign bank was served upon a bank in this state by giving notice to retain in their hands securities belonging to the foreign bank, and the sheriff's return was simply that he had "given notice of the within attachment" to the cashier. Held, that this was not a sufficient service to authorize the plaintiff to proceed to judgment. Thomas *v.* Merchants' Bank (N. Y.), 9 Paige 216.

2. Lien of attachment.—It being necessary, under Code Civ. Proc. § 649, subd. 3, in order to obtain a lien under a warrant of attachment on a deposit in a bank, that a certified copy of the warrant, and a notice showing the property attached, be delivered to and left with the person holding the same, the levy can not be held valid on testimony merely of a witness that he saw the sheriff give the bank officers a copy of the warrant, and that it was his memory that it was certified, or that a copy of the notice required was served with it. People *v.* St. Nicholas Bank, 44 App. Div. 313, 60 N. Y. S. 719.

sion or under his control any of its money or effects, whether individual or corporate, may be garnished by those to whom the bank is indebted.[3]

§ 224 (2b) Liability of Garnishee.—A garnishee bank, holding a deposit of the debtor, is to answer not only what he was indebted at the time of the service of the summons, but what he has become indebted to the defendant, and what effects he has received or got possession of, of his, between the date of the summons and the answer.[4]

§ 224 (2c) Service of Garnishment.—The writ of garnishment is usually to be served on the president or cashier.[5]

§ 224 (2d) Answer of Garnishee.—When a bank is garnished, its president is the only proper person to answer, under the general banking law.[6]

§ 225. Injunction and Receiver.—A bank may be injoined in a proper case from paying over a deposit if the plaintiff's remedy at law is inadequate,[7] so as to prevent the consummation of a fraud.[8]

3. See statutes in various jurisdictions and the following cases. Third Nat. Bank *v.* McCullough, 108 Ga. 249, 33 S. E. 848; Bank *v.* Farrar, 46 Me. 293.

No person indebted to the bank of the state is, under the statute, subject to be garnished by any person having a claim or debt against the bank, either by proceedings in equity or at law. State *v.* Curran, 15 Ark. 20.

4. Under the Act of 1869, a garnishee must answer not only what he was indebted, etc., at the date of the summons of garnishment, but also "what he has become indebted to the defendant, or what property or effects of his he has received or got possession of, belonging to the defendant, between the time of the service and the answer;" and under this rule, if a bank, under summons of garnishment, receives deposits of the defendant, and pays them to his checks, it is liable to the garnishing creditor for the amount deposited up to the time of the filing of the answer. Mayer *v.* Chattahoochee Nat. Bank, 51 Ga. 325.

5. **President.**—The president of a chartered bank being its alter ego, and therefore presumptively the official in charge of its affairs, an entry by a proper officer showing personal service on him of a summons of garnishment directed to the bank is prima facie evidence of lawful and sufficient service on the corporation. Third Nat. Bank *v.* McCullough, 108 Ga. 249, 33 S. E. 848.

Cashier.—Service of garnishment on the cashier of a bank is sufficient to bind the bank. Rosenberg *v.* First Nat Bank (Tex. Civ. App.), 27 S. W. 897.

Bookkeeper.—In garnishment proceedings against a bank, where the president and cashier are absent, the service of notice and a copy of the order of attachment upon the bookkeeper, during business hours, is sufficient. First Nat. Bank *v.* Turner, 30 Neb. 80, 46 N. W. 290.

6. **Answer of garnishee.**—Sturgis *v.* Rogers, 26 Ind. 1.

Sufficiency of answer.—The answer of a bank in a garnishment proceeding which denies that the bank is indebted to W. O. S., but alleges that it had a deposit credited on its books to one Mrs. W. O. S., is not subject to demurrer because of the presumption that the fund was community property, since the fact that Mrs. W. O. S. was the wife of the judgment debtor does not appear from the answer. Ragsdale *v.* Groos (Tex. Civ. App.), 51 S. W. 256.

7. **Injunction against payment of deposit.**—Where money deposited in

8. An insolvent silent member of a partnership, unknown to his partner, wrongfully obtained a certificate in his individual name for a deposit belonging to the firm, and transferred it to a foreign bank. Held, that equity will enjoin the payment of the certificate until the partnership can be settled. Grobe *v.* Roup, 44 W. Va. 197, 28 S. E. 699.

§ 226. Pleading—§ 226 (1) The Declaration, Petition or Complaint—§ 226 (1a) Form and Requisites—§ 226 (1aa) Definiteness and Certainty—§ 226 (1aaa) In General.—The cause of action against a bank should be set forth in the declaration, petition or complaint so as to inform the defendant of the precise nature of the claim against him.[9] But minute details of the subject matter of the action are not required.

Amount.—A petition in an action against a bank for a balance of a de-

bank to the credit of "P., Agent," was garnished by a creditor of P., and the bank knew the creditor's contention that the money belonged to P. individually, and not to an alleged principal, the bank could not, except at its peril, pay over the money to the alleged principal; hence there was no occasion for the issuance of an injunction at the instance of the creditor to prevent the bank from so doing, though P. was insolvent. Pettey *v.* Dunlap Hardware Co., 99 Ga. 300, 25 S. E. 697.

9. **Action for failure to honor depositor's checks.**—The facts which constitute the cause of action to recover for a failure of a bank to pay checks of a depositor properly drawn on funds on deposit, should be set forth in the pleadings with sufficient certainty to be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court which is to render judgment. Wood *v.* American Nat. Bank, 100 Va. 306, 40 S. E. 931.

Action for refusal to make loan.—Allegations that a bank had agreed to loan defendants $20,000, and had loaned them $18,000, but it refused to lend the additional $2,000, resulting in damage to defendants, because of their inability to make immediately other financial arrangements, thereby causing curtailment and injury to the business of defendants, are too indefinite. The amount and duration of the loans should have been given, the extent of the delay and how the failure to get the additional loan resulted in the damages claimed. Swindell & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13.

Receiving deposits after knowledge of insolvency.—In a suit by a depositor against the receiver of an insolvent national bank, to assert a claim to the proceeds of a draft received by the bank for collection, as alleged, after it was hopelessly insolvent, where the issue framed by the averments of the bill and the answer was sufficient to enable the court to proceed to a decree, the bill was sufficient without stating the degree of insolvency which rendered the bank's conduct fraudulent. St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390.

The bill alleged that the bank was insolvent on the 5th day of May; that this was well known to its officers; that it wrongfully neglected to disclose its insolvency to complainant, and, by continuing business and otherwise, represented to complainant and all other persons dealing with it, that it was solvent; that complainant, on the faith of these representations believed such to be the fact, without suspicion that the bank was, or was in danger of becoming, insolvent; that, acting upon the representations, and relying on the bank's solvency, complainant delivered the draft; that next morning the bank closed its doors, and the draft was collected thereafter; and that, by reason of the premises, the draft or its proceeds did not become the property of the bank. The receiver in his answer specifically denied these averments. The issue thus framed was sufficient to enable the court to proceed to a decree. The fraudulent intention flowed from the guilty knowledge, and the bank must be held to the consequences of a representation which it knew to be contrary to the fact, and upon which the complainant innocently acted. Granted that the mere omission to disclose the insolvency, if there had been ground for the supposition that the bank might continue in business, would not be sufficient, there is nothing for such a belief to rest on here. As a matter of pleading, the averment was that the bank wrongfully neglected to make the disclosure; as a matter of fact, the condition of the bank was so hopeless that it was its duty to make it. The omission to specifically state in the pleading the degree of insolvency which rendered the bank's conduct fraudulent, was not fatal, as the conclusion asserted showed the intention

posit may be sufficiently certain, though not stating the exact amount.[10] The cause of action should not ordinarily be stated with a quod cum.[11]

§ 226 (1aab) Conclusion of Counts.—Under the federal practice the want of a conclusion to counts of the declaration in an action against a bank was cured, on special demurrer, by § 32 of the Judiciary Act of 1789.[12]

§ 226 (1aac) Prayer for Relief.—Improperly including a prayer for discovery does not effect the sufficiency of the petition in an action to recover money deposited with a bank, where there is a prayer for general relief.[13]

§ 226 (1ab) Surplusage.—The defective averment of matter of mere surplusage is immaterial.[14]

of the pleader, and the particular contention could fairly be tested on the hearing. St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390.

10. Certainty—Averment of amount.—Coleman *v.* First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938, affirmed in 94 Tex. 605.

And in an action against a bank for negligence in failing to protest a note placed with it for collection, it is sufficient if the declaration avers it was so placed before its maturity, though the date of the placing is not specified. Roanoke Nat. Bank *v.* Hambrick, 82 Va. 135.

Description of bills.—In suing on bank bills, it is not necessary to describe them by setting forth the numbers and letters. Carey *v.* Greene, 7 Ga. 79.

11. Pleading by way of recital.—In an action against a bank to recover damages for the bank's negligence in failing to protest for nonpayment a note left for collection by the plaintiff, where declaration, though inartificially commencing statement of cause of action with a quod cum, yet states the essential averments in direct and positive terms, it is sufficient. Roanoke Nat. Bank *v.* Hambrick, 82 Va. 135.

12. Want of conclusion cured.—Action on an agreement in writing, by which Guttschlick had purchased a lot of ground in the city of Washington, from the Bank of the Metropolis, for which he had paid a part of the purchase money, and given a note for the residue; by the contract, the Bank of the Metropolis, through its president and cashier, was pledged to convey the lot in fee simple to Guttschlick, when the whole purchase money was paid. The declaration, in each count, averred the payment of the note, and the failure of the bank to convey; to the three special counts in the declaration, there was no conclusion; to the fourth count, for money had and received, there was a general conclusion. It was held, by the court, that whatever might have been the effect of the want of a conclusion to the three counts, upon a special demurrer, the 32d section of the judiciary act of 1789, would cure the defect, if admitted to be one. Bank *v.* Guttschlick (U. S.), 14 Pet. 19, 10 L. Ed. 335.

13. Coleman *v.* First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938, affirmed in 94 Tex. 605.

14. Defective averment of matter of surplusage.—The averments in a declaration set forth that the plaintiff had been turned out of possession of a lot of ground, but did not state that the eviction was by due course of law; the breach alleged in the count was, that the defendant had refused, on demand, to convey the lot. The court held the averment of eviction to be mere surplusage. Bank *v.* Guttschlick (U. S.), 14 Pet. 19, 10 L. Ed. 335.

Action by assignee of bank.—And in an action by assignees, an allegation that they are the assignees of a certain bank, is surplusage or mere description. Nutting *v.* Hill, 71 Ga. 557.

Declaration in suit by assignees.—An allegation in a declaration that the plaintiffs were "assignees of Citizens' Bank of Georgia" are mere words of description and are surplusage, hence a plea of nul tiel corporation is demurrable, especially, as by the Acts of 1870 and 1872, the Citizens' Bank of Georgia was duly incorporated and chartered. Nutting *v.* Hill, 71 Ga. 557.

§ 226 (1b) Necessary Allegations—§ 226 (1ba) In General.—In actions by or against banks, in the corporate name whether the bank be a domestic[15] or a foreign one,[16] it is unnecessary to allege corporate existence or to set out the act of incorporation.

15. Averment of corporate existence.—Ryan *v.* Farmers' Bank, 5 Kan. 658; Bank *v.* Williams (N. Y.), 5 Wend. 478; Ridenour *v.* Mayo, 29 O. St. 138; Taylor *v.* Bank, 32 Va. (5 Leigh) 471; Rees *v.* Conococheague Bank, 26 Va. (5 Rand.) 326, 16 Am. Dec. 755; Crews *v.* Farmers' Bank, 72 Va. (31 Gratt.) 348.

"In many of the states, if not all, it has been held sufficient to declare in the corporate name, without setting forth the act itself. Bank *v.* Haskins (N. Y.), 1 Johns. Cas. 132." Lewis *v.* Bank, 12 O. 132, 40 Am. Dec. 469.

In an action by a bank in its corporate capacity, it is not necessary that its petition allege that it is a corporation, if the answer impliedly recognizes the bank's corporate existence. Ryan *v.* Farmers' Bank, 5 Kan. 658.

Construction of New York statute.—The rule that a corporation, when suing, need not aver or prove its corporate existence, unless it be expressly pleaded that it is not a corporation, applies to banks incorporated under the special provisions of the general banking laws. Bank *v.* Beltser (N. Y.), 13 How. Prac. 270.

Necessity of proving incorporation.—Although it is not necessary in the declaration to aver the incorporation, it is necessary, under the general issue, to prove it. Grays *v.* Lynchburg, etc., Turnpike Co., 25 Va. (4 Rand.) 578; Rees *v.* Conococheague Bank 26 Va. (5 Rand.) 326, 16 Am. Dec. 755; Taylor *v.* Bank, 32 Va. (5 Leigh) 471; Henriques *v.* Dutch E. I. Co., 2 Ld. Raym. 1532; Norris *v.* Staps, 5 Hob. 211; Jackson *v.* Plumbe, 8 Johns. 295; Bill *v.* Fourth Great Western, etc., Co. (N. Y.), 14 Johns. 416; Bank *v.* Weed (N. Y.), 19 Johns. 300; Portsmouth Livery Co. *v.* Watson, 10 Mass. 91; Bank *v.* Smalley (N. Y.), 2 Cow. 770, 14 Am. Dec. 526; Jackson *v.* Bank, 36 Va. (9 Leigh) 240.

On the other hand, it is held that the naming of the plaintiff in a declaration as a bank is a sufficient allegation that it is a corporation, and proof of such fact is not required unless its corporate existence is challenged by proper plea. Judgment (1895) 64 Ill. App. 612, affirmed. Wheatley *v.* Chicago, etc., Sav. Bank, 167 Ill. 480, 47 N. E. 711.

If, however, the bank was created by a public act of the legislature this proof will be supplied by judicial notice. Rees *v.* Conococheague Bank, 26 Va. (5 Rand.) 326, 16 Am. Dec. 755; Gillett *v.* American Stove, etc., Co., 70 Va. (29 Gratt.) 565; Hays *v.* Northwestern Bank, 30 Va. (9 Gratt.) 127; Farmers' Bank *v.* Willis, 7 W. Va. 31. Compare Taylor *v.* Bank, 32 Va. (5 Leigh) 471.

Cases distinguished.—In Hays *v.* Northwestern Bank, 30 Va. (9 Gratt.) 127, it is said: "But it is insisted that the evidence in support of the plaintiff's action was insufficient in this, that there was no proof that the plaintiff was an incorporated institution authorized to sue; and the case of Jackson *v.* Bank, 36 Va. (9 Leigh) 240, is relied upon in support of the objection. That was an action of assumpsit by a bank alleged to have been incorporated by an act of the legislature of Ohio; the plea was nonassumpsit, and there was a demurrer to the plaintiff's evidence filed by the defendant. The court held that proof of the plaintiff's incorporation was necessary to maintain the action; and none having been given, there was judgment for the defendant. But this is an action by a bank incorporated by the legislature of Virginia, and the act for its incorporation is a public act of which the courts will judicially take notice. Stribbling *v.* Bank, 26 Va. (5 Rand.) 132. In that case the court ex officio took notice of the act incorporating the Bank of the Valley; and the North-

16. Lewis *v.* Bank, 12 O. 132, 40 Am. Dec. 469.

A banking corporation of the District of Columbia, or of any state of the union, and even a foreign corporation, may maintain suits in the courts of Virginia. It is not necessary for such corporation to show in its declaration how it was incorporated; it may prove that it is incorporated under the general issue. Taylor *v.* Bank, 32 Va. (5 Leigh) 471; Bank *v.* Pindall, 23 Va. (2 Rand.) 465. But see Jackson *v.* Bank, 36 Va. (9 Leigh) 240.

§ 226 (1bb) In Actions by Banks—§ 226 (1bba) In General.—In actions by banks, it is unnecessary to aver any matter of which the court will take judicial notice.[17] But if the action by the bank is under the terms of a special statute, the petition or an amendment thereof must bring the plaintiff within its provisions.[18] And if the action is in the name of its president it must be alleged that the contract or other transaction sued on was made by or with the bank.[19] And where ratification of an unauthorized act of a president of a bank is alleged, some specific act of ratification must be alleged.[20]

Action on Paper Indorsed or Payable to Cashier.—A declaration in an action on paper endorsed or payable to its cashier, should allege that such person was in fact the bank's cashier, and that the ownership thereof is in the plaintiff,[21] and its failure to contain such allegations, cured by

western Bank was incorporated by the same act. It was not necessary, therefore, that it should have been especially given in evidence to the jury."

Demurrer to evidence.—A bank brings a suit in Virginia, declaring that it is a corporate company by act of the legislature of Ohio; plea, the general issue; at the trial, defendant demurs to plaintiff's evidence; the demurrer contains no direct proof of the legal incorporation of the bank, nor can the fact be fairly inferred from the evidence stated in the demurrer; held, this defect of evidence is fatal to the plaintiff's case. Jackson *v.* Bank, 36 Va. (9 Leigh) 240, cited in Gillett *v.* American Stove, etc., Co., 70 Va. (29 Gratt.) 565.

Nor can the want, in the demurrer to evidence, of this necessary proof to entitle the bank to recover, be supplied by resort to a demurrer to the declaration, which was overruled, whereby the averment therein contained, of the legal incorporation of the bank, was admitted. Jackson *v.* Bank, 36 Va. (9 Leigh) 240.

17. Matters judicially known.—Section 25 of the original charter of the Central Bank of Georgia limited loans to any one person to $2,500. In a suit by the bank upon a renewal note under the amended charter of 1829, or on a bill of exchange, discounted or purchased under the Act of 1838, for the purpose of remitting funds to pay interest on the state's bonds or foreign debt, it is not necessary to set out these latter acts as exceptions to the limitations contained in the original statute, and to aver that the debt sued on was contracted under the powers which they confer. These acts were passed to extend the original charter, by clothing the bank with additional authority, and the courts are bound to observe their provisions. Bond *v.* Central Bank, 2 Ga. 92.

18. *Kentucky*.—A bank suing as assignee on a note can not recover on the same as a bill of exchange, under St. 1894, § 483, placing on an equal footing with bills of exchange commercial paper which, being payable to any bank organized under the state or federal law, is indorsed to and discounted by any bank so organized, unless the petition shows that it is a bank of that class. Merritt *v.* Drovers', etc., Bank, 18 Ky. L. Rep. 223, 35 S. W. 285.

19. Action on bank's behalf in president's name.—Though a suit against an association formed under the general banking law of New York may be brought in the name of the association, with the addition of the name of the president thereof, the contract must be stated as having been made by or with the bank, using its business name. Delafield *v.* Kinney (N. Y.), 24 Wend. 345.

Signature.—(N. Y.) St. 1838, p. 250, § 21, providing that contracts made by a banking association, and all bills and notes issued by them, shall be signed by the president or vice president and cashier, does not require the complaint, in a suit against a bank on its contract, to state that it was so signed; it being sufficient to allege in general terms that defendant made the contract. Delafield *v.* Kinney (N. Y.), 24 Wend. 345.

20. Swindell & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13.

21. Action on note endorsed to cashier.—In an action by a bank upon a negotiable note payable to order, the ti-

amendment, renders it fatally defective, and advantage of its defects may be taken even at the trial term by a motion to dismiss,[22] but the declaration may allege that the indorsement was to the bank, without being open to the objection of variance.[23]

§ 226 (1bbb) Amendments.—The liberal practice of allowing amendments will not be extended to the case of amendments to a declaration by a bank that would deprive the defendant of his defenses.[24]

§ 226 (1bc) In Actions against Banks—§ 226 (1bca) In General.—A bank in an action against it, is entitled to a specific allegation in the petition of every essential fact upon which its liability to the defendant depends.[25] Thus a petition in an action against a bank for deceit must show damage to the plaintiff, as fraud without damage gives no action.[26] But it

tle to which, by appropriate indorsement, has become vested in the name of a person as cashier, the declaration must show that such person is plaintiff's cashier, and that the ownership of the note sued upon is in plaintiff; else it will be demurrable. Hobbs *v.* Chemical Nat. Bank, 97 Ga. 524, 25 S. E. 348.

In an action by a bank on a note, an averment in the petition that M. was its cashier, and that the note was indorsed to "M., Cashier," is sufficient to show title in the bank. Pratt *v.* Topeka Bank, 12 Kan. 570.

Petition upon notes payable to cashier.—The petition, in an action brought by a bank upon promissory notes payable to a named person as cashier, or order, was amendable by alleging that this person was in fact the cashier of the plaintiff and that the notes were its property. After the petition was thus amended the action was maintainable by the bank. Roush *v.* First Nat. Bank, 102 Ga. 109, 29 S. E. 144. The petition in such case was further amendable by alleging that certain stock deposited as collateral security for the payment of the notes sued on had been sold for a specific amount and that the defendant was entitled to a credit for the same. Roush *v.* First Nat. Bank, 102 Ga. 109, 29 S. E. 144.

An allegation in the declaration that the note sued on was payable to A., cashier, or bearer, in consideration whereof the defendant promised to pay the plaintiff, etc., is sufficient, upon demurrer, to show that the bank was entitled to maintain the action, under the statute of 1841. Erwin *v.* Branch Bank, 14 Ala. 307.

22. Hobbs *v.* Chemical Nat. Bank, 97 Ga. 524, 25 S. E. 348.

23. Variance.—An indorsement to the cashier of a bank is virtually an indorsement to the bank, and in an action upon a draft so indorsed the declaration is not defective where it alleges that the draft was indorsed to the bank. Bank *v.* Davis, Fed. Cas. No. 915, 4 Cranch, C. C. 533.

24. Amendment.—A defendant to a suit by a bank may set off against the bank, notes issued by it; hence in such a suit by a bank it is improper to allow an amendment that the bank is suing for the use of a third party, where the effect of such amendment would be to deprive the defendant of setting off the banknotes. Morrow *v.* Merchants', etc., Bank, 35 Ga. 267.

25. Action against bank on certificate of deposit.—Where a certificate of deposit was payable upon certain conditions, it was held that a declaration stating "the conditions of said certificate of deposit have been fully complied with" was not good and was open to special demurrer. The bank was entitled to have specified allegations of every essential fact upon which its liability depended. Lamar, etc., Drug Co. *v.* First Nat. Bank, 127 Ga. 448, 56 S. E. 486.

26. Petition in action against bank for deceit.—A petition against a bank and the officers of an insurance company which alleges that the directors of the bank caused its cashier to make a certificate or statement to the insurance commissioner, falsely representing that the company had a certain amount of paid-up capital and surplus, all of which was on deposit in such bank in cash subject to check, when in fact a large part of such capital was represented by notes of the other defendants and other subscribers to the

is unnecessary for the petition in an action against a bank to negative matter of defense,[27] or to allege matters implied.[28]

§ 226 (1bcb) Averment of Demand.—In an action against a bank upon a banknote, payable generally on demand, it is not necessary to aver and prove a demand, the suit itself is a sufficient demand.[29]

§ 226 (2) Plea or Answer—§ 226 (2a) In General.[30]—Pleas in actions by or against a bank must be equally as definite and certain as the initial pleading is required to be.[31] Thus, in an action by a bank against the

stock, indorsed by the company, of which the bank had made a pretended discount, and to secure which it held the stock as collateral, and that after thus securing from the commissioner a license to do business the bank and the other defendants conspired together, and caused such statement to be published in the newspapers, for the purpose of inducing third persons to purchase the stock so held as collateral, and that plaintiff, being misled thereby, purchased a number of shares of such stock from one of the defendants, the payment for which was received by the bank, and which stock was in fact worthless, because the company did not have the capital represented, states a cause of action against the bank for deceit. Judgment 86 F. 1013, reversed. Hindman *v.* First Nat. Bank, 98 Fed. 562, 39 C. C. A. 1, 48 L. R. A. 210.

27. In an action by married woman for money belonging to her separate estate deposited in bank.—A petition in an action by a married woman to recover money belonging to her separate estate deposited by her in the defendant bank need not negative the withdrawal of the money by her husband, as that is a matter of defense. Coleman *v.* First Nat. Bank, 17 Tex. Civ. App. 132, 43 S. W. 938, affirmed in 94 Tex. 605.

28. Implied matters.—In an action against a bank touching a bill received by it for collection or renewal, and for violating instructions in respect to the same, the law implies a contract on the part of the bank to obey instructions, and on the part of the bailor to pay reasonable compensation; and the omission of proper allegations as to such implied matters, will not render the declaration fatally defective. It is amendable. Central Georgia Bank *v.* Cleveland Nat. Bank, 59 Ga. 667.

29. Averment of demand.—Dougherty *v.* Western Bank, 13 Ga. 287. Compare Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186.

Averment of demand at place of payment.—In case of a banknote payable on demand, at a particular time and place, demand at the place is necessary to a suit against the bank at the time designated, or afterwards, and must be averred in the declaration, and proven on the trial. The place must be stated in the note, with distinctness and precision. A note payable at Rome is a note payable generally. Dougherty *v.* Western Bank, 13 Ga. 287.

When demand prerequisite to action against bank.—Under § 17 of the charter of the Southern Bank of Georgia, no action can be brought against the bank under its charter, until special demand is made of the debt due or claimed by the creditor. Southern Bank *v.* Mechanics' Sav. Bank, 27 Ga. 252.

30. Pleading defense of usury in action by bank, see ante, "Interest or Rate of Discount and Usury," § 181.

31. Plea of illegality.—In an action on a bill of exchange, brought by a corporation having power "to purchase, discount, and sell bills of exchange," and prohibited from making or issuing any bills, etc., to circulate as money, the plea alleged that plaintiff procured from a foreign bank a loan or deposit of a large amount of its notes for the unlawful purpose of putting said notes in circulation in this state, "under an express agreement that said bank should redeem said notes as the same shall be returned to the counter of said bank by which they were issued;" that plaintiff, with the banknotes thus obtained, "made discounts, purchased bills, and did other business pertaining to banking," and put said notes into circulation as money; that the bill of exchange sued on was made for the benefit of defendant, "and with the intent to have the same discounted by plaintiff, either with said foreign bank

principal and sureties on a note, a plea that the principal had money on deposit in the plaintiff's bank applicable to the note must be definite and certain.[32] But a plea or answer setting up that the defendant "had reason to believe," etc., is sufficient without setting out the facts upon which the belief is based.[33]

§ 226 (2b) Actions by or against Assignees.—A plea in an action by assignees of a bank must allege that they were assignees with notice or that they were not bona fide assignees without notice.[34] And in an action against an assignee of a bank, a plea that there was never an assignment made to him, and a plea that he (the defendant) is not the assignee of the bank, are pleas to the action, and go to the merits.[35]

bills or some other bank bill, as plaintiff might see fit and proper;" that it was presented at plaintiff's banking house for discount, "and was then and there discounted by plaintiff with said foreign bank bills;" that plaintiff, in thus using said foreign bank bills in the purchase and discount of said bill, "did emit and put them into circulation in this state;" and that this was the only consideration given by plaintiff for said bill of exchange. Held that, though Code, § 939, provides that no foreign corporation invested with the privilege of banking must exercise the same by agent in this state except by the exclusive use of gold or silver coin, etc., yet that the plea did not show any illegality of consideration for the contract by which plaintiff obtained the bill of exchange, the averments not being sufficient to show the existence of an agency between plaintiff and the foreign bank, within the meaning of said section, nor a violation of plaintiff's charter. Wray *v.* Tuskegee Ins. Co., 34 Ala. 58.

Plea of forfeiture of charter.—A plea to an action brought by the plaintiff as "The Gate City National Bank," which alleged that "the said Gate City National Bank has been dissolved by a forfeiture of its charter, and by misuser of its franchises," was good against a general demurrer or mere motion to strike. It will be presumed as against such a demurrer or motion that the charter of the bank in question was forfeited in the manner prescribed at law. Merritt *v.* Gate City Nat. Bank, 100 Ga. 147, 27 S. E. 979, 38 L. R. A. 749.

Statute of limitations.—It is necessary in a plea of the statute of limitations by a bank when sued on its bills, to aver the facts which take them out of the ordinary rule, to wit: That the statute does not apply to such contracts. Kimbro *v.* Bank, 49 Ga. 419.

32. In an action by a bank against the principal and sureties on a note, the sureties pleaded that the bank held cash belonging to the principal "on deposit, and payable to his order," after the note became due, which money the bank had failed to apply on the note. Held, that the allegation was sufficient to show that the deposit was a general one, and, as such, liable to appropriation for the depositor's debt to the bank. Dawson *v.* Real-Estate Bank, 5 Ark. 283.

33. Ohio Act March 19, 1850, provides that the discount by any bank of any note payable without the state, when the officer of the bank has reason to believe that the parties will not be prepared to pay it, shall be usurious and unlawful. An answer in the action on the note averred that the payee "had reason to believe," etc. Held, that the answer was sufficient, though it did not set out the facts upon which the belief of the payee was based. Gebhart *v.* Sorrels, 9 O. St. 461.

34. In suit by assignee—Plea of set-off—Demurrer.—Where to a suit on a promissory note by certain plaintiffs, who alleged themselves to be the assignees of a bank, a plea of set-off was filed to the effect that certain persons had been depositors in the bank of which the plaintiffs were assignees and receivers, and that after the assignment and before the bringing of this suit, they transferred to defendant for value their claim, such plea was demurrable, it nowhere being alleged that the assignees took with notice. Nutting *v.* Hill, 71 Ga. 557.

35. Dougherty *v.* Bethune, 7 Ga. 90.

§ 226 (2c) Traversing Bank's Capacity to Sue.—A proper plea must be interposed to the right of a bank to sue.[36] But a plea simply alleging that the notes sued on were endorsed, etc., does not put in issue the right of a foreign bank to sue on nonnegotiable paper, because such paper is assignable only.[37]

§ 226 (2d) Nul Tiel Corporation.—In a suit by a bank, a sworn plea of nul tiel corporation puts in issue the corporate existence of the bank.[38]

§ 226 (2e) Conclusion of Plea.—In an action by a bank on a note, a plea that the consideration for the note was bank paper unlawfully issued by plaintiff as currency need not conclude as against the form of the statute.[39]

§ 226 (2f) Matters Provable under General Issue.—The fact that a bank is incorporated may be shown under the general issue.[40] But affirmative defenses,[41] such as a violation of the banking laws,[42] must be specially pleaded.

§ 226 (3) Replication.—Where the plea in an action against a bank is responsive to the declaration but sets up new matter in avoidance, a rep-

36. Right of state bank to sue.—The State Bank has a right, in some cases, to take bonds. An objection, therefore, to the right of the bank to sue upon a bond must be raised by proper plea. Neely *v.* Bank, 4 Ark. 522.

37. Plea to declaration by foreign bank.—Where a declaration by a foreign bank alleged that the note sued on had been assigned to the plaintiff but there was no allegation as to the place of assignment, a plea that the note was indorsed to the plaintiff in Virginia was not sufficient to raise the question as to whether the plaintiff could sue in the courts of Virginia; the note in question being nonnegotiable, and the term indorsed therefore not being equivalent to the term assigned. Bank *v.* Pindall, 23 Va. (2 Rand.) 465.

38. Unsworn plea nul tiel corporation.—In a suit by a banking corporation the plea of "nul tiel corporation" unaccompanied by an affidavit denying the corporate existence of the plaintiff, does not put the plaintiff to the proof of its corporate existence. Special pleas which only raise questions which are involved in the plea of nil debet, under which the defendant may rely upon the same matters in evidence which are set out in the pleas, are properly excluded. Crews *v.* Farmers' Bank, 72 Va. (31 Gratt.) 348.

Action by assignee.—A plea of nul tiel corporation to an action by the assignees of a bank is demurrable. Nutting *v.* Hill, 71 Ga. 557.

39. Conclusion of plea.—To an action of debt on a note alleged to have been made and discounted by the plaintiffs in Virginia but made payable out of the state, a plea that the plaintiffs are an unchartered banking company, etc., need not conclude as against the form of the statute. Hamtramck *v.* Selden, etc., Co., 53 Va. (12 Gratt.) 28.

40. Incorporation of bank.—Taylor *v.* Bank, 32 Va. (5 Leigh) 471; Rees *v.* Conococheague Bank, 26 Va. (5 Rand.) 326, 16 Am. Dec. 755; Crews *v.* Farmers' Bank, 72 Va. (31 Gratt.) 348.

41. Defense of suretyship.—In an action on orders to a bank to allow a firm to overdraw where the only defenses pleaded were a general denial of execution of the orders or that anything was due on them and a plea of non est factum, it was reversible error to admit evidence of affirmative defenses or suretyship of defendant, his discharge as surety and of payment, and to charge thereon. People's Bank *v.* Stewart (Mo.), 117 S. W. 99.

42. Defense of violation of banking laws.—In an action by a banker for money loaned, the defense that plaintiff violated Laws 1839, c. 355, § 3, forbidding any banker to pay out, for paper purchased or discounted, any bank bill or note not received by him at its par value, must be specially pleaded. Codd *v.* Rathbone, 19 N. Y. 37.

lication must be filed.[43]

§ 226 (4) Construction of Pleadings.—A corporation may be bound by contracts, not executed under their common seal, and by the acts of its officers, in the course of their official duties, and when, in a declaration, it is averred, that a bank, by its officers, agreed to a certain contract, this averment imports everything to make the contract binding.[44]

§ 226 (5) Issues, Proof and Variance.—Raising or Tendering Issue.—If the defendant expects to rely on the defense of ultra vires in an action by a bank, he must put it in issue, so that the plaintiff may not be surprised, but come to the trial prepared to meet it.[45]

Conformity of Pleadings and Proof.—The evidence introduced at the trial must apply to the allegations in the answer. A different theory can not be adopted at the trial from that relied on in the pleadings.[46]

43. **Replication—Necessity for.**—A reply to an answer in an action against several persons alleged to be associated together as bankers, to recover on their alleged joint undertaking, which denies the corporate character of the contract, without denying the corporate existence of the association, is sufficient on general demurrer. Ridenour *v.* Mayo, 29 O. St. 138.

Where, in an action against a bank on a cashier's check transferred to plaintiff, the bank pleaded plaintiff's fraud in procuring the check, replications not denying the fraud, nor confessing and avoiding the effect thereof, but alleging that after the check had been transferred to plaintiff he had, in consideration thereof, released the payees from their indebtedness to him and delivered up a note and mortgage securing the indebtedness, and that defendant's cashier procured from the payees of the check a note and mortgage to a partnership of which the cashier was a member to secure the loan made by the bank evidenced by the check, and that the bank was therefore estopped from setting up such fraud, or that, after discovering it, defendant had ratified the transaction, were insufficient and demurrable. Bank *v.* McGilvray & Co., 167 Ala. 408, 52 So. 473.

Allegations as to corporate existence.—In an action against several persons alleged to be associated together as bankers, to recover on their alleged joint undertaking, an answer which admits the association and the undertaking, but avers that the association at the date of the undertaking was, and still is, a body corporate, and that the undertaking is the corporate contract of the association, may be regarded as setting up new matter constituting a defense, and not as stating mere evidence disproving the allegations in the petition. Ridenour *v.* Mayo, 29 O. St. 138.

44. **Averring execution of contract by officers.**—Bank *v.* Guttschlick (U. S.), 14 Pet. 19, 10 L. Ed. 335.

45. **Issue of ultra vires.**—In an action by a bank against another bank to recover damages for failing to take sufficient security for a loan made for it, an issue that the business of loaning money was ultra vires of the bank should have been made by answer in order that the plaintiff might offer evidence to show that it was incidental to the business of banking, and therefore within the implied powers of the defendant. Bank *v.* Western Bank (Ky.), 13 Bush 526, 26 Am. Rep. 211.

46. **Payment of check by mistake.**—Plaintiff bank received checks drawn by C. upon defendant, a private banker, which were forwarded to F., its correspondent, for collection, and paid by draft, payment of which was afterwards stopped by defendant. In an action on the draft, defendant pleaded that it was executed under the mistaken belief that C. had sufficient funds on deposit to meet the checks. On the trial defendant testified that he drew the draft in reliance upon C.'s statement that a certain check left by him with defendant for collection would be paid, and that such check was not paid. Held, that the mistake attempted to be proved was not the one relied on in the pleading, and that neither of them was available as a defense. First Nat. Bank *v.* Devenish, 15 Colo. 229, 25 Pac. 177, 22 Am. St. Rep. 394.

Variance.—Immaterial variances between the allegations and proof in actions by or against banks may be disregarded.[47]

§ 227. Evidence[48]—§ 227 (1) Presumptions and Burden of Proof—§ 227 (1a) Presumptions.—There is a presumption that an endorsement unless otherwise stated is in blank,[49] that banks are banks of discount and deposit,[50] that a bank making a loan is aware of its nature and character,[51] and that payments by a banker are not loans but are made in consideration of deposits.[52] But these presumptions are merely prima facie and may be rebutted.[53]

§ 227 (1b) Burden of Proof.—The general rule that the burden of proof rests upon the party who holds the affirmative of the issue, whether he be the plaintiff[54] or defendant, applies equally in actions by or against

47. **Variance—Date.**—Where a depositor sues a banker on a parol contract to loan the depositor's money, alleging that it was made on a certain date, but the proof shows that the contract was made seven years earlier, the variance is immaterial. Judgment 105 Ill. App. 52, affirmed. Watson *v.* Fagner, 208 Ill. 136, 70 N. E. 23.

48. Of authority of officers or agents, see ante, "Evidence as to Authority," § 118.

Admissibility of evidence in action for overdraft, see ante, "Overdrafts," § 150.

Competency of rules of clearing house, see post, "Settlement and Transactions Through Clearing House," § 320.

49. **Effect of endorsement.**—Upon the mere allegation that one who was the owner of checks indorsed the same for the purpose of depositing them to the credit of his account, the presumption is that he simply wrote his name across the back, making the same payable to bearer. Peerrot *v.* Mt. Morris Bank, 120 App. Div. 247, 104 N. Y. S. 1045.

50. **Bank of discount.**—Since there is only one general statute in Indiana providing for the organization of banks of discount and deposit, it will be presumed, in an action to foreclose a note and mortgage executed to a bank of the state, that it is a bank of discount and deposit organized under the statute, in the absence of a showing to the contrary. Brighton *v.* White, 128 Ind. 320, 27 N. E. 620.

51. **Knowledge or notice.**—Where the books of a bank show that a certain loan was made, and there is no countervailing evidence, it will be presumed that the nature and character and all the essential features of the loan were known to the bank; and, no disapproval of the loan appearing, it will be further presumed that the bank approved of the loan. Roe *v.* Bank, 167 Mo. 406, 67 S. W. 303.

52. **That banker pays checks from deposits.**—Where a banker pays checks drawn upon him, the presumption is that they were paid out of deposits or in consideration of a debt due from him; and therefore such checks are not sufficient to support an action for money loaned, in the absence of evidence to rebut such presumption. Bradford *v.* Taylor, 61 Tex. 508.

The fact that a check was drawn on and paid by a bank is not evidence of an indebtedness from the drawer to the bank. The legal presumption is that it was drawn against funds of the drawer in the bank at the time. White *v.* Ambler, 8 N. Y. 170, Seld. Notes 84.

53. **Rebuttal of presumption.**—The presumption arising from $1,000 in cash being on hand, when a receiver was appointed for a bank, which before insolvency had collected a draft for plaintiff and not remitted proceeds, that the bank had kept plaintiff's money or its representatives, in cash, so as to entitle him thereto, is overcome by the fact that it was mostly in nickels and dimes, collected several months prior to the draft, and that the bank had other debts in the same condition, aggregating a large sum, arising in the same way, from collections before and after plaintiff's. Farmers', etc., Bank *v.* First Nat. Bank (Tex.), 46 S. W. 271.

54 **Fraudulent and unauthorized indorsements.**—In an action by a bank to recover against another bank the amount of checks paid by the former

banks. Accordingly, the burden is upon a bank to show that checks which it has paid and charged to a depositor were the due and proper checks of such depositor, and were properly paid by it.[54a]

§ 227 (2) Admissibility of Evidence—§ 227 (2a) General Rules as to Admissibility.—The general rules respecting the relevancy, competency and admissibility of evidence generally are no different in actions by or against banks. Accordingly, it may be stated as a general rule of relevancy in actions by or against banks that all facts are admissible which tend to prove or disprove the fact in issue and to render it more or less probable, unless excluded on some other ground.[55] And by parity of reasoning if the evidence does not bear on any fact in issue it should be excluded because it tends to confuse the jury and draw away their minds from

to the latter through the clearing house, on the ground that the indorsements on the checks were fraudulent and unauthorized, the burden of establishing the fraudulent and unauthorized character of the indorsements was on plaintiff. National Park Bank *v.* American Exch. Nat. Bank, 88 N. Y. S. 271.

Upon a plea of payment to a bank, the burden is on defendant to show the circumstances that made payment to an officer of a bank payment in law to the bank. Tulley *v.* Citizens' State Bank, 18 Ind. App. 240, 47 N. E. 850.

Estoppel.—In an action by a bank to recover its funds used by its cashier in payment of his individual debt to defendant, the burden of showing acts which estopped the bank to deny the authority of the cashier to use the funds for his own benefit was on defendant. Home Sav. Bank *v.* Otterbach, 135 Iowa 157, 112 N. W. 769.

54a. Chicago Sav. Bank *v.* Block, 126 Ill. App. 128.

55. Where a depositor repudiates a loan made by the bank out of his deposit, without authority, and sued the bank for the amount thereof, evidence showing that the goods agreed to be taken by the bank as security for the loan were perishable was admissible. Valley Bank *v.* Brown, 9 Ariz. 311, 83 Pac. 362.

Action for negligence in loaning money.—Where a depositor sues a banker on an alleged contract to loan the depositor's money to responsible borrowers, care for and collect the loans, and reloan the money, plaintiff's evidence that it was defendant's custom to collect the principal and interest of plaintiff's notes and loan his money, and that defendant caused or permitted his cashier to indorse plaintiff's name on a note as a preliminary to its being put in judgment, is admissible. Judgment 105 Ill. App. 52, affirmed. Watson *v.* Fagner, 208 Ill. 136, 70 N. E. 23.

Action by depositor fraud.—A bank having money of a depositor to loan on real-estate security transferred to him several notes payable to it and secured by a trust deed; and the cashier testified, in an action by the depositor against the bank for fraud, that the rest of the notes were assigned to the cashier to secure an indebtedness due him from the bank, and that he foreclosed the trust deed, purchased the land, and secured a deficiency judgment against the mortgagee. Held, that it was error to refuse to allow him to be asked if he paid the sheriff the money on the sale, or if he assigned the judgment to the bank; it being a part of the transaction in issue. Larsen *v.* Utah Loan, etc., Co., 23 Utah 449, 65 Pac. 208.

To identify principal debtor.—In an action on a note, where the first signer claimed that he was surety only, and that the second signer was principal, it was error to refuse to allow one who was appointed cashier of plaintiff bank, shortly after the note was executed, to testify who he was informed was principal. Young *v.* New Farmers' Bank, 102 Ky. 257, 19 Ky. L. Rep. 1309, 43 S. W. 473.

One claiming against a bank because of services as administrator of an estate in which the bank was largely interested may show what the directors of the bank told him to do, and said on the subject. Lowe *v.* Ring, 115 Wis. 575, 92 N. W. 238.

Identity of cashier.—Under Negotiable Instruments Act, § 42 (29th Gen. Assem., p. 85, c. 130; Code Supp. 1902, § 3060a42), providing that, where an

the main issue.[56] The relevancy of rebutting evidence is to be tested not by its convincing or persuasive character but the test is whether it tends to cut down, limit, explain, or obviate the defense, or tends to illustrate some legitimate answer to the defense.[57] But the evidence must be limited to the very transaction in suit.[58]

The duly authorized officer of a bank, who makes a contract on behalf of his principal, may testify as to the terms of the agreement.[59]

instrument is drawn or indorsed to a person as cashier of a bank, it is deemed prima facie to be payable to the bank of which he is an officer, and may be negotiated by either the indorsement of the bank or the officer, it was competent for plaintiff in an action on a certificate of deposit made payable to S. as cashier of the defendant bank, and indorsed by him as cashier, to show that S. was the cashier of the defendant bank, and was acting in that capacity in transferring the certificate sued on. Johnson *v.* Buffalo Center State Bank, 134 Iowa 731, 112 N. W. 165.

56. Evidence that defendant held collateral to secure the debt of the bank was properly refused, as irrelevant, where the question in issue was whether such bank was indebted to defendant so as to authorize the application of the checks to the debt. Judgment, 74 Ill. App. 429, affirmed. Doppelt *v.* National Bank, 175 Ill. 432, 51 N. E. 753.

Proceedings of board of directors. —In an action by a bank on a promissory note, defendant offered to read in evidence certain proceedings of the plaintiff's directors, with a view to showing that there were not a sufficient number of directors present to transact business at the time a certain order was made pursuant to which funds had been withdrawn, and whereby he, as a stockholder, had been deprived of a dividend. Held, that the evidence was not admissible. Whittington *v.* Farmers' Bank (Md.), 5 Har. & J. 489.

Title of bank to note sued on.— Where a bank does not hold the legal title to a note, and sues in the name of the person who has the legal title to its use, evidence that the bank has no interest in the note is not relevant unless offered as the foundation of a defense against the real owner. Moore *v.* Penn, 5 Ala. 135.

57. Rebutting evidence.—The evidence in an action against a bank for fraud in loaning money deposited to be loaned on real estate security showed that certain notes owing to the bank from an officer thereof, and secured by a trust deed, which also secured other notes, were transferred to the plaintiff, who received payments thereon. The plaintiff testified that he supposed that the loan was made directly to him. Held, that it was error to strike out plaintiff's testimony that the bank officers told him that the trust deed covered property which was not included therein, since it tends to rebut the theory that plaintiff received the notes with a knowledge of the facts. Larsen *v.* Utah Loan, etc., Co., 23 Utah, 449, 65 Pac. 208.

In an action against a bank for reimbursement of a loss plaintiff was compelled to pay purchasers of his stock through misrepresentations by his agent and father-in-law as to the soundness of the bank, plaintiff claiming similar misrepresentations were made to him when he purchased, the bank could show that the agent was president of the bank between the times of plaintiff's purchase and sale of the stock and knew of the bank's failing condition, and that he sold his own stock, plaintiff's and other relatives' just before the bank failed. Day's Committee *v.* Exchange Bank (Ky.), 116 S. W. 259.

58. Action for fraud by depositor. —Where a bank, having money of a depositor to loan on real estate security, transfers to him certain notes owing the bank, and secured by a trust deed, and the depositor brings action for fraud therein, it is error to admit evidence that the security was sufficient at the time the loan was made by the bank, but it should have been limited to the time when the notes were transferred to the depositor. Larsen *v.* Utah Loan, etc., Co., 23 Utah. 449, 65 Pac. 208.

59. Proof of terms of contract.— Where the president of a bank made an agreement with a party whereby such party was to get money from the bank to buy a certain description of hogs, he is competent to testify of the kind of hogs which the party was to

§ 227 (2b) Collateral Evidence.—Collateral facts and transactions are excluded in actions by or against banks as in other proceedings, because such evidence not only does not throw light on the issues but tends to confuse the jury.[60]

§ 227 (2c) Best and Secondary Evidence.—In an action against a bank secondary evidence of the contents of a check is admissible where the check is a collateral matter and the question is not as to the contents or form of the check but as to the making of a special or conditional deposit.[61] And the cashier of a bank may testify that money paid over by the bank was credited to, turned over or paid over to a certain person without being required to produce the books.[62]

§ 227 (2d) Judicial Notice.—In those jurisdictions in which banks are organized under general laws, the incorporation need not be proven, but the courts will take notice of it judicially.[63] But in case of foreign banks incorporated by sister states, the rule is otherwise. Foreign laws are facts to be proved as other facts; the courts will not ordinarily take judicial

buy under the terms of the contract as a condition of getting credit at the bank. Roe *v.* Bank, 167 Mo. 406, 67 S. W. 303.

60. Collateral facts.—Defendant's evidence that he performed like services for other persons with reference to papers left at the bank merely for safe-keeping is properly excluded as irrelevant. Judgment, 105 Ill. App. 52, affirmed. Watson *v.* Fagner, 208 Ill. 136, 70 N. E. 23.

61. In an action against a bank on its liability on a deposit made by plaintiff for the vendor of property, on condition that the deposit be subject to a mechanic's lien claim against the property, evidence to show the money was paid to the bank by a check is not inadmissible as evidence tending to prove its contents without proof of the loss of the check, as the check is a collateral matter, and a question as to its contents or form is not the principal matter in dispute. Fort *v.* First Nat. Bank, 82 S. C. 427, 64 S. E. 405.

62. Smith *v.* First Nat. Bank, 43 Tex. Civ. App. 495, 95 S. W. 1111, affirmed in 101 Tex. 659, no op. See, also, Coleman *v.* First Nat. Bank (Tex. Civ. App.), 64 S. W. 93.

63. Judicial notice.—Davis *v.* Bank, 31 Ga. 69; Terry *v.* Merchants', etc., Bank, 66 Ga. 117, 179; Hays *v.* Northwestern Bank, 50 Va. (9 Gratt.) 127; Mason *v.* Farmers' Bank, 39 Va. (12 Leigh) 84; Stribbling *v.* Bank, 26 Va. (5 Rand.) 132; Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336; Farmers' Bank *v.* Willis, 7 W. Va. 31; Northwestern Bank *v.* Machir, 18 W. Va. 271.

When, therefore, pending an action against a bank on a dormant judgment, its charter expired, the court properly dismissed the action, and there being no other party defendant except the defunct bank, a motion to reinstate and appoint a receiver was properly overruled. Terry *v.* Merchants', etc., Bank, 66 Ga. 177.

In Virginia and West Virginia, banks are usually incorporated institutions, but unlike many other corporations, banks are organized under general, as distinguished from special, statutes; being thus general or public, such statutes are not required to be proved, but are noticed by the courts ex officio. Stribbling *v.* Bank, 26 Va. (5 Rand.) 132; Hays *v.* Northwestern Bank, 50 Va. (9 Gratt.) 127.

The act incorporating the Northwestern Bank of Virginia by the legislature of Virginia was a public act, of which the courts will take judicial notice; and in an action by the bank it is not required to prove its incorporation. This corporation existing under the laws of Virginia prior to the foundation of the state of West Virginia, its existence was preserved by art. 11, § 8, constitution of 1863; art. 8, § 36, constitution of 1872. Northwestern Bank *v.* Machir, 18 W. Va. 271, following Hays *v.* Northwestern Bank, 50 Va. (9 Gratt.) 127.

notice thereof.[64]

§ 227 (2e) Documentary Evidence.—Documents may be admitted in evidence in actions by or against banks,[65] if properly authenticated so as to show their genuineness.[66]

And printed copies of statutes of another jurisdiction may be admitted to prove the incorporation of a foreign bank.[67]

64. In Hays *v.* Northwestern Bank, 50 Va. (9 Gratt.) 127, it is said: "But it is insisted that the evidence in support of the plaintiff's action was insufficient in this, that there was no proof that the plaintiff was an incorporated institution authorized to sue; and the case of Jackson *v.* Bank, 36 Va. (9 Leigh) 240, is relied upon in support of the objection. That was an action of assumpsit by a bank alleged to have been incorporated by an act of the legislature of Ohio; the plea was nonassumpsit, and there was a demurrer to the plaintiff's evidence filed by the defendant. The court held, that proof of the plaintiff's incorporation was necessary to maintain the action; and none having been give, there was judgment for the defendant. But this is an action by a bank incorporated by the legislature of Virginia, and the act for its incorporation is a public act of which the courts will judicially take notice. Stribbling *v.* Bank, 26 Va. (5 Rand.) 132. In that case the court ex officio took notice of the act incorporating the Bank of the Valley; and the Northwestern Bank was incorporated by the same act. It was not necessary, therefore, that is should have been specially given in evidence to the jury."

65. **Bank books are competent evidence,** both for and against the corporation; it is admissible, however, to prove, by parol independent facts, such as the division and distribution of stock and the issuing of large amount of bills or notes. Banks *v.* Darden, 18 Ga. 318. In a suit by a bank, the defendant having introduced in evidence the books of the bank, it is held that the defendant can not impeach the books as a whole, but may show that particular items in the books are wrong and disprove them, and that by mistake or fraud they have been improperly kept. Merchants' Bank *v.* Rawls, 7 Ga. 191.

The book of a teller in a bank is not per se evidence to establish the facts appearing in that book, but may be given in evidence in connection with the evidence of the teller himself, if the teller's evidence make it proper to refer to it, to prove that a particular entry was made. (This was in a prosecution for forgery.) Courtney *v.* Commonwealth, 26 Va. (5 Rand.) 666.

Draft with bill of lading attached.—Where a bank loaned defendant money on his draft, to which were attached bills of lading of bark consigned to the drawees, and facts afterwards transpired that show that defendant gave the draft with intent to defraud the bank, the bank may repudiate the draft as void, and sue defendant o account for money loaned, and introduce in evidence the draft, bills of lading, and letters from defendant to the drawees, as showing his intention to defraud the bank by appropriating the proceeds of the bark to his own use, instead of paying the money loaned by the bank. Massengill *v.* First Nat. Bank, 76 Ga. 341.

66. **Authentication of note.**—A promissory note payable to "S. J., as cashier, or order," but not indorsed by him, is not evidence, in an action brought thereon by the bank, of money had and received to its use, or of an account stated with it. Bank *v.* Lyman, Fed. Cas. No. 924, 1 Blatchf. 297, 20 Vt. 666.

A dispatch, or the copy of a dispatch, purporting to have been written and sent by A. B., as cashier, to C. D., can not be read in evidence, without first proving that it is a genuine paper; that is, that it was written and sent by the party whose name it bears. National Bank *v.* National Bank, 7 W. Va. 544.

67. **Proof of incorporation of foreign bank.**—In an action by the president, directors and company of the bank of Alexandria, being an incorporated bank and body politic by that name established at Alexandria in the District of Columbia, by virtue of the act of assembly entitled "an act for establishing a bank in the town of Alexandria," it was held, that the printed copies of the acts of congress, dis-

§ 227 (2f) Declarations and Admissions.—A bank's indorsement on a note at the time it is discounted is an admission by the bank and binds it.[68] But letters written by a cashier long after the transaction in controversy was closed, and so not constituting a part of the res gestæ,[69] and mere statements of the bank's clerk[70] are not binding on the bank.

§ 227 (2g) Parol Evidence.—In an action by a bank on a letter of guaranty given by the defendant to obtain credit for a third person, the defendant may show that a particular thing falling within its general terms was intended at the time of the delivery of the written instrument, without impugning the parol evidence rule.[71] And evidence may be received to show that a note given to the cashier of a bank was intended as a promise to the corporation, because such evidence has no tendency whatever to contradict the terms of the instrument.[72]

tributed to the executives of the several states to be distributed among the people, are proper evidence to show the incorporation of such institution. Taylor *v.* Bank, 32 Va. (5 Leigh) 471.

68. Indorsement by discounting bank.—An indorsement on the note o. the sum for which it was discounted, and the date of the discount, is an mission, on the part of the bank dis counting, of the sum lent upon the note, of which the defendant may avail himself; as otherwise the inference would be that the bank was entitled to recover the entire amount. Colgin *v.* State Bank, 11 Ala. 222.

69. Admissions by cashier.—Even though it should be held that a cashier has no implied power to receive money for interest in advance on a note owned by the bank, and to gran. indulgence, still letters written by the cashier a good while after the date when he is said to have granted the time, and which are claimed to obtain admissions that he had granted such indulgence, such admissions are not admissible against the bank, because made a considerable time after the a. of the cashier granting indulgence. That matter was closed. Such admissions are not part of the res gestæ. But the rule is well settled that the cashier has no power to bind the bank by such admissions made at any tir Bank *v.* Wetzel, 58 W. Va. 1, 50 S. E. 886.

70. The mere statement of a bank clerk, unsworn to, "that a note of $500 had been placed in the hands of the bank's attorney for suit," is not evidence of the claim, and the commissioner should not allow it without proof of its existence, and the court should in such a case recommit the report for proof. White *v.* Drew, 9 W. Va. 695.

71. A. agreed by letter of guaranty, delivered to B. in February, 1831, to be responsible to a bank "for any moneys, notes, discounts, or accounts whatever that B." might "contract, receive a credit for, or be in any wise indebted to the said bank." In February, 1834, the bank discounted a draft by K. on B., and by him accepted, payable to P. and C., and in March, 1834, discounted a promissory note, made by B., payable to T.'s order, and indorsed by T. in an action by the bank against A. on this letter of guaranty to recover the amount of said draft and note, it was held that A. might give evidence that B. kept said letter in his possession until the autumn of 1833; that he then applied in writing to the bank to discount the drafts of K. on him, stating that the money was wanted for K., and offering to deposit said letter as collateral security; that the bank required that said letters should be first renewed and confirmed, and that A. thereupon renewed and confirmed it at B.'s request, and that B. then delivered it to the bank; and that the bank never afterwards discounted any draft or note for B., or for his benefit. Held, also, on this evidence, that the bank could not maintain said action against A.; that he was answerable only for such drafts of K. on B. as the bank should discount for B. or on his request, or for his particular benefit. Commercial Bank *v.* Eddy (Mass.), 7 Metc. 181.

72. Evidence of capacity in which note was taken by cashier.—Baldwin

§ 227 (2h) Usages and Customs.—In an action for damages against a bank resulting from the alleged failure of the defendant to exercise ordinary care in the conduct of the plaintiff's business, the defendant may introduce evidence of the customs and usages of other banks in transacting business of that nature so as to enable the jury to say what was the ordinary and usual way amongst banks doing that kind of business and thereby have a standard by which to measure the care used by the defendant and ascertain whether or not he used the care which the law required of him.[73]

§ 227 (3) Weight and Sufficiency of Evidence.—In actions by or against banks it is sufficient to prove the facts in issue by a preponderance of the evidence as in other civil cases.[74]

v. Bank (U. S.), 1 Wall. 234, 17 L. Ed. 534.

Where negotiable paper is drawn to a person by name, with addition of "cashier" to his name, but with no designation of the particular bank of which he was cashier, parol evidence is allowable to show that he was the cashier of a bank which is plaintiff in the suit, and that in taking the paper he was acting as cashier and agent of that corporation. Baldwin v. Bank (U. S.), 1 Wall. 234, 17 L. Ed. 534.

"Where a check was drawn by a person who was a cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument whether it was an official or a private act, this court held, in the case of the Mechanics' Bank v. Bank (U. S.), 5 Wheat. 326, 5 L. Ed. 100, that parol evidence was admissible to show that it was an official act. The signature of the promisor in that case had nothing appended to it to show that he had acted in an official character, and yet it was unhesitatingly held that parol evidence was admissible to show the real character of the transaction." Baldwin v. Bank (U. S.), 1 Wall. 234, 17 L. Ed. 534.

73. Customs and usages among bankers.—In an action against a bank for negligence in accepting spurious bonds as collateral security for a loan made with plaintiff's funds, to a person then in good standing, it appeared that defendant's clerk merely examined the outside of the bonds, to see that they were of the proper amount, without making any examination as to their genuineness. Held, that evidence that an examination of such a character was customary among bankers, under similar circumstances, accustomed to make loans on such bonds as collateral, and that great reliance was placed by them on the character of the persons to whom the loans were made, was admissible to show that defendant used ordinary care. Judgment, 56 N. Y. S. 244, 37 App. Div. 601, affirmed. Clinton Nat. Bank v. National Park Bank, 165 N. Y. 629, 59 N. E. 1120.

74. Authority to make overdrafts.—Evidence held to sustain findings that the drawer of a draft was not authorized to overdraw his account, that the draft was not accepted by the drawee, and that the drawee was not estopped from denying the drawer's authority to draw the draft, nor its own liability thereon. Gibbs Nat. Bank v. Citizens' Bank (Tex. Civ. App.), 108 S. W. 776.

Sufficiency of funds of drawer of draft.—Evidence held to sustain a finding that the drawer of a draft did not have sufficient funds in defendant bank to require payment of the draft by the bank. Gibbs Nat. Bank v. Citizens' Bank (Tex. Civ. App.), 108 S. W. 776.

Amount of recovery on contract.—Evidence, in an action against a bank to recover on a contract between the depositor, who was the purchaser of property, and the grantor, under which the deposit was to be subject to the payment of a mechanic's lien against the property, held to show that the contract was for the payment, not only of the original amount of the mechanic's lien, but for the costs and fees incident to a suit to enforce the lien. Fort v. First Nat. Bank, 82 S. C. 427, 64 S. E. 405.

Ratification.—In an action against a bank to recover damages for the bank's negligence in failing to protest for nonpayment, a note left for collection

§ 228. Trial—§ 228 (1) Time of Trial.—Suits brought by the Bank of Alexandria, upon promissory notes, made negotiable in that bank, were entitled to trial at the return term of the writ, under the Act of 1792, incorporating said bank.[75]

by the plaintiff, the fact that cashier handed plaintiff, in lieu of old note which should have been protested, a renewed note, saying former was lost, and plaintiff retained latter some time, is not conclusive of plaintiff's ratification of the bank's action, but evidence from which the jury might or might not infer such ratification. Roanoke Nat. Bank *v.* Hambrick, 82 Va. 135.

Evidence in an action against a bank by a depositor to recover the amount of a loan made out of his deposit by the bank without authority examined, and held to warrant a finding that the depositor did not ratify the act of the bank because of want of knowledge of the facts, authorizing a recovery against the bank. Valley Bank *v.* Brown, 9 Ariz. 311, 83 Pac. 362.

Action for conversion by bank.—In an action to recover on certain bonds left in defendant bank's custody, and claimed to have been converted by it, the issue was as to whether such bank received the money which had been borrowed on collateral in the hands of the bank's president. While it was shown that the check by which the money was transferred was made payable to the bank's order, there was evidence that the indorsement on such check was such as would appear there in the natural course of business, and the president testified that the proceeds of the checks were used by himself to make good a prior loan which he had personally negotiated on the same securities. Held, that a dismissal of the action on its merits was proper. Judgment, 70 N. Y. S. 651, 61 App. Div. 434, affirmed. Griffen *v.* Mechanics', etc., Bank, 171 N. Y. 665, 64 N. E. 1121.

Action for negligence in loaning money.—Evidence in an action by a depositor against a banker for negligence in loaning plaintiff's money, whereby it was lost, examined, and held to sustain a finding that the person borrowing the money without security was not a safe, responsible, and conservative borrower. Judgment, 105 Ill. App. 52, affirmed. Watson *v.* Fagner, 208 Ill. 136, 70 N. E. 23.

In an action by a bank on a note, evidence held to show that defendant in giving the note was aware that the cashier was to withdraw his own notes from the assets of the bank and substitute plaintiff's obligation instead. State Bank *v.* Forsyth (Mont.), 108 Pac. 914.

Knowledge—Notice.—Evidence by a cashier of a bank that in the purchase of a note neither he nor the other officers of the bank had notice of matters pleaded by defendant as a defense to the note, was not conclusive evidence that the other officers had no notice thereof. Bennett State Bank *v.* Schloesser, 101 Iowa 571, 70 N. W. 705.

Falsity of representations by bank officer.—An insolvent engaged in a business supported by government contracts was largely indebted to a bank, and the cashier thereof, having knowledge of such facts, stated in reply to a request by plaintiff, who was contemplating selling goods on time to the insolvent, to enable him to continue business, that the contract of the insolvent was all right, and advised plaintiff to accept the insolvent's note, and stated that it would be paid. The cashier afterwards made similar statements to plaintiff, both before and after the maturity of the note. The continuance of the insolvent in the business was apparently the only manner in which the bank could make its debt. Held sufficient to warrant the inference that the representations were made by the cashier for the benefit of the bank, as the plaintiff's action in acting on the representations would increase the assets of the insolvent. Taylor *v.* Commercial Bank, 68 App. Div. 458, 73 N. Y. S. 924, reversed in 66 N. E. 726, 174 N. Y. 181, 62 L. R. A. 783, 95 Am. St. Rep. 564.

75. **Time of trial of action by bank.**—Bank *v.* Henderson, Fed. Cas. No. 848, 1 Cranch, C. C. 167; Young *v.* Bank (U. S.), 5 Cranch 45, 3 L. Ed. 32.

The Bank of Alexandria, under its charter, had a right to have its causes tried at the first term to which the writ was returnable, if the note was made negotiable at the bank, and the writ was served ten days before its return day. Bank *v.* Henderson, Fed. Cas. No. 848, 1 Cranch, C. C. 167; Bank *v.* Young, Fed. Cas. No. 857, 1 Cranch, C. C. 458.

What law governs.—Where it is provided by Act Va., Nov. 23, 1792,

§ 228 (2) Reception of Evidence.—Whether an amendment allowed to the pleadings was permissible or not, it is a fatal error to refuse the adverse party an opportunity to produce further evidence to meet the new issues presented by the amendment.[76]

§ 228 (3) Instructions—§ 228 (3a) Duty to Instruct.—It is the duty of the court upon request to instruct upon matters in issue if there is evidence bearing on such issue.[77]

§ 228 (3b) Validity of Instructions.—Completeness.—An instruction in an action by a bank should not refer to the pleadings for a fuller description of the subject matter of the controversy, but must be complete in itself.[78]

Consistency.—Instructions should be so framed as not to conflict with each other.[79]

incorporating a bank, that, in suits brought by the bank upon notes made negotiable therein, an issue shall be made up and trial had at the return term of the writ, the fact that a trial may be had at a different time by the general law is immaterial. Young *v.* Bank (U. S.), 5 Cranch 45, 3 L. Ed. 32.

76. Further evidence after amendments.—Myers *v.* Brown, 142 App. Div. 658, 127 N. Y. S. 374. In this case the court said: "It constituted one of those traps condemned many times by the courts, where a defendant comes into court to try issues carefully defined in pleadings, and finds himself cast in judgment upon entirely different issues. Wright *v.* Delafield, 25 N. Y. 266; Southwick *v.* First Nat. Bank, 84 N. Y. 420, 61 How. Prac. 164; Romeyn *v.* Sickles, 108 N. Y. 650, 15 N. E. 698, 1 Silvernail Ct. App. 594; Freeman *v.* Grant, 132 N. Y. 22, 30 N. E. 247; Gordon *v.* Ellenville, etc., R. Co., 195 N. Y 137, 88 N. E. 14; Keefe *v.* Lee, 197 N. Y. 68, 90 N. E. 344, 27 L. R. A., N. S., 837."

Identification.—Where a complaint, for failure to pay a certain sum on the order of plaintiff's assignor to a certain person at a bank in Tokio, is amended to allege that the defendant agreed to instruct the bank at Tokio to pay the sum to the designated person upon satisfactory identification, and that they did not instruct the Tokio bank to pay upon satisfactory identification, and neither the defendant nor the Tokio bank ever paid the sum, it is error to refuse defendant an opportunity to supply evidence from bankers in Japan whether any different identification would have been required, if the words "upon satisfactory identification" had been inserted in the direction to the Tokio bank. Myers *v.* Brown, 142 App. Div. 658, 127 N. Y. S. 374.

77. Implied authority of teller.—In a suit against a bank on a check certified by its teller, there being evidence that the bank had no cashier, and that the teller was accustomed to certify checks, the question of his implied authority was properly submitted to the jury. Muth *v.* St. Louis Trust Co., 94 Mo. App. 94, 67 S. W. 978.

78. Completeness.—An instruction, in an action to recover on drafts drawn on defendant, which states if the drawer "drew the drafts described in the petition," etc., is not objectionable as referring the jury to the petition for a description of the drafts, where the drafts were in evidence. Farmers' Bank *v.* Fudge, 109 Mo. App. 186, 82 S. W. 1112.

79. Must not be contradictory.—Where, in an action by a bank to recover on drafts drawn on defendant by a third person and paid by the bank to the third person, the petition alleged that the third person was defendant's agent and was so held out to the bank by defendant, an instruction authorizing a recovery if the third person was defendant's agent or was so held out by him is not in conflict with an instruction directing the jury to find for defendant if defendant did not agree to pay drafts drawn on him by the third person and the latter was not the agent of defendant. Farmers' Bank *v.* Fudge, 109 Mo. App. 186, 82 S. W. 1112.

Must Be Limited to the Evidence.—Instructions on matters not supported by the evidence are properly refused.[80]

§ 228 (3c) Further Instructions.—It is reversible error to refuse an instruction in an action against a bank when the one given is not full enough to embrace questions included in the requested charge.[81]

§ 228 (3d) Construction of Instructions.—If instructions construed as a whole fairly submit the issues in an action by or against the bank it is sufficient against an objection that some issues have been ignored.[82]

§ 228 (4) Questions of Law and Fact.—The question whether a bank is liable on its indorsement,[83] or has ratified the acts of its officers,[84]

80. Manner of acquiring knowledge by cashier.—In instructing that a bank is bound by the knowledge of its cashier pertaining to a fraudulent transaction, it is unnecessary to charge that such knowledge must have been acquired in his official capacity, where the evidence shows no knowledge was acquired in any other way. Mansur-Tebbetts Implement Co. *v.* Ritchie, 143 Mo. 587, 45 S. W. 634.

81. Further instructions.—In an action by a bank as assignee of a note, plaintiff requested a charge that, in determining whether plaintiff had knowledge of the defenses, the jury should not consider any knowledge of any person who was an officer or agent of plaintiff at a time when he was not engaged in plaintiff's business. The charge given only related to the knowledge of plaintiff's president, though the evidence tended to show that knowledge of such defenses may have been obtained individually by others of plaintiff's officers. Held, that the charge requested was not sufficiently covered by the charge given. Grayson County Nat. Bank *v.* Hall (Tex. Civ. App.), 91 S. W. 807.

82. Instructions construed as a whole.—In an action by a depositor against a banker for negligence in loaning the depositor's money, the court, at plaintiff's instance, gave two instructions, embodying all the facts necessary to sustain a recovery, but not noticing the two affirmative defenses of ratification and the extension of time to the borrower by plaintiff himself. In two instructions, however, given by the court of its own motion, the jury were told that if plaintiff ratified the loan in question defendant would not be responsible for anything done prior thereto, and that if plaintiff extended the time of payment or assumed the burden of collecting the note, and as a result thereof it was lost, defendant would not be liable. Held, that the instructions as a whole sufficiently covered the affirmative defenses. Judgment, 105 Ill. App. 52, affirmed. Watson *v.* Fagner, 208 Ill. 136, 70 N. E. 23.

83. Liability of bank on indorsement.—Where the cashier of a bank used plaintiff's deposits to take up certain notes held by the bank, and thereupon indorsed one of the debtor's notes to plaintiff, but the bank claimed that in so doing the cashier acted merely as plaintiff's agent to loan her deposits, whether the bank was liable on the indorsement was for the jury. First Nat. Bank *v.* Anderson, 5 Ind. T. 118, 82 S. W. 693, reversed in 141 Fed. 926, 73 C. C. A. 160.

84. Ratification.—A bank was the holder of a mortgage on growing wheat, and the cashier went to look after the condition of the indebtedness. The president knew he had gone, but did not know what he intended to do. An arrangement was made with the mortgagor to deliver the entire crop of wheat to the cashier as the representative of the bank, which was done by indorsement on the mortgage, reciting that the cashier was to attend the further threshing of the wheat and was to receive the full proceeds until all indebtedness was paid the bank in full and all the expenses were paid. Such agreement was witnessed by plaintiff, who was under a contract to thresh the wheat for the mortgagor. Plaintiff stated that the cashier instructed him to go ahead with the threshing and to look to the bank for his pay. The cashier left the management of the matter with

or whether it acted in good faith in a particular transaction,[85] are all for the jury. And it may be a question for the jury to determine what was the intention of the parties to a sale as to what passed thereby.[86]

§ 228 (5) Verdict and Findings—§ 228 (5a) Directing Verdict.—Where there is no evidence whatever to sustain an issue of negligence on the part of a bank in an action by or against it, the case should be taken from the jury.[87] But if the evidence is conflicting[88] or there is sufficient evidence to warrant a verdict in favor of the party producing it,[89] the case should be submitted to the jury.

a firm, which paid plaintiff various sums for the threshing, when further payment was refused, and plaintiff sued the bank. The cashier informed the president, on his return, of what he had done, and the bank received a considerable portion of its indebtedness, and the cashier stated he was advised a report was made to the bank showing the amount paid plaintiff for the work. Held sufficient evidence for the jury on the question of ratification by the directors of the contract for the threshing. Hill *v.* Bank, 87 Mo. App. 590.

85. Good faith.—Whether a bank which paid a depositor on the faith of a raised draft which had been certified by another bank and sent to the clearing house acted in good faith in paying such draft to its depositor is a question for the jury, to be determined on the rules of the clearing house and the evidence. Judgment, 69 N. Y. S. 82, 59 App. Div. 103, affirmed. Continental Nat. Bank *v.* Tradesmen's Nat. Bank, 173 N. Y. 272, 65 N. E. 1108.

86. Question for jury as to subject of sale.—In an action by a bank upon notes given it for the purchase price of property sold by the bank and purchased by the defendants, where, before the defendants became indebted to the bank, the bank had made a compromise of certain claims, which, amongst others, were the subject of the sale by the bank and purchase by the defendants, two of the defendants having knowledge of the conditions of this compromise, and their knowledge to be considered as extending to the other defendants, it was a question for the jury to determine what the defendants purchased. Lyman *v.* Bank (U. S.), 12 How. 225, 13 L. Ed. 965.

87. Negligence in paying forged or altered paper.—Where a customer of a bank takes to the bank a foreign check with a good signature, but fraudulently raised in amount to ascertain whether the check would be paid, and the customer at the request of the teller indorses the check and the teller makes out a deposit slip and credits the amount of the check to the customer's account, and thereafter the bank uses due diligence in ascertaining that the check had been paid and notifying the customer thereof, and the bank after the fraud has been detected is compelled to pay back the money to the drawee, and brings an action to recover the amount from the customer, it is not error to refuse to submit the case to the jury, where there is no evidence of negligence on the part of the bank, and no conflict of testimony as to any of the material facts. Girard Trust Co. *v.* Boyd, 45 Pa. Super. Ct. 285.

88. Identity of loanee.—Upon the question whether a loan was made to the defendant bank itself, and secured by a guaranty note of its directors individually, or was made to the directors upon their own note, there was conflicting testimony as to the original agreement, but it appeared that interest was charged to the bank, and by it entered on its books under profit and loss; that the note itself was a promise to repay loans made to the bank; that the bank's cashier, in transmitting the note, referred to it as a guaranty; and that the loan was credited to the bank, and drawn on by it in the ordinary method and course. Held, that there was sufficient evidence of a loan to the bank to warrant a submission to the jury. American Exch. Nat. Bank *v.* First Nat. Bank, 82 Fed. 961, 27 C. C. A. 274.

89. In an action by a bank on a note given to it in part payment of a draft on a banking firm which failed before the draft was paid, evidence examined, and held sufficient to carry the case to the jury upon the question whether,

Under the Pennsylvania practice if the allegations in the plaintiff's statement of claim against a bank are not traversed by the affidavit of defense and no evidence is offered to support the allegations of the affidavit of defense alleged as matters of defense, the plaintiff makes out a prima facie case entitling it to binding instructions.[90]

§ 228 (5b) Findings of Court.—Where in an action by or against a bank a jury trial is waived and the judge tries the case, if the evidence justifies it, it is the duty of the court to make its findings as a matter of law.[91] But no judgment can be pronounced on contradictory and irreconcilably conflicting findings of fact.[92]

§ 229. Judgments—§ 229 (1) In General.—It seems that statutes providing generally as to judgments do not include banks unless such institutions are specially mentioned.[93]

§ 229 (2) Judgment by Default.—Under its charter, the Bank of Alexandria, where the defendant is in default, will be given judgment at the first term, without a rule being laid, or further notice to defendant.[94]

§ 229 (3) Parties.—In many of the states it is now provided by statute that where two or more persons are jointly bound by contract, the ac-

in view of all the facts, the bank in the issuance of the draft could reasonably rely upon the drawee of the draft to honor it, if presented for payment within a reasonable time. West Branch State Bank *v.* Haines, 135 Iowa 313, 112 N. W. 552.

90. Sufficiency of statement of claim.—In an action by plaintiff bank against defendant bank on checks, a statement of claim alleging that the amount sued on was the balance on a stated account, containing three checks drawn by the cashier of defendant, that plaintiff had received the checks in the course of business from a bank duly indorsed, that plaintiff added its own indorsement and sent the checks to defendant, that notwithstanding the checks were without the indorsement of the original payee defendant accepted them and credited plaintiff therewith, and advised plaintiff of the credits as entered, and that, relying upon the credit given by defendant, plaintiff paid the amount of the checks to the bank which had forwarded them to plaintiff, states a cause of action. Mellon Nat. Bank *v.* People's Bank, 226 Pa. 261, 75 Atl. 363.

91. Customs of clearing house.—In an action by one bank against another to recover the amount of a note paid as an alleged conditional payment through the clearing house, a finding that a certain clearing house rule had not been established by a universal, uniform, and general custom is not a finding that no such custom existed as a fact. Atlas Nat. Bank *v.* National Exch. Bank, 178 Mass. 531, 60 N. E. 121. See post, "Clearing Houses," XVIII.

92. In an action to determine the title to drafts, a finding that the plaintiff bank took them for collection before insolvency, agreeing to credit them to defendant's account and charge them back and return them to defendant if not paid, is in irreconcilable conflict with findings that defendant understood that the title to the drafts had passed to the bank, which became defendant's debtor for their amount, less the discount, and that it was the intention of the parties that title should pass, and they will not support a judgment for plaintiff. Davis *v.* Butters Lumber Co., 130 N. C. 174, 41 S. E. 95.

93. Applicability of judgment statutes to banks.—The Act of 1823 "to prevent the fraudulent enforcement of dormant judgments," does not apply to judgments in favor of the Central Bank. Central Bank *v.* Williams, 17 Ga. 193.

94. Bank *v.* Davis, Fed. Cas. No. 845, 1 Cranch, C. C. 262.

tion thereon may be brought against all or any of them, at the plaintiff's option, and that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants.[95]

§ 229 (4) Operation and Effect of Judgment.—The defense that certain judgments have been fully satisfied, which were obtained against former county treasurers on account of interest on such deposits received by them as a personal gratuity, is a bar to the prosecution of actions against the banks for recovery of further sums alleged to be due the county on account of interest on such deposits.[96]

§ 230. Execution and Enforcement of Judgment—§ 230 (1) Execution.—A judgment creditor of a bank is not deprived of his remedy by execution, because other remedies or means are provided for collecting his debt.[97]

§ 230 (2) Enforcement of Judgment—§ 230 (2a) Supplementary Proceedings.—By statute in some jurisdictions supplementary proceedings in aid of execution are provided for enabling a creditor to ascertain whether his judgment debtor has any property in his possession or under his control applicable to the satisfaction of his judgment.[98]

95. **Construction of Alabama statute.**—In a suit by the Bank of the State, or any of its branches, on a joint and several promissory note or bill of exchange, judgment may be rendered, under the statute of 1840, requiring all the parties to be sued in the same action, against any defendant whom the jury shall, by their verdict, find liable on it, although other defendants may make a successful defense, and defeat a recovery against them. Bussey *v.* Branch Bank, 15 Ala. 216.

96. State *v.* Kilgour, 8 N. P., N. S., 81, 19 O. D. N. P. 637 (see 8 N. P., N. S., 617, 19 O. D. N. P. 670).

97. **Execution against bank.**—Act Jan. 10, 1845, appropriating $16,000 to pay the salaries of officers of the State Bank and judgments against the bank, and requiring the payments to be made through the state treasury, and not otherwise, merely gave an additional security to creditors of the bank, and did not suspend a judgment creditor's right to proceed against the bank by a writ of execution. McJunkin *v.* State Bank, 8 Ark. 61.

98. **Supplementary proceedings—Applicability of statute to banks.**—A judgment against a bank may be enforced under Rev. St., c. 134, § 91 (2 Taylor's St., p. 1566), providing that after the issuing or return of an execution against property of the judgment debtor, the judge may require any person to appear and answer concerning such property. Ballston Spa Bank *v.* Marine Bank, 18 Wis. 490, following McBride *v.* Farmers' Bank (N. Y.), 7 Abb. Prac. 347, 28 Barb. 476.

Construction of statute.—The right to enforce a judgment against an incorporated bank by supplementary proceedings, under Rev. St., c. 134, § 91 (2 Taylor's St., p. 1566), is not inconsistent with, nor impliedly repealed by, Rev. St., c. 148, §§ 21-32 (2 Taylor's St., p. 1733), inclusive, providing that, whenever any banking corporation shall become insolvent, a court may, on application of a creditor, restrain the further exercise of corporate rights, appoint receivers, wind up the business, and enforce the personal liability of stockholders. Ballston Spa Bank *v.* Marine Bank, 18 Wis. 490.

Duty of president to answer questions.—Where it is sought to enforce a judgment against an incorporated bank by supplementary proceedings, under Rev. St., c. 134, § 91 (2 Taylor's St., p. 1566), and the bank's president is ordered to appear in court and answer concerning the property of the bank alleged to be in his hands, he must be regarded as an individual having property of the bank liable in law for the satisfaction of its debts; the mere fact that he is president con-

§ 230 (2b) Limitations.—The same limitation does not apply to suits for the enforcement of a judgment by or against a bank as apply to the cause of action on which the judgment is based.[99]

§ 231 Costs—§ 231 (1) Right to and Liability for Costs.—Right to Recover Costs.—Since costs in a suit in equity are given or withheld at the discretion of a court of chancery, and the sound exercise of this discretion forbids the imposition of costs on a party in no wise in the wrong, if a debtor brings suit against a bank without a previous demand he will be denied any recovery of costs, even though he prevails in the suit.[1] By statute in many jurisdictions a bank, though substantially prevailing in the controversy, is not entitled to recover its costs unless it recovers at least a prescribed amount.[2]

Liability for Costs.—The state banks are frequently exempted from liability for costs.[3] Nor can a bank acting as a mere stakeholder under the directions of its principal be held liable for costs.[4]

§ 231 (2) Items Taxable.—As the right to and liability for costs is entirely dependent on statute, items not provided for in the statutory fee bill cannot be taxed in suits by or against banks.[5]

§ 231½. Appeal and Error.—Reversal.—A judgment in favor of a

stitutes no excuse whatever for a refusal to answer questions properly propounded to him concerning the property. Ballston Spa Bank *v.* Marine Bank, 18 Wis. 490.

99. **Judgments on banknotes.**—Where banknotes have been sued upon in due time, and judgments thereon recovered, a bill to bring in equitable assets, and subject them to the judgments for satisfaction of the same, is not governed by the period of limitation that would be applicable if the banknotes, instead of the judgments, were the foundation of the bill. Cherry *v.* Lamar, 58 Ga. 541.

Dormant judgment.—A judgment in favor of the Central Bank of Georgia does not become dormant after seven years, as the Act of 1823, "to prevent the fraudulent enforcement of dormant judgment," does not specially include judgments in its favor. Central Bank *v.* Williams, 17 Ga. 193.

1. **Suit with previous demand.**—Where a banknote is cut in two, and one-half sent by mail and lost, the holder of the remaining half has a right to demand payment at the bank, upon presentation of the half in his possession, proving ownership, and giving bond with adequate security for the indemnification of the bank. But if these prerequisites are not complied with, and the bank is sued in consequence of refusing payment, the holder shall not recover interest or costs, although he may perform the conditions after the suit is brought. Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186.

2. **Right to costs as dependent on amount of recovery.**—If the Bank of the United States recovers less than $500 in a circuit court, it can not recover costs. Bank *v.* Roberts, Fed. Cas. No. 934, 4 Conn. 323.

3. **The old State Bank of Illinois** was exempted from costs by statute; and, when her mere ministerial agents are joined with the bank as defendants, they will not be liable for costs. Duncan *v.* State Bank (Ill.), 1 Scam. 262.

4. **A bank withholding money by virtue of the instruction** of a party to an agreement, but offering to pay it under the direction of the court, is not subject to the payment of costs in a suit against it and the party for the money. Barnett *v.* Pyle, 35 Tex. Civ. App. 22, 79 S. W. 1093

5. **Suit tax.**—*Alabama.*—Under the statute of February 13, 1843, the judge of the county court of Tuscaloosa was authorized to tax a fee of two dollars on bank suits, although no jury trial was had. Ex parte State Bank, 6 Ala. 498.

bank will not be reversed for such technicalities as an insufficient signing of the initial pleading, where it appears that the defendant could not have been mislead thereby, more especially if he has set up no defense whatever.[6]

6. **Grounds for reversal.**—Where a statement of a cause of action on a note in a suit by a bank is signed in the individual name of the cashier, with a scroll appended, which is recognized among banks as the equivalent of the word "cashier," and defendant is a customer of the bank, a judgment otherwise properly entered for want of a sufficient affidavit of defense will not be reversed because the statement is not signed by the cashier as such. Brook v. Merchants' Nat. Bank, 125 Pa. 394, 17 Atl. 418.

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